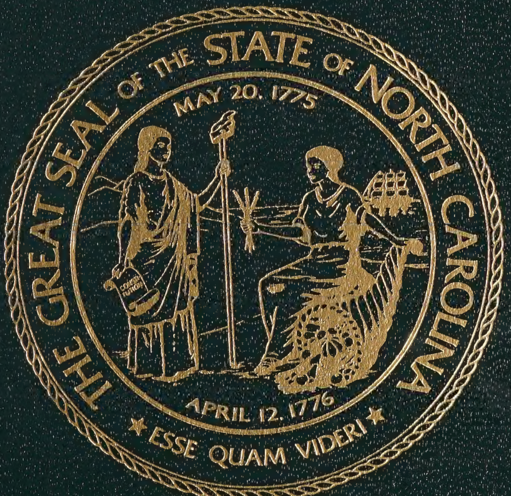
GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED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GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

Volume 12

Chapters 97 Through 105

Prepared Under the Supervision of
THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA
by
The Editorial Staff of the Publisher

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Preface

This volume contains the general laws of a permanent nature enacted by the General Assembly through the 2007 Regular Session and 1st Extra Session that are within Chapters 97 through 105, and brings to date the annotations included therein.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 60 days after the adjournment of the session" in which passed.

A ready reference index is included at the back of this volume. This index is intended to give the user a quick reference to larger bodies of statutes within this volume only. For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LexisNexis, Charlottesville, Virginia.

ROY COOPER
Attorney General

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 2007 Regular Session and 1st Extra Session affecting Chapters 97 through 105 of the General Statutes.

Annotations:

This publication contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of the appropriate federal courts posted through September 21, 2007. These cases will be printed in the following reporters:

South Eastern Reporter 2nd Series.
Federal Reporter 3rd Series.
Federal Supplement 2nd Series.
Federal Rules Decisions.
Bankruptcy Reports.
Supreme Court Reporter.

Additionally, annotations have been taken from the following sources:

North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

Abbreviations

(The abbreviations below are those found in the General Statutes that refer to prior codes.)

P.R.	Potter's Revisal (1821, 1827)
R.S.	Revised Statutes (1837)
R.C.	Revised Code (1854)
C.C.P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C.S.	Consolidated Statutes (1919, 1924)

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

December 2007

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2007 Replacement Code to the General Statutes of North Carolina was prepared and published by LexisNexis under the supervision of the Department of Justice of the State of North Carolina.

Roy Cooper

Attorney General of North Carolina

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Article 1.

Workers' Compensation Act.

§ 97-1. Short title.

This Article shall be known and cited as The North Carolina Workers' Compensation Act. (1929, c. 120, s. 1; 1979, c. 714, s. 1.)

Cross References. — As to application of this Chapter to incapacitated State law-enforcement officers, see G.S. 143-166.14. As to the inapplicability of this chapter to prisoners working pursuant to G.S. 162-58, see G.S. 162-61.

Study Committee on Workers' Compensation Benefits. — Session Laws 2005-448, ss. 1(a)-(e), provide: "(a) There is established the Study Committee on Workers' Compensation Benefits. The Committee shall study disability benefits available under the Workers' Compensation Act, including the following:

"(1) The appropriate coverage and benefit levels, including the level of scheduled payments under G.S. 97-31, the appropriateness of cost-of-living adjustments, and a comparison of workers' compensation benefits in other states.

"(2) How the workers' compensation system functions with other disability benefits, including social security and private disability.

"(3) Employment issues and their relationship to the current workers' compensation system.

"(4) The appropriate manner for compensation related to exposure to asbestos or silica.

"(5) The manner and duration of medical benefits.

"(6) Any other issues the Committee deems relevant under the workers' compensation system.

"(b) The Study Committee on Workers' Compensation Benefits shall consist of 12 members, appointed as follows:

"(1) Six appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.

"(2) Six appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate.

"Vacancies in membership shall be filled by the original appointing authority. The Committee, while in the discharge of its official duties, may exercise all powers provided for under G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4. The Committee may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02.

"(c) Subject to the approval of the Legislative Services Commission, the Committee may meet in the Legislative Building or the Legislative Office Building. The Legislative Services Commission, through the Legislative Services Officer, shall assign professional staff to assist the Committee in its work. The House of Representatives' and the Senate's Supervisors of Clerks shall assign clerical support staff to the Committee, and the expenses relating to clerical employees shall be borne by the Committee. Members of the Committee shall receive subsistence and travel expenses at the rates set forth in G.S. 120-3.1, 138-5, or 138-6, as appropriate.

"(d) The Committee shall report to the 2006 Regular Session of the 2005 General Assembly upon its convening and shall make its final report to the 2007 General Assembly upon its convening. Progress and final reports of the Commission may include recommended legislation. The Committee shall terminate upon the convening of the 2007 General Assembly.

"(e) Of the funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds for the expenses of the Committee established by this act."

Legal Periodicals. — For case law survey on workers' compensation, see 41 N.C.L. Rev. 409 (1963); 44 N.C.L. Rev. 1069 (1966); 45 N.C.L. Rev. 983 (1967).

For survey of 1977 workers' compensation law, see 56 N.C.L. Rev. 1166 (1978).

For note discussing the nonexistence of a private right of action for retaliatory discharge resulting from pursuit of workers' compensation benefits, see 15 Wake Forest L. Rev. 139 (1979).

For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

For comment on injury by accident in workers' compensation, see 59 N.C.L. Rev. 175 (1980).

For note on occupational disease under workers' compensation statute, see 16 Wake Forest L. Rev. 288 (1980).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1032 (1981).

For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

For comment discussing the North Carolina Workers' Compensation Act in light of Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (1982), see 19 Wake Forest L. Rev. 513 (1983).

For note discussing proof of causation requirement in occupational disease cases, in light of Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983), see 7 Campbell L. Rev. 99 (1984).

For survey of North Carolina construction law, with particular reference to workers' compensation, see 21 Wake Forest L. Rev. 633 (1986).

For note discussing workers' compensation and mental injuries, in light of 79 N.C. App. 483, 340 S.E.2d 116, disc. rev. denied, 317 N.C. 334, 346 S.E.2d 140 (1986), see 65 N.C.L. Rev. 816 (1987).

For article on "North Carolina Construction Law Survey II," see 22 Wake Forest L. Rev. 481 (1987).

For note discussing the exclusive remedy requirement for the scheduled injuries section of the North Carolina Workers' Compensation Act, see 66 N.C.L. Rev. 1365 (1988).

For note, "Roberts v. Burlington Industries — Workers' Compensation for the Death of a Good Samaritan," see 66 N.C.L. Rev. 1377 (1988).

For article, "Smoking in the Workplace: Who Has What Rights?," see 11 Campbell L. Rev. 311 (1989).

For article, discussing the protection of nonsmokers' rights in the workplace, see 11 Campbell L. Rev. 339 (1989).

For note, "Workers' Compensation — Death Knell of a Good Samaritan!," commenting on Culpepper v. Fairfield Sapphire Valley, 93 N.C. App. 242, 377 S.E.2d 777 (1989), see 12 Campbell L. Rev. 121 (1989).

For note, "The Intentional-Tort Exception to the Workers' Compensation Exclusive Remedy Immunity Provisions: Woodson v. Rowland," see 70 N.C.L. Rev. 849 (1992).

For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

For note, "North Carolina's Expansion of the Definition of 'Intentional' in Exceptions to the Exclusivity of Workers' Compensation: Is Legislative Action 'Substantially Certain' to Follow? — Woodson v. Rowland", see 27 Wake Forest L. Rev. 797 (1992).

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

For article, "The Substantial Certainty Exception to Workers' Compensation," see 17 Campbell L. Rev. 413 (1995).

For note, "The Fairness Requirement for a Workers' Compensation Agreement — The Effect of Vernon v. Steven L. Mabe Builders," see 17 Campbell L. Rev. 521 (1995).

For a survey of 1996 developments in the law regarding prisoner rights, see 75 N.C.L. Rev. 2428 (1997).

For a survey of 1996 developments in workers' compensation law, see 75 N.C.L. Rev. 2505 (1997).

For comment, "A Proposal to Reform the North Carolina Workers' Compensation Act to Address Mental-Mental Claims," see 32 Wake Forest L. Rev. 193 (1997).

For comment on the reality of work-related stress, see 20 Campbell L. Rev. 321 (1998).

For legislative survey on worker's compensation, see 22 Campbell L. Rev. 253 (2000).

Survey of Developments in North Carolina Law and the Fourth Circuit, 1999: Revisiting Rutledge: A Survey of Recent Developments in Occupational Disease Law Under the North Carolina Workers' Compensation Act, 78 N.C.L. Rev. 2083 (2000).

For casenote, "Nickel and Dimed: North Carolina Court Blocks Carolina Panthers' Attempt to Avoid Payment of Workers' Compensation Benefits to Injured Athletes," see 28 N.C. Cent. L.J. 241 (2006).

CASE NOTES

Constitutionality. — The North Carolina Workers' Compensation Act has been held to be constitutional by the North Carolina Supreme Court, and the Supreme Court of the United States has upheld the constitutionality of similar compensation acts. Jenkins v. American Enka Corp., 95 F.2d 755 (4th Cir. 1938).

The contention that the Workers' Compensation Act is unconstitutional on the ground that it destroys the right of trial by jury is untenable. McCune v. Rhodes-Rhyne Mfg. Co., 217 N.C. 351, 8 S.E.2d 219 (1940). See also Hagler v. Mecklenburg Hwy. Comm'n, 200 N.C. 733, 158 S.E. 383 (1931); Huffman v. Douglass Aircraft Co., 260 N.C. 308, 132 S.E.2d 614 (1963), cert. denied, 379 U.S. 850, 85 S. Ct. 93, 13 L. Ed. 2d 53, rehearing denied, 379 U.S. 925, 85 S. Ct. 279, 13 L. Ed. 2d 338 (1964).

This act is not unconstitutional in denying punitive damages for willful injuries to an employee. McCune v. Rhodes-Rhyne Mfg. Co., 217 N.C. 351, 8 S.E.2d 219 (1940).

Contention of mother of deceased employee that she was entitled under the statute of distribution to any sum receivable for the death of the deceased and that the Workers' Compensation Act, which deprived her of that right, was unconstitutional, was without merit, as compensation legislation is a valid exercise of police power. Heavner v. Town of Lincolnton, 202 N.C. 400, 162 S.E. 909, appeal dismissed, 287 U.S. 672, 53 S. Ct. 4, 77 L. Ed. 579 (1932).

This Chapter is not violative of N.C. Const., Art. I, § 18, as a taking of property without due process of law. Sneed v. Carolina Power & Light Co., 61 N.C. App. 309, 300 S.E.2d 563 (1983).

Purpose of Act. — The primary purpose of legislation of this kind is to compel industry to take care of its own wreckage. Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943).

The purpose of this act is to provide compensation benefits for industrial injuries. Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963).

The purpose of the Workers' Compensation Act is not only to provide a swift and certain remedy to an injured worker, but also to ensure a limited and determinate liability for employers. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966); Taylor v. J.P. Stevens & Co., 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified and affirmed, 307 N.C. 392, 298 S.E.2d 681 (1983).

The underlying purpose of the Workers' Compensation Act is to provide compensation for workers who suffer disability by accident arising out of and in the course of their employment. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

One of the primary objects and purposes of compensation laws is to grant certain and speedy relief to injured employees, or, in case of death, to their dependents. Cabe v. Parker-Graham-Sexton, Inc., 202 N.C. 176, 162 S.E. 223 (1932).

The general purpose of the Workers' Compensation Act, in respect to compensation for disability, is to substitute, for common-law or statutory rights of action and grounds of liability, a system of money payments by way of financial relief for loss of capacity to earn wages. There is no compensation provided for physical pain or discomfort. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

One of the purposes of the Workers' Compensation Act is to relieve against hardship, rather than to afford full compensation for injury. The fixing of maximum and minimum awards in industry is a compromise. Kellams v. Carolina Metal Prods., Inc., 248 N.C. 199, 102 S.E.2d 841 (1958).

It is not the purpose of the Workers' Compensation Act to exculpate or absolve employers from the consequences of their negligent conduct. Tscheiller v. National Weaving Co., 214 N.C. 449, 199 S.E. 623 (1938).

The purpose of the Workers' Compensation Act is to furnish compensation for loss of earning capacity. Wilhite v. Liberty Veneer Co., 47 N.C. App. 434, 267 S.E.2d 566, rev'd on other grounds, 303 N.C. 281, 278 S.E.2d 234 (1981).

The purpose of the Workers' Compensation Act is twofold. It was enacted to provide swift and sure compensation to injured workers without the necessity of protracted litigation. Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 295 S.E.2d 458 (1982).

The Workers' Compensation Act is a compromise arrived at through the concessions of employees and employers alike. Nothing in it supports the notion that it was enacted just for the protection of careful, prudent employees, or that employees that do not stick strictly to their business are beyond its protection. By its terms, with certain exceptions the act applies to all employees who work for employers with the requisite number of employees and are injured by accident during the course of and arising from their employment; and it is not required that the employment be the sole proximate cause of the injury, it being enough that any reasonable relationship to the employment exists, or employment is a contributory cause. Bare v. Wayne Poultry Co., 70 N.C. App. 88, 318 S.E.2d 534 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 484 (1985).

The philosophy which supports the Workers' Compensation Act is that the wear and tear of human beings in modern industry should be charged to the industry, just as the wear and tear of machinery has always been charged. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968); Porterfield v. RPC Corp., 47 N.C. App. 140, 266 S.E.2d 760 (1980).

While compensation is presumably charged to the industry, and consequently to the employer or owner of the industry, eventually it becomes a part of the fair money cost of the industrial product, to be paid for by the general public patronizing such products. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951).

Workers' compensation laws were enacted to treat the cost of industrial accidents as a cost of production. Daniels v. Swofford, 55 N.C. App. 555, 286 S.E.2d 582 (1982).

Cost-effectiveness is not the sole goal of the Workers' Compensation Act. Grantham v. Cherry Hosp., 98 N.C. App. 34, 389 S.E.2d 822, cert. denied, 324 N.C. 138, 394 S.E.2d 454 (1990).

Applicability. — The Workers' Compensation Act deals with the incidents and risks of the contract of employment, in which is included the negligence of the employer in that relation. It has no application outside the field of industrial accident, and does not intend, by its general terms, to take away common-law or other rights which pertain to the parties as members of the general public, disconnected from the employment. Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943).

Mutuality of Act. — It was the purpose of the General Assembly that both employee and employer should receive the benefits and enjoy the protection of this act. The act contemplates mutual concessions by employee and employer; for that reason, its validity has been upheld, and its policy approved. Winslow v. Carolina Conference Ass'n, 211 N.C. 571, 191 S.E. 403 (1937). See also Lee v. American Enka Corp., 212 N.C. 455, 193 S.E. 809 (1937); NLRB v. Moss Planing Mill Co., 224 F.2d 702 (4th Cir. 1955).

The Workers' Compensation Act is primarily for the protection and benefit of the employee, and he is entitled to know with certainty when his right of action accrues. Hartsell v. Thermoid Co., 249 N.C. 527, 107 S.E.2d 115 (1959).

Basis of Liability. — The Workers' Compensation Act takes into consideration certain elements of a mutual concession between the employer and employee by which the question of negligence is eliminated, and liability under the act rests upon the employer upon the condition precedent of an injury by accident occurring in the course of employment and arising out of it. Conrad v. Cook Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930).

Workers' compensation laws are a statutory compromise which assure workers' compensation for injuries arising out of and in the course of employment without their having to prove negligence on the part of the employer. In exchange for the employer's loss of common law defenses, however, the employee gives up his right to common-law verdicts. In effect, tort liability was replaced with no-fault liability. Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

It is generally conceded by all courts that the various compensation acts were intended to eliminate the fault of the workman as a basis for denying recovery. In other words, a workman is entitled to recover irrespective of fault if the injury arises out of and in the course of the employment. The doctrine of horseplay, which excludes a workman from compensation, although he is not at fault, and does not engage therein, is inconsistent with the underlying philosophy of compensation acts, which are designed for the very purpose of eliminating fault as a basis for determining liability. Bare v. Wayne Poultry Co., 70 N.C. App. 88, 318 S.E.2d 534 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 484 (1985).

Compensability under the Workers' Compensation Act is not dependent upon negligence or fault of the employer. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

But the act is not the equivalent of general accident or health insurance. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963).

The legislative intent seems clear that the Workers' Compensation Act is an industrial injury act, and not an accident and health insurance act. The court should not overstep the bounds of legislative intent and by judicial legislation make the compensation act an accident and health insurance act. Lewter v. Abercrombie Enters., Inc., 240 N.C. 399, 82 S.E.2d 410 (1954).

The Workers' Compensation Act is not intended to provide general health and accident insurance, but its purpose is to provide compensation for those injuries which result from accidents which arise out of and in the course of the employment. Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

The Workers' Compensation Act is not intended to provide general health and accident insurance. To be compensable the injury must spring from the employment. Hales v. North Hills Constr. Co., 5 N.C. App. 564, 169 S.E.2d 24 (1969).

Payment of Employee's Consumer Debts as Rehabilitative Service Not Authorized. — The Workers' Compensation Act does not authorize the Commission to order an employer to pay an employee's common consumer debts as a rehabilitative service. Grantham v. Cherry Hosp., 98 N.C. App. 34, 389 S.E.2d 822, cert. denied, 324 N.C. 138, 394 S.E.2d 454 (1990).

It is not a reasonable interpretation of the Workers' Compensation Act to classify the payment of consumer debt as a rehabilitative service. Grantham v. Cherry Hosp., 98 N.C. App. 34, 389 S.E.2d 822, cert. denied, 324 N.C. 138, 394 S.E.2d 454 (1990).

Preexisting Infirmity. — The fact that an employee is peculiarly disposed to injury because of an infirmity or disease incurred prior to his employment affords no sound basis for a reduction in the employer's liability. Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975), rev'd on other grounds, 289 N.C. 254, 221 S.E.2d 355 (1976).

The Workers' Compensation Act is to be liberally construed to effectuate the broad intent of the act to provide compensation for employees sustaining an injury arising out of and in the course of the employment, and no technical or strained construction should be given to defeat this purpose. Johnson v. Asheville Hosiery Co., 199 N.C. 38, 153 S.E. 591 (1930). See Roberts v. City Ice & Coal Co., 210 N.C. 17, 185 S.E. 438 (1936); Barbour v. State Hosp., 213 N.C. 515, 196 S.E. 812 (1938).

The provisions of the Workers' Compensation Act are to be liberally construed to effectuate the legislative intent as gathered from the act to award compensation for the injury or death of an employee arising out of and in the course of his employment, irrespective of the question of negligence. Reeves v. Parker-Graham-Sexton, Inc., 199 N.C. 236, 154 S.E. 66 (1930).

The Workers' Compensation Act must be liberally construed and liberally applied. Thomas v. Raleigh Gas. Co., 218 N.C. 429, 11 S.E.2d 297 (1940).

The Workers' Compensation Act should be liberally construed to the end that benefits should not be denied upon a technical, narrow and strict interpretation. Graham v. Wall, 220 N.C. 84, 16 S.E.2d 691 (1941); Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950); Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955); Kellams v. Carolina Metal Prods., Inc., 248 N.C. 199, 102 S.E.2d 841 (1958); Hartley v. North Carolina Prison Dep't, 258 N.C. 287, 128 S.E.2d 598 (1962); Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965); Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968); Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968); Hall v. W.A. Davis Milling Co., 1 N.C. App. 380, 161 S.E.2d 780 (1968); Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970), cert. denied, 277 N.C. 726, 178 S.E.2d 831 (1977); West v. J.P. Stevens Co., 12 N.C. App. 456, 183 S.E.2d 876 (1971); Stevenson v. City of Durham, 281 N.C. 300, 188 S.E.2d 281 (1972); Conklin v. Hennis Freight Lines, 27 N.C. App. 260, 218 S.E.2d 484 (1975); Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976); Inscoe v. DeRose Indus., Inc., 30 N.C. App. 1, 226 S.E.2d 201 (1976), aff'd, 292 N.C. 210, 232 S.E.2d 449 (1977); Gallimore v. Marilyn's Shoes, 30 N.C. App. 628, 228 S.E.2d 39 (1976), rev'd on other grounds, 292 N.C. 399, 233 S.E.2d 529 (1977); Smith v. Liberty Mut. Ins. Co., 409 F. Supp. 1211 (M.D.N.C. 1976); Schofield v. Great Atl. & Pac. Tea Co, 32 N.C. App. 508, 232 S.E.2d 874, cert. denied, 292 N.C. 641, 235 S.E.2d 62 (1977); Porterfield v. RPC Corp., 47 N.C. App. 140, 266 S.E.2d 760 (1980); Deese v. Southern Lawn & Tree Expert Co., 306 N.C. 275, 293 S.E.2d 140, rehearing denied, 306 N.C. 753, 303 S.E.2d 83 (1982); Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 295 S.E.2d 458 (1982); Taylor v. J.P. Stevens & Co., 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified, 307 N.C. 392, 298 S.E.2d 681 (1983); Donnell v. Cone Mills Corp., 60 N.C. App. 338, 299 S.E.2d 436, cert. denied, 308 N.C. 190, 302 S.E.2d 243 (1983); Roper v. J.P. Stevens & Co., 65 N.C. App. 69, 308 S.E.2d 485 (1983), cert. denied, 310 N.C. 309, 312 S.E.2d 652 (1984); Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985); Smith v. Dacotah Cotton Mills, Inc., 31 N.C. App. 687, 230 S.E.2d 772 (1976), rev'd on other grounds, Sweatt v. Rutherford County Bd. of Educ., 237 N.C. 653, 75 S.E.2d 738 (1953).

The Workers' Compensation Act is a radical and systematic change in the common law and must be liberally construed to accomplish its purposes. Its provisions are superior to the common law in all respects where it deals with the liabilities arising out of the relationship of employer and employee. Essick v. City of Lexington, 232 N.C. 200, 60 S.E.2d 106 (1950).

The Workers' Compensation Act requires that it be liberally construed to effectuate the purpose for which it was passed, i.e., to provide compensation for injured workers. Keller v. Electric Wiring Co., 259 N.C. 222, 130 S.E.2d 342 (1963); Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1963); Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967); Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985).

In the absence of other than technical prejudice to the opposing party, the liberal spirit and policy of the Workers' Compensation Act should not be defeated or impaired by a too strict adherence to procedural niceties. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

The Workers' Compensation Act should be liberally construed. Bailey v. North Carolina Dep't of Mental Health, 2 N.C. App. 645, 163 S.E.2d 652 (1968).

The Workers' Compensation Act was an innovating substitution of statute law in a field theretofore left entirely to the common law. Because of the radical and systematic changes in the common law, a statute so markedly remedial in nature must be liberally construed with a view to effectuating its purposes. Wilmington Shipyard, Inc. v. North Carolina State Hwy. Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

Courts favor a liberal construction of the Workers' Compensation Act in favor of the claimant. Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971), rev'd on other grounds, 281 N.C. 234, 188 S.E.2d 350 (1972); Bartlett v. Duke Univ., 17 N.C. App. 598, 195 S.E.2d 371, rev'd on other grounds, 284 N.C. 230, 200 S.E.2d 193 (1973).

The legislature has provided that the Workers' Compensation Act shall be liberally construed, but it does not permit either the commission or the courts to hurry evidence beyond the speed which its own force generates. Weidle v. Cloverdale Ford, 50 N.C. App. 555, 274 S.E.2d 263 (1981).

Courts construe the Workers' Compensation Act liberally in favor of compensability. Chandler v. Nello L. Teer Co., 53 N.C. App. 766, 281 S.E.2d 718 (1981), aff'd, 305 N.C. 292, 287 S.E.2d 890 (1982).

The provisions of the act are to be construed liberally and in favor of the employee. Dayal v. Provident Life & Accident Ins. Co., 71 N.C. App. 131, 321 S.E.2d 452 (1984).

As the liberal construction rule is a part of the Workers' Compensation Act. Kiger v. Balinson Serv. Co., 260 N.C. 760, 133 S.E.2d 702 (1963).

But the rule of liberal construction cannot be extended beyond the clearly expressed language of the act. Gilmore v. Hoke County Bd. of Educ., 222 N.C. 358, 23 S.E.2d 292 (1942).

The rule of liberal construction cannot be employed to attribute to a provision of the act a meaning foreign to the plain and unmistakable words in which it is couched. Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950); Hatchett v. Hitchcock Corp., 240 N.C. 591, 83 S.E.2d 539 (1954); Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955); Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976).

Liberality in construction of the Workers' Compensation Act should not extend beyond the clearly expressed language of its provisions, and the courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of judicial legislation. Deese v. Southern Lawn & Tree Expert Co., 306 N.C. 275, 293 S.E.2d 140, rehearing denied, 306 N.C. 753, 303 S.E.2d 83 (1982).

Nor can the rule of liberal construction be used to apply the act to employments not within its stated scope, or not within its intent or purpose. Wilson v. Town of Mooresville, 222 N.C. 283, 22 S.E.2d 907 (1942).

The courts are without authority to enlarge the meaning of the terms used in the Workers' Compensation Act by the legislature or to extend by construction its scope and intent so as to include persons not embraced by its terms. Hayes v. Board of Trustees, 224 N.C. 11, 29 S.E.2d 137 (1944).

The doctrine of liberal construction of the Workers' Compensation Act arises out of the act itself and relates only to cases falling within the purview of the act. It cannot be invoked to determine when the act applies. Hayes v. Board of Trustees, 224 N.C. 11, 29 S.E.2d 137 (1944).

Or to Expand Liability. — The Workers' Compensation Act insures a limited and determinate liability for employers, and the court cannot legislate expanded liability under the guise of construing a statute liberally. Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 295 S.E.2d 458 (1982); McDonald v. Brunswick Elec. Membership Corp., 77 N.C. App. 753, 336 S.E.2d 407 (1985).

The Workers' Compensation Act will be construed as a whole to effectuate the intent of the General Assembly. Morris v. Laughlin Chevrolet Co., 217 N.C. 428, 8 S.E.2d 484 (1940).

The various provisions of the Workers' Compensation Act are to be construed in their relations to each other as a whole to effectuate the intent of the legislature to provide compensation to an employee for injury arising out of and in the course of his employment. Rice v. Denny Roll & Panel Co., 199 N.C. 154, 154 S.E. 69 (1930).

In all cases of doubt, the intent of the legislature regarding the operation or application of a particular provision is to be discerned from a consideration of the Workers' Compensation Act as a whole — its language, purposes and spirit. Deese v. Southern Law & Tree Expert Co., 306 N.C. 275, 293 S.E.2d 140, rehearing denied, 306 N.C. 753, 303 S.E.2d 83 (1982).

Choice of Law. — Where plaintiff sought and received workers' compensation benefits pursuant to the North Carolina Workers' Compensation Act for an injury received in Virginia and caused by a third-party subcontractor, and, inter alia, North Carolina was the place of plaintiff's residence, the location of defendant's business, and the place of the initial hiring, North Carolina had significant interests in applying its own law based on the employment relationship and its connection with North Carolina. Braxton v. Anco Elec., Inc., 100 N.C. App. 635, 397 S.E.2d 640 (1990), aff'd, 330 N.C. 124, 409 S.E.2d 914 (1991).

Injuries resulting from horseplay initiated and participated in by a claimant have not been excluded from the Workers' Compensation Act. Bare v. Wayne Poultry Co., 70 N.C. App. 88, 318 S.E.2d 534 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 484 (1985).

Exclusive Remedy. — The Workers' Compensation Act provided the exclusive remedy for the claimants' fraud and bad faith refusal to pay or settle a valid claim, unfair and deceptive trade practices, intentional infliction of emotional distress and civil conspiracy claims against their employer and insurer. Johnson v. First Union Corp., 131 N.C. App. 142, 504 S.E.2d 808 (1998).

Employer and town officials were not liable for the death of their employee while collecting garbage, as the narrow exception to the exclusivity provisions of the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., did not apply because the evidence did not show that they engaged in intentional misconduct that they knew was substantially certain to cause decedent's serious injury or death. Whitaker v. Town of Scotland Neck, 357 N.C. 552, 597 S.E.2d 665, 2003 N.C. LEXIS 1263 (2003).

Act Not Exclusive Remedy for Intentional Misconduct by Employer. — Trial court erred in granting summary judgment in favor of municipal defendants in an action alleging gross negligence and wanton misconduct in the death of decedent while employed by defendants caused when a dumpster on a garbage truck partially detached and pinned decedent against the side of the truck. Although the North Carolina Workers Compensation Act is the sole remedy in most cases for employees who suffer employment-related injuries, decedent's estate presented evidence that defendants acted with substantial certainty of causing decedent serious bodily harm in the form of testimony concerning an earlier incident of dumpster failure that had been reported to defendants; the failure of defendants to take action to repair the garbage truck following the previous accident presented a genuine issue of material fact that precluded summary judgment. Whitaker v. Town of Scotland Neck, 154 N.C. App. 660, 572 S.E.2d 812, 2002 N.C. App. LEXIS 1526 (2002), cert. granted, 356 N.C. 696, 579 S.E.2d 104 (2003).

Act Not Exclusive Remedy for Intentional Injury by Fellow Employees. — North Carolina's Workers' Compensation Act is not the exclusive remedy for an employee intentionally injured by a fellow employee. Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

An employee was free to assert an intentional assault and battery tort action against a coemployee. The coemployee was liable when he intentionally tapped the employee behind the knees, causing her to fall and injure herself, although he allegedly did not intend or foresee the injury. Andrews v. Peters, 75 N.C. App. 252, 330 S.E.2d 638, cert. denied, 315 N.C. 182, 337 S.E.2d 65 (1985), aff'd, 318 N.C. 133, 347 S.E.2d 409 (1986).

No Double Recovery Allowed Under Workers Compensation Where Compensatory Damages Have Already Been Awarded. — Where plaintiff workers exposed to asbestos were awarded compensatory damages against defendant manufacturer, the trial court did not err by allowing defendant a full set-off for prior workers' compensation claim settlements and prior third-party settlement amounts paid to plaintiffs from other sources; plaintiffs could not recover workers' compensation benefits and damages from defendant for the same injury. Schenk v. HNA Holdings, Inc., 167 N.C. App. 47, 604 S.E.2d 689, 2004 N.C. App. LEXIS 2059 (2004).

Wrongful Discharge Claim. — Employee may state a claim for wrongful discharge in violation of public policy where he or she alleges the dismissal resulted from an assertion of rights under the North Carolina Workers' Compensation Act, G.S. 97-1 et seq.; the statute of limitations for such a claim is three years under G.S. 1- 52(5). Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

Trial court did not err in granting an employer's G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion, dismissing an employee's claim of wrongful discharge in violation of public policy because she engaged in a protected activity when she requested that her employer pay for a medical evaluation of a work-related injury, as her act of asking her employer to pay for a doctor's visit or other medical services was merely an abstract assertion, and not an assertion of rights under the Workers' Compensation Act, G.S. 97-1 et seq. (2003), and no evidence was presented that she filed a workers' compensation claim which would have triggered the statutory and common law protection against employer retaliation in violation of public policy. Whitings v. Wolfson Casing Corp., 173 N.C. App. 218, 618 S.E.2d 750, 2005 N.C. App. LEXIS 1916 (2005).

This section did not bar plaintiff's claims for intentional and negligent infliction of emotional distress because they neither resulted from a risk to which she was exposed because of the nature of her employment nor occurred in the course of her employment. Buser v. Southern Food Serv., 73 F. Supp. 2d 556 (M.D.N.C. 1999).

Act Does Not Cover Injury During Pre-employment Interview. — It was not the purpose of the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., to provide benefits to a prospective employee who was injured during a pre-employment interview, when no employment relationship existed between the prospective employee and her prospective employer. Huntley v. Howard Lisk Co., 154 N.C. App. 698, 573 S.E.2d 233, 2002 N.C. App. LEXIS 1528 (2002), cert. denied, 357 N.C. 62, 579 S.E.2d 389 (2003).

Disability Compensation Agreement Constitutes Award. — A validly executed Industrial Commission Form 21 agreement ("Agreement for Compensation for Disability") constitutes an "award" under the North Carolina Workers' Compensation Act. Apple v. Guilford County, 84 N.C. App. 679, 353 S.E.2d 641, rev'd on other grounds, 321 N.C. 98, 361 S.E.2d 588 (1987).

The Workers' Compensation Act makes no provision for property damage suits, and the Supreme Court has clearly distinguished the recoveries allowable in personal injury damage suits and payments received under the Workers' Compensation Act. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

What Law Governs. — The rights of employer, employee, and insurance carrier under a workers' compensation statute are governed by the law of the state of the statute. Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934).

Version of Statute in Effect for Determining Compensation. — Plaintiff who became partially disabled in 1973 and was compensated pursuant to the laws in effect at that time, was entitled to compensation for total disability (arising out of the same injury) under the laws in effect in 1981, when he became totally disabled. Peace v. J.P. Stevens Co., 95 N.C. App. 129, 381 S.E.2d 798 (1989).

Wrongful Death Statute Controls. — The provisions of the North Carolina wrongful death statute, G.S. 28-173 (see now G.S. 28A-18-2), are controlling over the provisions of the Workers' Compensation Act. Byers v. North Carolina State Hwy. Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968), aff'd, 277 N.C. 229, 166 S.E.2d 649 (1969).

Wrongful Death Action Held Barred. — Employers' motion for summary judgment was granted because the administratrix's wrongful death action was barred by the North Carolina Workers' Compensation Act, G.S. 97-1, et seq., since (1) the shooting occurred at the deceased's place of employment, and (2) regardless of whether the deceased was the intended victim, the shooting arose out of the deceased's employment because the gunman intended to shoot a co-worker. Champion v. PPG Indus., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 9034 (W.D.N.C. Apr. 2, 2004).

Simultaneous Claims in Workers' Compensation and Civil Intentional Tort. — A plaintiff in North Carolina may now simultaneously pursue a workers' compensation claim and a civil intentional tort claim without being required to elect between them. Federal Ins. Co. v. Sanfatex, Inc., 897 F. Supp. 932 (E.D.N.C. 1995).

A plaintiff should not be allowed to recover twice for a single injury; once in workers' compensation benefits and a second time in a civil action. Federal Ins. Co. v. Sanfatex, Inc., 897 F. Supp. 932 (E.D.N.C. 1995).

Where civil action was settled for only $415,000 because plaintiff was already receiving over $700,000 in workers' compensation benefits, the threat of double recovery was negated and the combined amount of $1,197,669.09 was a single recovery. Federal Ins. Co. v. Sanfatex, Inc., 897 F. Supp. 932 (E.D.N.C. 1995).

Pursuing one's rights under the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., is a legally protected activity under G.S. 95-241(a)(1)a.; public policy is violated for purposes of the public policy exception to the at-will employment doctrine when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes, and the statutory remedy available for violation of this public policy does not diminish the rights or remedies of any employee at common law under G.S. 95-244. Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

Employer and employee held not to come within the provisions of the North Carolina Workers' Compensation Act. Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Harrill, 106 F. Supp. 332 (W.D.N.C. 1952).

Double Coverage — Workers' Compensation and Longshoremen's Benefits. — If a valid award may be made under the Workers' Compensation Act, the Longshoremen's and Harbor Workers' Act, 33 USC G.S. 901 to 950, may be dismissed from consideration, since double coverage is not intended. Rice v. Uwharrie Council Boy Scouts of Am., 263 N.C. 204, 139 S.E.2d 223 (1964).

Same — Workers' Compensation and Unemployment Benefits. — Several states allow the recovery of both workers' compensation and unemployment benefits for the same time period, in the absence of an express statutory prohibition. In North Carolina, there is no express prohibition of duplicate benefits, although a persuasive argument can be made that the General Assembly intended that there be no recovery of both workers' compensation and unemployment. Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983), cert. denied, 310 N.C. 308, 312 S.E.2d 651 (1984).

Adoption of per diem reimbursement rule exceeded the Commission's statutory authority to review and approve hospital charges for services rendered to patients entitled to care under the Workers' Compensation Act. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

Personal Deviation from Work Route. — Test developed by North Carolina case law was whether, at the time of the injury, the employee was on a substantial personal deviation, and therefore his injury was not compensable, or whether the employee had returned to the business route, and therefore his injury was compensable, where the employee was injured while leaving a ball game while on a business trip, his attendance at the ball game was a deviation from the employer's benefit, and the injury was not compensable. Jacobs v. Sara Lee Corp., 157 N.C. App. 105, 577 S.E.2d 696, 2003 N.C. App. LEXIS 374 (2003).

The Industrial Commission has exclusive jurisdiction of the rights and remedies herein afforded. Hedgepeth v. Lumbermen's Mut. Cas. Co., 209 N.C. 45, 182 S.E. 704 (1935); Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952).

Ordinarily, when the pleadings in a common-law tort action disclose that the parties are subject to and bound by the provisions of this act with respect to the injury involved, dismissal is proper, for the Industrial Commission has exclusive jurisdiction in such cases. Neal v. Clary, 259 N.C. 163, 130 S.E.2d 39 (1963).

Jurisdiction in Commission Upheld. — Where the findings of fact of the Industrial Commission, supported by competent evidence, were to the effect that defendant's employee was temporarily employed in pumping water from a barge which was being loaded with logs on a navigable river, that the barge careened, and that the employee fell or jumped from the shore side of the barge and was actually killed on land as a result of the barge crushing him, and it further appeared that the barge was without means of propulsion and was at the time incapable of navigation, and that both the employee and the defendant had accepted and were amenable to this Chapter, it was held that the North Carolina Industrial Commission had jurisdiction to hear and determine the claim for compensation for the employee's death, its jurisdiction not being ousted by the admiralty and maritime jurisdiction of the United States. Johnson v. Foreman-Blades Lumber Co., 216 N.C. 123, 4 S.E.2d 334 (1939).

The strict rules applicable to ordinary civil actions are not appropriate in proceedings under the act. Conklin v. Hennis Freight Lines, 27 N.C. App. 260, 218 S.E.2d 484 (1975).

Because the Industrial Commission, pursuant to this article, has sole jurisdiction over the plaintiff-worker's allegations, after settlement, that defendants committed fraud, bad faith, unfair and deceptive trade practices, intentional infliction of emotional distress and civil conspiracy during the handling of his workers' compensation claim, the trial court properly dismissed the post-settlement claim pursuant to G.S. 1A-1-12(b). Deem v. Treadaway & Sons Painting & Wallcovering, Inc., 142 N.C. App. 472, 543 S.E.2d 209, 2001 N.C. App. LEXIS 141 (2001).

Appellate Review. — Findings of fact by the Industrial Commission are conclusive on appeal if there is any competent evidence to support them, and even if there is evidence that would support contrary findings. Richards v. Town of Valdese, 92 N.C. App. 222, 374 S.E.2d 116 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Conclusions of law based on the Industrial Commission's findings are subject to review by the appellate courts. Richards v. Town of Valdese, 92 N.C. App. 222, 374 S.E.2d 116 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Under the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., the Industrial Commission is the factfinding body, the sole judge of the credibility of witnesses, and the ultimate factfinder whether it is conducting a hearing or reviewing a cold record, and the commission's findings of fact could have been set aside on appeal only where there was a complete lack of competent evidence to support them; ample evidence supported the denial of an employee's workers' compensation claim where the full commission reviewed depositions from three qualified physicians, and reviewed notes from another physician who was not present, and only one of the doctors opined that the employee's job aggravated his underlying arthritis. Armstrong v. W.R. Grace & Co., 175 N.C. App. 528, 623 S.E.2d 820, 2006 N.C. App. LEXIS 127 (2006), cert. denied, 360 N.C. 581, 633 S.E.2d 672 (2006).

Effect of Superior Court's Jurisdictional Findings. — The Supreme Court would consider the superior court's findings of jurisdictional fact as binding on appeal if supported by the evidence when the question was whether the Industrial Commission or the superior court had jurisdiction over a claim. Lemmerman v. A.T. Williams Oil Co., 318 N.C. 577, 350 S.E.2d 83, rehearing denied, 318 N.C. 704, 351 S.E.2d 736 (1986).

Conflicts in the evidence are for the Industrial Commission to resolve. The only question on appeal is whether there was sufficient evidence to support the Commission's findings, not whether different findings might have been made. Bigelow v. Tire Sales Co., 12 N.C. App. 220, 182 S.E.2d 856 (1971).

Effect of Certification of Ability to Work to Employment Security Commission. — Employee's certification of himself as able to work to the Employment Security Commission does not mean that he is estopped from recovering workers' compensation benefits. His statement to the Employment Security Commission was not conclusive evidence on the question of disability, and therefore, was not binding upon the Industrial Commission. Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983), cert. denied, 310 N.C. 308, 312 S.E.2d 651 (1984).

Pleadings. — Unless the notice of accident required by G.S. 97-22 and G.S. 97-23 is so considered, the Workers' Compensation Act makes no mention of pleadings. Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

Judicial Notice. — North Carolina courts will take judicial notice of a public statute of this State, which therefore need not be pleaded, and the North Carolina Workers' Compensation Act is a public statute. Miller v. Roberts, 212 N.C. 126, 193 S.E. 286 (1937).

Applied in Davis v. Mecklenburg County, 214 N.C. 469, 199 S.E. 604 (1938); Gay v. Guaranteed Supply Co., 12 N.C. App. 149, 182 S.E.2d 664 (1971); Dowell v. Aetna Life Ins. Co., 468 F.2d 802 (4th Cir. 1972); Benfield v. Troutman, 17 N.C. App. 572, 195 S.E.2d 75 (1973); Carter v. Frank Shelton, Inc., 62 N.C. App. 378, 303 S.E.2d 184 (1983); Wiggins v. Rufus Tart Trucking Co., 63 N.C. App. 542, 305 S.E.2d 749 (1983); Ross v. Young Supply Co., 71 N.C. App. 532, 322 S.E.2d 648 (1984); Rose v. Isenhour Brick & Tile Co., 120 N.C. App. 235, 461 S.E.2d 782 (1995).

Cited in Dark v. Johnson, 225 N.C. 651, 36 S.E.2d 237 (1945); Morris v. Wilkins, 241 N.C. 507, 85 S.E.2d 892 (1955); Whitlow v. Seaboard Air Line R.R., 222 F.2d 57 (4th Cir. 1955); Tipton v. Barge, 243 F.2d 531 (4th Cir. 1957); Whitworth v. Lumbermens Mut. Cas. Co., 265 N.C. 530, 144 S.E.2d 616 (1965); Pendergraph v. Celebrezze, 255 F. Supp. 313 (M.D.N.C. 1966); Barham v. Kayser-Roth Hosiery Co., 15 N.C. App. 519, 190 S.E.2d 306 (1972); Byrd v. Fieldcrest Mills, Inc., 496 F.2d 1323 (4th Cir. 1974); Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981); Malloy v. Durham County Dep't of Social Servs., 58 N.C. App. 61, 293 S.E.2d 285 (1982); Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983); Diaz v. United States Textile Corp., 60 N.C. App. 712, 299 S.E.2d 843 (1983); Weaver v. Swedish Imports Maintenance, Inc., 61 N.C. App. 662, 301 S.E.2d 736 (1983); Mills v. Mills, 68 N.C. App. 151, 314 S.E.2d 833 (1984); Lemmerman v. A.T. Williams Oil Co., 79 N.C. App. 642, 339 S.E.2d 820 (1986); Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501 (1986); Carawan v. Carolina Tel. & Tel. Co., 79 N.C. App. 703, 340 S.E.2d 506 (1986); Gupton v. United States, 799 F.2d 941 (4th Cir. 1986); Roberts v. Burlington Indus., Inc., 321 N.C. 350, 364 S.E.2d 417 (1988); Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); McCorkle v. Aeroglide Corp., 115 N.C. App. 651, 446 S.E.2d 145 (1994); Canady v. McLeod, 116 N.C. App. 82, 446 S.E.2d 879 (1994); Fletcher v. Dana Corp., 119 N.C. App. 491, 459 S.E.2d 31 (1995); Roman v. Southland Transp. Co., 131 N.C. App. 571, 508 S.E.2d 543 (1998), aff'd, 350 N.C. 549, 515 S.E.2d 214 (1999); Barber v. Going West Transp., Inc., 134 N.C. App. 428, 517 S.E.2d 914 (1999); Salter v. E & J Healthcare, Inc., 155 N.C. App. 685, 575 S.E.2d 46 (2003); Parker v. Wal-Mart Stores, Inc., 156 N.C. App. 209, 576 S.E.2d 112, 2003 N.C. App. LEXIS 70 (2003); Harrison v. Lucent Techs., 156 N.C. App. 147, 575 S.E.2d 825, 2003 N.C. App. LEXIS 80 (2003), cert. denied, 357 N.C. 164, 580 S.E.2d 365 (2003); Dodson v. Dubose Steel, Inc., 159 N.C. App. 1, 582 S.E.2d 389, 2003 N.C. App. LEXIS 1419 (2003).

§ 97-1.1. References to workmen's compensation.

Any reference in any act, public or local, to the "Workmen's Compensation Act," "Workmen's Compensation," or "workmen's compensation" shall be deemed to refer respectively to "Workers' Compensation Act," "Workers' Compensation" or "workers' compensation." (1979, c. 714, s. 4.)

Editor's Note. — Session Laws 1991, c. 636, s. 3, provides: "Consistent with G.S. 97-1.1, the Revisor of Statutes is authorized to change the terms "Workmen's Compensation Act", "Workmen's Compensation" and "workmen's compensation" to "Workers' Compensation Act", "Workers' Compensation", and "workers' compensation", respectively, wherever these terms are used in the General Statutes."

§ 97-2. Definitions.

When used in this Article, unless the context otherwise requires —

(1) Employment. — The term "employment" includes employment by the State and all political subdivisions thereof, and all public and quasi-public corporations therein and all private employments in which three or more employees are regularly employed in the same business or establishment or in which one or more employees are employed in activities which involve the use or presence of radiation, except agriculture and domestic services, unless 10 or more full-time non-

seasonal agricultural workers are regularly employed by the employer and an individual sawmill and logging operator with less than 10 employees, who saws and logs less than 60 days in any six consecutive months and whose principal business is unrelated to sawmilling or logging.

(2) Employee. — The term "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer, and as relating to those so employed by the State, the term "employee" shall include all officers and employees of the State, including such as are elected by the people, or by the General Assembly, or appointed by the Governor to serve on a per diem, part-time or fee basis, either with or without the confirmation of the Senate; as relating to municipal corporations and political subdivisions of the State, the term "employee" shall include all officers and employees thereof, including such as are elected by the people. The term "employee" shall include members of the North Carolina national guard while on State active duty under orders of the Governor and members of the North Carolina State Defense Militia while on State active duty under orders of the Governor. The term "employee" shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs, whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full-time basis or a part-time basis, and including deputy sheriffs appointed to serve in an emergency, but as to those so appointed, only during the continuation of the emergency. The sheriff shall furnish to the board of county commissioners a complete list of all deputy sheriffs named or appointed by him immediately after their appointment and notify the board of commissioners of any changes made therein promptly after such changes are made. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representative, dependents, and other persons to whom compensation may be payable: Provided, further, that any employee, as herein defined, of a municipality, county, or of the State of North Carolina, while engaged in the discharge of his official duty outside the jurisdictional or territorial limits of the municipality, county, or the State of North Carolina and while acting pursuant to authorization or instruction from any superior officer, shall have the same rights under this Article as if such duty or activity were performed within the territorial boundary limits of his employer.

Every executive officer elected or appointed and empowered in accordance with the charter and bylaws of a corporation shall be considered as an employee of such corporation under this Article.

Any such executive officer of a corporation may, notwithstanding any other provision of this Article, be exempt from the coverage of the corporation's insurance contract by such corporation's specifically excluding such executive officer in such contract of insurance, and the exclusion to remove such executive officer from the coverage shall continue for the period such contract of insurance is in effect, and during such period such executive officers thus exempted from the coverage of the insurance contract shall not be employees of such corporation under this Article.

All county agricultural extension service employees who do not receive official federal appointments as employees of the United

States Department of Agriculture and who are field faculty members with professional rank as designated in the memorandum of understanding between the North Carolina Agricultural Extension Service, North Carolina State University, A & T State University, and the boards of county commissioners shall be deemed to be employees of the State of North Carolina. All other county agricultural extension service employees paid from State or county funds shall be deemed to be employees of the county board of commissioners in the county in which the employee is employed for purposes of workers' compensation.

The term "employee" shall also include members of the Civil Air Patrol currently certified pursuant to G.S. 143B-491(a) when performing duties in the course and scope of a State-approved mission pursuant to Article 11 of Chapter 143B of the General Statutes.

"Employee" shall not include any person performing voluntary service as a ski patrolman who receives no compensation for such services other than meals or lodging or the use of ski tow or ski lift facilities or any combination thereof.

Any sole proprietor or partner of a business or any member of a limited liability company may elect to be included as an employee under the workers' compensation coverage of such business if he is actively engaged in the operation of the business and if the insurer is notified of his election to be so included. Any such sole proprietor or partner or member of a limited liability company shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this Article.

"Employee" shall include an authorized pickup firefighter of the Division of Forest Resources of the Department of Environment and Natural Resources when that individual is engaged in emergency fire suppression activities for the Division of Forest Resources. As used in this section, "authorized pickup firefighter" means an individual who has completed required fire suppression training as a wildland firefighter and who is available as needed by the Division of Forest Resources for emergency fire suppression activities, including immediate dispatch to wildfires and standby for initial attack on fires during periods of high fire danger.

It shall be a rebuttable presumption that the term "employee" shall not include any person performing services in the sale of newspapers or magazines to ultimate consumers under an arrangement whereby the newspapers or magazines are to be sold by that person at a fixed price and the person's compensation is based on the retention of the excess of the fixed price over the amount at which the newspapers or magazines are charged to the person.

(3) Employer. — The term "employer" means the State and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustee of any person. The board of commissioners of each county of the State, for the purposes of this law, shall be considered as "employer" of all deputy sheriffs serving within such county, or persons serving or performing the duties of a deputy sheriff, whether such persons are appointed by the sheriff or by the board of commissioners and whether serving on a fee basis or salary basis. Each county is authorized to insure its compensation liability for deputy sheriffs to the same extent it is authorized to insure other compensation liability for employees thereof. For purposes of this Chapter, when an authorized pickup firefighter of the

Division of Forest Resources of the Department of Environment and Natural Resources is engaged in emergency fire suppression activities for the Division of Forest Resources, that individual's employer is the Division of Forest Resources.

(4) Person. — The term "person" means individual, partnership, association or corporation.

(5) Average Weekly Wages. — "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, including the subsistence allowance paid to veteran trainees by the United States government, provided the amount of said allowance shall be reported monthly by said trainee to his employer, divided by 52; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings.

Where a minor employee, under the age of 18 years, sustains a permanent disability or dies leaving dependents surviving, the compensation payable for permanent disability or death shall be calculated, first, upon the average weekly wage paid to adult employees employed by the same employer at the time of the accident in a similar or like class of work which the injured minor employee would probably have been promoted to if not injured, or, second, upon a wage sufficient to yield the maximum weekly compensation benefit. Compensation for temporary total disability or for the death of a minor without dependents shall be computed upon the average weekly wage at the time of the accident, unless the total disability extends more than 52 weeks, and then the compensation may be increased in proportion to his expected earnings.

In case of disabling injury or death to a volunteer fireman; member of an organized rescue squad; an authorized pickup firefighter, as defined in subdivision (2) of this section, when that individual is engaged in emergency fire suppression activities for the Division of Forest Resources; a duly appointed and sworn member of an auxiliary police department organized pursuant to G.S. 160A-282; or senior

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members of the State Civil Air Patrol functioning under Article 11 of Chapter 143B of the General Statutes, under compensable circumstances, compensation payable shall be calculated upon the average weekly wage the volunteer fireman, member of an organized rescue squad, authorized pickup firefighter of the Division of Forest Resources, when that individual is engaged in emergency fire suppression activities for the Division of Forest Resources, member of an auxiliary police department, or senior member of the State Civil Air Patrol was earning in the employment wherein he principally earned his livelihood as of the date of injury. Provided, however, that the minimum compensation payable to a volunteer fireman, member of an organized rescue squad, an authorized pickup firefighter of the Division of Forest Resources of the Department of Environment and Natural Resources, when that individual is engaged in emergency fire suppression activities for the Division of Forest Resources, a sworn member of an auxiliary police department organized pursuant to G.S. 160A-282, or senior members of the State Civil Air Patrol shall be sixty-six and two-thirds percent (66 ⅔%) of the maximum weekly benefit established in G.S. 97-29.

(6) Injury. — "Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident. With respect to back injuries, however, where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident. Injury shall include breakage or damage to eyeglasses, hearing aids, dentures, or other prosthetic devices which function as part of the body; provided, however, that eyeglasses and hearing aids will not be replaced, repaired, or otherwise compensated for unless injury to them is incidental to a compensable injury.

(7) Carrier. — The term "carrier" or "insurer" means any person or fund authorized under G.S. 97-93 to insure under this Article, and includes self-insurers.

(8) Commission. — The term "Commission" means the North Carolina Industrial Commission, to be created under the provisions of this Article.

(9) Disability. — The term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(10) Death. — The term "death" as a basis for a right to compensation means only death resulting from an injury.

(11) Compensation. — The term "compensation" means the money allowance payable to an employee or to his dependents as provided for in this Article, and includes funeral benefits provided herein.

(12) Child, Grandchild, Brother, Sister. — The term "child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild," "brother," and "sister" include only

persons who at the time of the death of the deceased employee are under 18 years of age.

(13) Parent. — The term "parent" includes stepparents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(14) Widow. — The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

(15) Widower. — The term "widower" includes only the decedent's husband living with or dependent for support upon her at the time of her death or living apart for justifiable cause or by reason of her desertion at such time.

(16) Adoption. — The term "adoption" or "adopted" means legal adoption prior to the time of the injury.

(17) Singular. — The singular includes the plural and the masculine includes the feminine and neuter.

(18) Hernia. — In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:

a. That there was an injury resulting in hernia or rupture.
b. That the hernia or rupture appeared suddenly.
c. Repealed by Session Laws 1987, c. 729, s. 2.
d. That the hernia or rupture immediately followed an accident. Provided, however, a hernia shall be compensable under this Article if it arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned.
e. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

All hernia or rupture, inguinal, femoral or otherwise, so proven to be the result of an injury by accident arising out of and in the course of employment, shall be treated in a surgical manner by a radical operation. If death results from such operation, the death shall be considered as a result of the injury, and compensation paid in accordance with the provisions of G.S. 97-38. In nonfatal cases, if it is shown by special examination, as provided in G.S. 97-27, that the injured employee has a disability resulting after the operation, compensation for such disability shall be paid in accordance with the provisions of this Article.

In case the injured employee refuses to undergo the radical operation for the cure of said hernia or rupture, no compensation will be allowed during the time such refusal continues. If, however, it is shown that the employee has some chronic disease, or is otherwise in such physical condition that the Commission considers it unsafe for the employee to undergo said operation, the employee shall be paid compensation in accordance with the provisions of this Article.

(19) Medical Compensation. — The term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end

of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

(20) Health care provider. — The term "health care provider" means physician, hospital, pharmacy, chiropractor, nurse, dentist, podiatrist, physical therapist, rehabilitation specialist, psychologist, and any other person providing medical care pursuant to this Article.

(21) Managed care organization. — The term "managed care organization" means a preferred provider organization or a health maintenance organization regulated under Chapter 58 of the General Statutes. "Managed care organization" also means a preferred provider benefit plan of an insurance company, hospital, or medical service corporation in which utilization review or quality management programs are used to manage the provision of health care services and benefits under this Chapter. (1929, c. 120, s. 2; 1933, c. 448; 1939, c. 277, s. 1; 1943, c. 543; c. 672, s. 1; 1945, c. 766; 1947, c. 698; 1949, c. 399; 1953, c. 619; 1955, c. 644; c. 1026, s. 1; c. 1055; 1957, c. 95; 1959, c. 289; 1961, cc. 231, 235; 1967, c. 1229, s. 1; 1969, c. 206, s. 2; c. 707; 1971, c. 284, s. 1; c. 1231, s. 1; 1973, c. 521, ss. 1, 2; c. 763, ss. 1-3; c. 1291, s. 14; 1975, c. 266, s. 1; c. 284, ss. 2, 3; c. 288; c. 718, s. 3; c. 817, s. 1; 1977, c. 419; c. 893, s. 1; 1979, cc. 86, 374; c. 516, ss. 4, 5; c. 714, s. 3; 1981, c. 421, ss. 1, 2; 1983, c. 833; 1983 (Reg. Sess., 1984), c. 1042, s. 1; 1985, cc. 133, 144; 1987, c. 729, ss. 1, 2; 1991, c. 703, s. 1; 1993, c. 389, s. 3; 1993 (Reg. Sess., 1994), c. 679, ss. 2.6, 10.7; 1995, c. 517, s. 35; 1999-219, s. 4.2; 1999-418, s. 1; 1999-456, s. 33(c); 2001-204, ss. 1, 1.1, 2; 2003-156, s. 1.)

Cross References. — As to exceptions from this Article, see G.S. 97-13. As to independent contractors, see G.S. 97-19 and notes thereunder.

Legal Periodicals. — For collection of cases arising under subdivision (6) of this section, see 10 N.C.L. Rev. 373 (1932).

For discussion of the situation as to deputy sheriffs prior to amendment of this section, see 16 N.C.L. Rev. 419 (1938).

On mealtime injuries, see 17 N.C.L. Rev. 458 (1939).

For note on injury from personal assault, 19 N.C.L. Rev. 108 (1941).

For note on accidents arising out of and in the course of employment of traveling employees, see 23 N.C.L. Rev. 159 (1945).

As to falls due to dizziness, vertigo, epilepsy and like causes as compensable accidents, see 26 N.C.L. Rev. 320 (1948).

As to infections, see 26 N.C.L. Rev. 320 (1948).

For note on street accidents arising out of and in the course of employment, see 32 N.C.L. Rev. 373 (1954).

For note on acts done in furtherance of employer's good will as arising out of and in the course of employment, see 33 N.C.L. Rev. 637 (1955).

For note on death of night watchman as arising out of and in the course of employment, see 34 N.C.L. Rev. 607 (1956).

For note on injuries sustained by employee while going to and from work, see 36 N.C.L. Rev. 367 (1958).

For note on average weekly wage and combination of wages, see 44 N.C.L. Rev. 1177 (1966).

For note on the range of compensable consequences of a work-related injury, see 49 N.C.L. Rev. 583 (1971).

For survey of 1972 case law on the "arising out of" requirement, see 51 N.C.L. Rev. 1215 (1973).

For survey of 1976 case law on workers' compensation, see 55 N.C.L. Rev. 1116 (1977).

For survey of 1977 workers' compensation law, see 56 N.C.L. Rev. 1166 (1978).

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For note discussing the use of age, education, and work experience in determining disability in workers' compensation cases, see 15 Wake Forest L. Rev. 570 (1979).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For comment on injury by accident in workers' compensation, see 59 N.C.L. Rev. 175 (1980).

For survey of 1980 law on evidence, see 59 N.C.L. Rev. 1173 (1981).

For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

For note discussing proof of causation requirement in occupational disease cases, in light of Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983), see 7 Campbell L. Rev. 99 (1984).

For note, "Winstead v. Derreberry: Stepchildren and the Presumption of Dependence Under the North Carolina Workers' Compensation Act," see 64 N.C.L. Rev. 1548 (1986).

For note, "Caulder v. Waverly Mills: Expanding the Definition of an Occupational Disease Under the Last Injurious Exposure Rule," see 64 N.C.L. Rev. 1566 (1986).

For note, "Houses and Wages: An Increase in Workers' Compensation Recovery," see 65 N.C.L. Rev. 1499 (1987).

For article, "Benefits Without Proof: The North Carolina Supreme Court Creates a Presumption of Compensability in Workers' Compensation Death Benefits Actions," see 67 N.C.L. Rev. 1522 (1989).

For note, "Workers' Compensation — Death Knell of a Good Samaritan!," commenting on Culpepper v. Fairfield Sapphire Valley, 93 N.C. App. 242, 377 S.E.2d 777 (1989), see 12 Campbell L. Rev. 121 (1989).

For note, "North Carolina's Expansion of the Definition of 'Intentional' in Exceptions to the Exclusivity of Workers' Compensation: Is Legislative Action 'Substantially Certain' to Follow? — Woodson v. Rowland", see 27 Wake Forest L. Rev. 797 (1992).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For article, "Primary Issues in Compensation Litigation," see 17 Campbell L. Rev. 443 (1995).

For a survey of 1996 developments in the law regarding prisoner rights, see 75 N.C.L. Rev. 2428 (1997).

For a survey of 1996 developments in workers' compensation law, see 75 N.C.L. Rev. 2505 (1997).

For note, "Searching for Limits on a Municipality's Retention of Governmental Immunity," see 76 N.C.L. Rev. 269 (1997).

For comment, "A Proposal to Reform the North Carolina Workers' Compensation Act to Address Mental-Mental Claims," see 32 Wake Forest L. Rev. 193 (1997).

For casenote: "The Established Standard for Fathers Who Have Acknowledged Paternity and Who Are Seeking Custody of Their Illegitimate Child(ren): Rosero v. Blake, 357 N.C. 193 (2003)," see 26 N.C. Cent. L.J. 116 (2003).

CASE NOTES

I. In General.
II. Employment, Employees, and Employers.
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  A. In General.

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  A. Falls.
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XVII. Disability.
XVIII. Burden of Proof and Evidence.
XIX. Compensation.
XX. Child, Grandchild, etc.
XXI. Widow and Widower.

I. IN GENERAL.

The Workers' Compensation Act is a compromise arrived at through the concessions of employees and employers alike. Nothing in it supports the notion that it was enacted just for the protection of careful, prudent employees, or that employees that do not stick strictly to their business are beyond its protection. By its terms, with certain exceptions the act applies to all employees who work for employers with the requisite number of employees and are injured by accident during the course of and arising from their employment; and it is not required that the employment be the sole proximate cause of the injury, it being enough that any reasonable relationship to the employment exists, or employment is a contributory cause. Bare v. Wayne Poultry Co., 70 N.C. App. 88, 318 S.E.2d 534 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 484 (1985).

The social policy behind the Workers' Compensation Act is twofold. First, the Act provides employees swift and certain compensation for the loss of earning capacity from accident or occupational disease arising in the course of employment. Second, the Act insures limited liability for employers. Although the Act should be liberally construed to effectuate its intent, the courts cannot judicially expand the employer's liability beyond the statutory parameters. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Liberal Construction. — The intent of the Legislature regarding the operation of a particular provision of the Workers' Compensation Act is to be discerned from a consideration of the act as a whole — its language, purposes and spirit. This spirit is one of liberal construction, whenever appropriate, so that benefits will not be denied upon mere technicalities. Brown v. Walnut Cove Volunteer Fire Dep't, 71 N.C. App. 409, 322 S.E.2d 443 (1984), aff'd, 317 N.C. 147, 343 S.E.2d 523 (1986).

Industrial Commission Sole Judge of Witnesses Reliability. — In weighing the evidence, the Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness' testimony entirely if warranted by disbelief of that witness. Lineback v. Wake County Bd. of Comm'rs, 126 N.C. App. 678, 486 S.E.2d 252 (1997).

As to the inapplicability of state compensation laws to employment of purely admiralty cognizance, see London Guar. & Accident Co. v. Industrial Accident Comm'n, 279 U.S. 109, 49 S. Ct. 296, 73 L. Ed. 632 (1929).

Effect of Superior Court's Jurisdictional Findings. — The Supreme Court would consider the superior court's findings of jurisdictional fact as binding on appeal if supported by the evidence when the question was whether the Industrial Commission or the superior court had jurisdiction over a claim. Lemmerman v. A.T. Williams Oil Co., 318 N.C. 577, 350 S.E.2d 83, rehearing denied, 318 N.C. 704, 351 S.E.2d 736 (1986).

Claim Held Cognizable. — Claim of employee hired for other types of work, who was temporarily engaged in pumping water from a leaking and powerless barge which was being loaded with logs on the Roanoke River and was crushed by the barge and killed when the logs started rolling, the barge careened toward the channel, and the employee jumped ashore, where he and his employer had both accepted the State compensation act, was properly cognizable by the Commission. The application of the State act to such a situation did not violate the federal Constitution by interference with the uniformity of the general maritime law. Johnson v. Foreman-Blades Lumber Co., 216 N.C. 123, 4 S.E.2d 334 (1939).

Duty and Forseeability Not at Issue. — Where plaintiff's intestate choked while eating during her lunch break at work, the fact that she was mentally retarded had no bearing with regard to plaintiffs' workers' compensation claim, as plaintiff's contention that defendant owed a higher duty of care to its employees because they were mentally retarded was an argument better suited to a negligence action where duty and foreseeability are required to be proven for the plaintiff to recover. Forsythe v. INCO, 95 N.C. App. 742, 384 S.E.2d 30 (1989).

Death Benefits. — To recover death benefits under the Workers Compensation Act a claimant bears the burden of proving that the decedent sustained a fatal injury (1) by accident, (2) arising out of his employment, and (3) during the course of his employment. Westbrooks v. Bowes, 130 N.C. App. 517, 503 S.E.2d 409 (1998).

Civil Action Allowed for Employer's Misconduct Substantially Certain to Cause Injury or Death. — When an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer as well as a claim for workers' compensation as such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Workers' Compensation Act. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Election Between Remedies Not Required. — A claimant may, but is not required to, elect between a civil remedy and a remedy under the Workers' Compensation Act but, in any event, is entitled to but one recovery. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Woodson v. Rowland Applies Retroactively. — The Supreme Court's decision in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), which is annotated above, applies retroactively, even though the Woodson court was silent on whether its decision was to operate retroactively. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Co-employee Civil Liability. — The Workers' Compensation Act does not bar an employee from suing a co-employee for injuries caused by willful, wanton, and reckless negligence. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

No Common-Law Action against Negligent Fellow Employee. — An employee who sustains an "injury arising out of and in the course of employment," caused by the negligence of a fellow employee who was acting within "the course of employment," as that term is used in subdivision (6) of this section, may not maintain an action at common law against the negligent employee. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Failure to Specify Defense. — Plaintiff was not prejudiced by failure of defendants to specify the defense which they planned to use at his hearing, and whatever defense the defendants may have relied upon, the burden was on plaintiff to prove that he was injured by an accident arising out of and in the course of employment. Parker v. Burlington Indus., Inc., 78 N.C. App. 517, 337 S.E.2d 589 (1985).

Refusal to Accept Tendered Work. — Defendant's argument that the plaintiff was not disabled within the meaning of subsection (9) because they offered him employment consistent with his medical limitations (one functional arm) at no reduction in salary and that plaintiff was barred from compensation for total disability because he unjustifiably refused the tendered employment suitable to his capacity, was rejected. Bowden v. Boling Co., 110 N.C. App. 226, 429 S.E.2d 394 (1993).

Length of Healing Period. — Both pain treatment and vocational services were medical compensation, and were designed to give relief and to lessen the period of disability; the evidence supported the industrial commission's finding that the worker had not reached maximum medical improvement or the end of the healing period since he was in need of and would have benefited from both chronic pain treatment and a vocational rehabilitation program, and until he reached maximum vocational recovery, the worker's healing period was not at an end. Walker v. Lake Rim Lawn & Garden, 155 N.C. App. 709, 575 S.E.2d 764, 2003 N.C. App. LEXIS 384 (2003), cert. denied, 357 N.C. 67, 579 S.E.2d 577 (2003).

Return of Employee to Normal Hours and Wages. — North Carolina Industrial Commission's finding that a workers' compensation claimant had returned to his normal hours and wages did not require denial of the claimant's disability claim. White v. Weyerhaeuser Co., 167 N.C. App. 658, 606 S.E.2d 389, 2005 N.C. App. LEXIS 5 (2005).

When Fault of Employee Bars Recovery. — The circumstances in which fault of an employee operates to bar workers' compensation benefits are (1) when the employee's injury was proximately caused by intoxication or being under the influence of a controlled substance, or (2) when the injury was proximately caused by the employee's willful intention to injure or kill himself. Creel v. Town of Dover, 126 N.C. App. 547, 486 S.E.2d 478 (1997).

Competent evidence existed to show that employee's loss of wage-earning capacity was caused by his injury because he was informed by prospective employers that they did not have a position for him while he was on light-duty work restrictions. White v. Weyerhaeuser Co., 167 N.C. App. 658, 606 S.E.2d 389, 2005 N.C. App. LEXIS 5 (2005).

Workers' compensation claimant met his burden of proving disability by producing evidence that he was capable of some work, but that, after a reasonable effort, he had been unsuccessful and by showing that he had obtained other employment at a considerably reduced wage. White v. Weyerhaeuser Co., 167 N.C. App. 658, 606 S.E.2d 389, 2005 N.C. App. LEXIS 5 (2005).

While the case law interpreting the specific traumatic incident provision of G.S. 97-2(6) requires the plaintiff to prove an injury at a cognizable time, this does not compel the plaintiff to allege the specific hour or day of the injury; where a Form 18 specifically described the accident causing an employee's injury as a tire changing incident, this was sufficient to constitute a claim arising out of that incident, despite the fact that the form listed the date of a later truck exiting incident as the date of the accident. Crane v. Berry's Clean-Up & Landscaping, Inc., 169 N.C. App. 323, 610 S.E.2d 464, 2005 N.C. App. LEXIS 614 (2005).

Applied in Miller v. Roberts, 212 N.C. 126, 193 S.E. 286 (1937); Rice v. Thomasville Chair Co., 238 N.C. 121, 76 S.E.2d 311 (1953); Edwards v. City of Raleigh, 240 N.C. 137, 81 S.E.2d 273 (1954); McNair v. Ward, 240 N.C. 330, 82 S.E.2d 85 (1954); Harris v. Asheville Contracting Co., 240 N.C. 715, 83 S.E.2d 802 (1954); Burns v. Riddle, 265 N.C. 705, 144 S.E.2d 847 (1965); Cobb v. Eastern Clearing & Grading, Inc., 1 N.C. App. 327, 161 S.E.2d 612 (1968); Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969); Bass v. Morresville Mills, 15 N.C. App. 206, 189 S.E.2d 581 (1972); Lewallen v. National Upholstery Co., 27 N.C. App. 652, 219 S.E.2d 798 (1975); Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980); Hyatt v. Waverly Mills, 56 N.C. App. 14, 286 S.E.2d 837 (1982); Dowdy v. Fieldcrest Mills, Inc., 59 N.C. App. 696, 298 S.E.2d 82 (1982); May v. Shuford Mills, Inc., 64 N.C. App. 276, 307 S.E.2d 372 (1983); Godley v. Hackney & Sons, 65 N.C. App. 155, 308 S.E.2d 492 (1983); Freeman v. SCM Corp., 66 N.C. App. 341, 311 S.E.2d 75 (1984); Joyner v. J.P. Stevens & Co., 71 N.C. App. 625, 322 S.E.2d 636 (1984); Keziah v. Monarch Hosiery Mills, 71 N.C. App. 793, 323 S.E.2d 356 (1984); Phillips v. Boling Co., 73 N.C. App. 139, 326 S.E.2d 76 (1985); Algary v. McCarley & Co., 74 N.C. App. 125, 327 S.E.2d 296 (1985); Kelly v. Carolina Components, 86 N.C. App. 73, 356 S.E.2d 367 (1987); Ross v. Mark's Inc., 120 N.C. App. 607, 463 S.E.2d 302 (1995); Adams v. Kelly Springfield Tire Co., 123 N.C. App. 681, 474 S.E.2d 793 (1996); Brown v. Family Dollar Distribution Ctr., 129 N.C. App. 361, 499 S.E.2d 197 (1998); Soto v. McLean, 20 F. Supp. 2d 901 (E.D.N.C. 1998); Davis v. Weyerhaeuser Co., 132 N.C. App. 771, 514 S.E.2d 91 (1999); Smith v. Pinkerton's Sec. & Investigations, 146 N.C. App. 278, 552 S.E.2d 682, 2001 N.C. App. LEXIS 861 (2001); Zimmerman v. Eagle Elec. Mfg. Co., 147 N.C. App. 748, 556 S.E.2d 678, 2001 N.C. App. LEXIS 1255 (2001); Bailey v. W. Staff Servs., 151 N.C. App. 356, 566 S.E.2d 509, 2002 N.C. App. LEXIS 747 (2002); McGhee v. Bank of Am. Corp., 173 N.C. App. 422, 618 S.E.2d 833, 2005 N.C. App. LEXIS 2016 (2005).

Cited in Murphy v. American Enka Corp., 213 N.C. 218, 195 S.E. 536 (1938); Lineberry v. Mebane, 219 N.C. 257, 13 S.E.2d 429 (1941); Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948); Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); Ducan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951); Fields v. Hollowell, 238 N.C. 614, 78 S.E.2d 740 (1953); Sweatt v. Rutherford County Bd. of Educ., 237 N.C. 653, 75 S.E.2d 738 (1953); Watts v. Brewer, 243 N.C. 422, 90 S.E.2d 764 (1956); Smith v. Mecklenburg County Chapter Am. Red Cross, 245 N.C. 116, 95 S.E.2d 559 (1956); Brinkley v. United Feldspar & Minerals Corp., 246 N.C. 17, 97 S.E.2d 419 (1957); Evans v. Asheville Citizens Times Co., 246 N.C. 669, 100 S.E.2d 75 (1957); Wesley v. Lea, 252 N.C. 540, 114 S.E.2d 350 (1960); Shealy v. Associated Transp., 252 N.C. 738, 114 S.E.2d 702 (1960); Jackson v. Bobbitt, 253 N.C. 670, 117 S.E.2d 806 (1961); Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963); Burgess v. Gibbs, 262 N.C. 462, 137 S.E.2d 806 (1964); Byers v. North Carolina State Hwy. Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968); Wilmington Shipyard, Inc. v. North Carolina State Hwy. Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969); Hudson v. J.P. Stevens & Co., 12 N.C. App. 366, 183 S.E.2d 206 (1971); Smith v. Liberty Mut. Ins. Co., 409 F. Supp. 1211 (M.D.N.C. 1976); Allred v. Piedmont Woodyards, Inc., 32 N.C. App. 516, 232 S.E.2d 879 (1977); Perry v. Hibriten Furn. Co., 296 N.C. 88, 249 S.E.2d 397 (1978); Wood v. J.P. Stevens & Co., 36 N.C. App. 456, 245 S.E.2d 82 (1978); Britt v. Colony Constr. Co., 35 N.C. App. 23, 240 S.E.2d 479 (1978); Perry v. Hibriten Furn. Co., 35 N.C. App. 518, 241 S.E.2d 697 (1978); Taylor v. J.P. Stevens & Co., 300 N.C. 94, 265 S.E.2d 144 (1980); Thornton v. Thornton, 45 N.C. App. 25, 262 S.E.2d 326 (1980); Morrison v. Burlington Indus., 47 N.C. App. 50, 266 S.E.2d 741 (1980); Hilliard v. Apex Cabinet Co., 54 N.C. App. 173, 282 S.E.2d 828 (1981); McKee v. Crescent Spinning Co., 54 N.C. App. 558, 284 S.E.2d 175 (1981); Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981); Sparks v. Mountain Breeze Restaurant & Fish House, Inc., 55 N.C. App. 663, 286 S.E.2d 575 (1982); Lankford v. Dacotah Cotton

Mills, 56 N.C. App. 250, 287 S.E.2d 471 (1982); Harrell v. Yarns, 56 N.C. App. 697, 289 S.E.2d 846 (1982); Cook v. Bladenboro Cotton Mills, Inc., 61 N.C. App. 562, 300 S.E.2d 852 (1983); West v. Bladenboro Cotton Mills, Inc., 62 N.C. App. 267, 302 S.E.2d 645 (1983); Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983); Prevette v. Clark Equip. Co., 62 N.C. App. 272, 302 S.E.2d 639 (1983); Anderson v. Century Data Sys., Inc., 71 N.C. App. 540, 322 S.E.2d 638 (1984); Capps v. Standard Trucking Co., 77 N.C. App. 448, 335 S.E.2d 357 (1985); Underwood v. Cone Mills Corp., 78 N.C. App. 155, 336 S.E.2d 634 (1985); Gupton v. Builders Transp., 320 N.C. 38, 357 S.E.2d 674 (1987); Pitman v. Feldspar Corp., 87 N.C. App. 208, 360 S.E.2d 696 (1987); Gaddy v. Anson Wood Prods., 92 N.C. App. 483, 374 S.E.2d 477 (1988); Brimley v. Logging, 93 N.C. App. 467, 378 S.E.2d 52 (1989); Cook v. Norvell-Mackorell Real Estate Co., 99 N.C. App. 307, 392 S.E.2d 758 (1990); Mayhew v. Howell, 102 N.C. App. 269, 401 S.E.2d 831 (1991); Postell v. B & D Constr. Co., 104 N.C. App. 1, 411 S.E.2d 413 (1992); Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); Matthews v. Petroleum Tank Serv., Inc., 108 N.C. App. 259, 423 S.E.2d 532 (1992); Gilliam v. Perdue Farms, 112 N.C. App. 535, 435 S.E.2d 780 (1993); Grantham v. R.G. Barry Corp., 115 N.C. App. 293, 444 S.E.2d 659 (1994); Blackmon v. North Carolina Dep't of Cors., 118 N.C. App. 666, 457 S.E.2d 306 (1995), aff'd, 343 N.C. 259, 470 S.E.2d 8 (1996); Murray v. Associated Insurers, Inc., 341 N.C. 712, 462 S.E.2d 490 (1995); Harris v. North Am. Prods., 125 N.C. App. 349, 481 S.E.2d 321 (1997); Cooke v. P.H. Glatfelter/Ecusta, 130 N.C. App. 220, 502 S.E.2d 419 (1998); Flores v. Stacy Penny Masonry Co., 134 N.C. App. 452, 518 S.E.2d 200 (1999); Buser v. Southern Food Serv., 73 F. Supp. 2d 556 (M.D.N.C. 1999); Lanning v. Fieldcrest-Cannon, Inc., 352 N.C. 98, 530 S.E.2d 54, 2000 N.C. LEXIS 434 (2000); Kanipe v. Lane Upholstery, 141 N.C. App. 620, 540 S.E.2d 785, 2000 N.C. App. LEXIS 1302 (2000); Reece v. Forga, 138 N.C. App. 703, 531 S.E.2d 881, 2000 N.C. App. LEXIS 790 (2000); Terrell v. Terminix Servs., 142 N.C. App. 305, 542 S.E.2d 332, 2001 N.C. App. LEXIS 91 (2001); Russos v. Wheaton Indus., 145 N.C. App. 164, 551 S.E.2d 456, 2001 N.C. App. LEXIS 567 (2001); Landry v. US Airways, Inc., 150 N.C. App. 121, 563 S.E.2d 23, 2002 N.C. App. LEXIS 385 (2002); Foster v. U.S. Airways, Inc., 149 N.C. App. 913, 563 S.E.2d 235, 2002 N.C. App. LEXIS 406 (2002), cert. denied, 356 N.C. 299, 570 S.E.2d 505 (2002); Shoemaker v. Creative Builders, 150 N.C. App. 523, 563 S.E.2d 622, 2002 N.C. App. LEXIS 588 (2002); Pomeroy v. Tanner Masonry, 151 N.C. App. 171, 565 S.E.2d 209, 2002 N.C. App. LEXIS 709 (2002); Nix v. Collins & Aikman, Co., 151 N.C. App. 438, 566 S.E.2d 176, 2002 N.C. App. LEXIS 751 (2002); Johnson v. S. Tire Sales & Serv., 152 N.C. App. 323, 567 S.E.2d 773, 2002 N.C. App. LEXIS 920 (2002), cert. denied, 356 N.C. 437, 572 S.E.2d 784 (2002); Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003), cert. denied, 540 U.S. 1177, 124 S. Ct. 1407, 158 L. Ed. 2d 78 (2004); Dial v. Cozy Corner Rest., Inc., 161 N.C. App. 694, 589 S.E.2d 146, 2003 N.C. App. LEXIS 2261 (2003); Workman v. Rutherford Elec. Mbrshp. Corp., 170 N.C. App. 481, 613 S.E.2d 243, 2005 N.C. App. LEXIS 1077 (2005); Flynn v. EPSG Mgmt. Servs., 171 N.C. App. 353, 614 S.E.2d 460, 2005 N.C. App. LEXIS 1208 (2005); Outerbridge v. Perdue Farms, Inc., — N.C. App. —, 638 S.E.2d 564, 2007 N.C. App. LEXIS 40 (2007); Cash v. Lincare Holdings, — N.C. App. —, 639 S.E.2d 9, 2007 N.C. App. LEXIS 92 (2007); Bradley v. Mission St. Joseph's Health Sys., — N.C. App. —, 638 S.E.2d 254, 2006 N.C. App. LEXIS 2501 (2006).

II. EMPLOYMENT, EMPLOYEES, AND EMPLOYERS.

A. In General.

An injured person is entitled to compensation under the Act only if he was an employee of the party from whom compensation is claimed at the time of his injury. Hart v. Thomasville Motors, Inc., 244 N.C. 84, 92 S.E.2d 673 (1956); Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965); Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976).

To be entitled to maintain a proceeding for compensation for personal injury under the Act, the claimant must be, in fact and in law, an employee of the alleged employer. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965); Youngblood v. North State Ford Truck Sales, 321 N.C. 380, 364 S.E.2d 433, rehearing denied, Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976).

Employment Is Jurisdictional. — The question of whether an employer-employee relationship exists is jurisdictional. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965); Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976); Youngblood v. North State Ford Truck Sales, 321 N.C. 380, 364 S.E.2d 433, rehearing denied, Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

Because the act only applies where the employer-employee relationship exists, the question of whether it existed at the time of the accident is jurisdictional. Carter v. Frank Shelton, Inc., 62 N.C. App. 378, 303 S.E.2d 184 (1983), cert. denied, 310 N.C. 476, 312 S.E.2d 883 (1984).

And Is Thus the Initial Fact to Be Established. — Before the provisions of the act are called into play, the relation of master and servant, or employer and employee, or some appointment, must exist; this is the initial fact to be established. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

Whether an injured person is an employee of the defendant is a matter of proof which may properly be determined in the Supreme Court. Charnock v. Reusing Light & Refrigerating Co., 202 N.C. 105, 161 S.E. 707 (1931).

Inquiry Is Mixed Question of Law and Fact. — The inquiry whether employer-employee relationship exists is a mixed question of fact and law. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

Its correct determination depends upon the answer to two questions: (1) What are the terms of the agreement, that is, what was the contract between the parties; and (2) what relationship between the parties was created by the contract, that is, was it that of master and servant or that of employer and independent contractor? The first involves a question of fact and the second is a question of law. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

Burdern of Proof. — Claimant has burden of proving that an employer-employee relationship existed at the time an injury by accident occurred. Hughart v. Dasco Transp., Inc., 167 N.C. App. 685, 606 S.E.2d 379, 2005 N.C. App. LEXIS 3 (2005).

Common-Law Tests Applicable. — The statutory definition of "employee" adds nothing to the common-law meaning of the term. Whether an employer-employee relationship existed at the time of the injury by accident is to be determined by the application of the ordinary common-law tests. Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976); Carter v. Frank Shelton, Inc., 62 N.C. App. 378, 303 S.E.2d 184 (1983), cert. denied, 310 N.C. 476, 312 S.E.2d 883 (1984).

Wages or Salary. — An employee is one who works for another for wages or salary, and the right to demand pay for his services from his employer would seem to be essential to his right to receive compensation under the act. Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976).

Compulsion of Legal Process. — One may be an employee, within the meaning of the Workers' Compensation Act, even if his employment is involuntary and under the compulsion of legal process. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

Excluded Employees. — This Chapter excludes persons whose employment is casual and not in the course of the trade, business, profession or occupation of the employer, and specifically excepts from its provisions casual employees, farm laborers and domestic servants. Burnett v. Palmer-Lipe Paint Co., 216 N.C. 204, 4 S.E.2d 507 (1939).

Aliens. — This section makes clear that the General Assembly sought to include individuals like the plaintiff, who worked without the right of citizenship or a green card, under the protections of the Workers' Compensation Act. Rivera v. Trapp, 135 N.C. App. 296, 519 S.E.2d 777 (1999).

Illegal alien, who obtained his employment with falsified documents, was entitled to workers' compensation benefits following injuries in a fall. Ruiz v. Belk Masonry Co., 148 N.C. App. 675, 559 S.E.2d 249, 2002 N.C. App. LEXIS 50 (2002), appeal dismissed, cert. denied, 356 N.C. 166, 568 S.E.2d 610 (2002).

Employees Eligible to Retire. — A claimant's entitlement to a workers' compensation disability award is unrelated to either the claimant's eligibility to retire or his decision to retire. Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

Full-Time Employment. — Employees who are employed in distributive education programs may not be fairly and justly classified as full-time for purposes of the Workers' Compensation Act. Mabry v. Bowers Implement Co., 48 N.C. App. 139, 269 S.E.2d 165 (1980).

Joint employment occurs when a single employee under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other. In such a case, both employers are liable for workers' compensation. Henderson v. Manpower of Guilford County, Inc., 70 N.C. App. 408, 319 S.E.2d 690 (1984); Anderson v. Texas Gulf, Inc., 83 N.C. App. 634, 351 S.E.2d 109 (1986).

Under some circumstances a person can be an employee of two different employers at the same time, in which event either employer or both may be liable for worker's compensation. Henderson v. Manpower of Guilford County, Inc., 70 N.C. App. 408, 319 S.E.2d 690 (1984).

Even if there is a mutual business interest between the two employers, and perhaps even some element of control, joint employment as to one employer cannot be found in the absence of a contract with that employer. Anderson v. Texas Gulf, Inc., 83 N.C. App. 634, 351 S.E.2d 109 (1986).

Stipulation as to Employment Relationship. — Stipulation of defendants, prior to hearing, that at the time of injury, the employment relationship existed between plaintiff and defendant employer, was binding on defendants; such a stipulation made it unnecessary for plaintiff to offer evidence of the validity or legal status of his corporate employer at the time of plaintiff's injury. Sorrell v. Sorrell's

Farms & Ranches, Inc., 78 N.C. App. 415, 337 S.E.2d 595 (1985).

Because worker and owner of company were considered co-employees, owner was not individually liable to worker under the Workers' Compensation Act for injuries sustained by worker; thus worker's claims against owner were not excluded from insurer's policy coverage under general liability exclusion for workers' compensation benefits. Newton v. United States Fire Ins. Co., 98 N.C. App. 619, 391 S.E.2d 837 (1990).

Prospective employee who was injured during a pre-employment interview was not an "employee," for purposes of coverage by the North Carolina Workers' Compensation Act, as defined in G.S. 97-2(2). Huntley v. Howard Lisk Co., 154 N.C. App. 698, 573 S.E.2d 233, 2002 N.C. App. LEXIS 1528 (2002), cert. denied, 357 N.C. 62, 579 S.E.2d 389 (2003).

Employment Shown. — Where deceased was employed and paid by defendant's driver to assist him in delivering bottled drinks, but the defendant knew of, and consented to, the arrangement between deceased and the driver, the evidence was sufficient to support a finding that deceased was an employee of defendant. Michaux v. Gate City Orange Crush Bottling Co., 205 N.C. 786, 172 S.E. 406 (1934).

Evidence was sufficient to support a finding of the Commission that deceased, the driver of a tractor-tank, was an employee of defendant oil company, a partnership, and not of a separate transportation business operated by one of the partners. Moses v. Bartholomew, 238 N.C. 714, 78 S.E.2d 923 (1953).

Where the owner of a truck drives same on a trip in interstate commerce for an interstate carrier under a trip-lease agreement providing that the carrier's I.C.C. license plates should be used and the carrier retain control and direction over the truck, an assistant driver employed by the owner-lessor is an employee of the carrier within the coverage of the North Carolina Workers' Compensation Act. Further, if the owner-lessor were considered an independent contractor, but he had less than five employees and no compensation insurance coverage, the carrier would still be liable under G.S. 97-19. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

Under the circumstances, the act of an employee in reporting to the union office in this State, accepting a referral slip, and starting upon the trip to the job constituted acceptance of an offer of employment, so that the contract of employment was made and completed in this State. Warren v. Dixon & Christopher Co., 252 N.C. 534, 114 S.E.2d 250 (1960).

Plaintiff, who sought damages for injuries intentionally inflicted by her supervisor immediately after she had orally tendered her resignation, was still an employee as a matter of law at the time of the alleged incident. Daniels v. Swofford, 55 N.C. App. 555, 286 S.E.2d 582 (1982).

Eight-year-old child who did odd jobs as needed in defendant's service station/convenience store business, including stocking cigarettes and drinks and picking up trash, was defendant's employee at the time of accident. Lemmerman v. A.T. Williams Oil Co., 318 N.C. 577, 350 S.E.2d 83, rehearing denied, 318 N.C. 704, 351 S.E.2d 736 (1986).

Evidence that for a number of years, when he was able, and when his son, who ran a roofing business, needed him, decedent provided valuable roofing skills and services for his son, that in exchange for these services, which furthered his business, his son would provide decedent with three to four hundred dollars worth of necessities per month, and that without decedent's skills and services his son would not have been able to afford to provide the three to four hundred dollars worth of necessities per month, even though apart from their business relationship, he may have wanted to help out his father, showed that there existed an implied oral contract of hire between employer-son and employee-father. Dockery v. McMillan, 85 N.C. App. 469, 355 S.E.2d 153, cert. denied, 320 N.C. 167, 358 S.E.2d 49 (1987).

Former employer's subsequent sale of the division for which an injured employee worked to a buyer that later went bankrupt did not, standing alone, divest the North Carolina Industrial Commission of jurisdiction over the employer as the employee's employer at the time of the employee's accident. Goodson v. P.H. Glatfelter Co., 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

Employment Not Shown. — Where an individual requested the State Game Commission to appoint the plaintiff as a deputy game warden, and after the papers had been mailed out but before they were accepted by plaintiff, he went with said individual to assist in breaking bear traps and was injured while employed in this work, the court would affirm the Commission's holding that there was no employment until after the appointment had been accepted. Birchfield v. Department of Conservation & Dev., 204 N.C. 217, 167 S.E. 855 (1933).

The liability of one to pay, and the right of another to receive, compensation depends upon some appointment or the existence of the relation of employer and employee and is to be determined by the rules governing the establishment of contracts, and no such relation existed between defendant department and game warden who was injured as a result of testifying in a criminal prosecution. Hollowell v. North Carolina Dep't of Conservation & Dev., 206 N.C. 206, 173 S.E. 603 (1934).

Decedent was not an employee within the

meaning of subdivision (2) of this section where he had previously been dismissed from defendant's employment but continued to assist his wife when she succeeded him as acting manager of the store, in view of the fact that defendant's agent had no authority to allow decedent to continue working at the store and both decedent and his wife knew that defendant's agent was acting in excess of his authority in permitting decedent to continue working in the store. Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976).

Payroll services company was not an employer of a furniture company's delivery man because no contractual relationship existed, nor was there any supervision; therefore, the payroll services company was not liable for workers' compensation death benefits. Hughart v. Dasco Transp., Inc., 167 N.C. App. 685, 606 S.E.2d 379, 2005 N.C. App. LEXIS 3 (2005).

Conclusions About Employer Without Findings Remanded. — Where the Deputy Commissioner concluded, without any findings, that individual was employee's employer and not company, case was remanded for findings on the question whether individual was in fact the alter ego of company, and thus was properly named as the liable employer in the action. Harrelson v. Soles, 94 N.C. App. 557, 380 S.E.2d 528 (1989).

Volunteer Fireman to Be Treated as Employees. — Because the Workers' Compensation Act provides the specific calculation for the average weekly wage to be received by volunteer fireman in subsection (5), it is implicit that volunteer firemen are to be treated as employees under the Act. Hix v. Jenkins, 118 N.C. App. 103, 453 S.E.2d 551 (1995).

B. State and Municipal Employees.

A municipal corporation is subject to the Workers' Compensation Act, even though it employs less than the minimum number of employees under this section, the legislative intent to classify municipal corporations with the State and its political subdivisions being consonant with reason and being indicated by G.S. 97-13, which does not include municipal corporations employing less than the minimum number of employees in listing employers exempt from the act, and G.S. 97-7, which provides that neither the State nor any municipal corporation nor any subdivision of the State nor employees of the same shall have the right to reject the provisions of the act, and it being required that these sections be construed in pari materia to determine the legislative intent. Rape v. Town of Huntersville, 214 N.C. 505, 199 S.E. 736 (1938).

An employee of the State engaged in the cultivation of food crops on lands of the State used by the State Hospital is an employee of the State within the coverage of this section and G.S. 97-13, and his death from an accident arising out of and in the course of his employment is compensable. Barbour v. State Hosp., 213 N.C. 515, 196 S.E. 812 (1938).

CETA Employee. — Where a CETA employee would not otherwise be protected by workers' compensation insurance for a work-related injury, the state governmental unit which hired him and paid the required premiums would be estopped to deny liability therefor, as would its insurance carrier which accepted payment of those premiums. Godley v. County of Pitt, 306 N.C. 357, 293 S.E.2d 167 (1982).

Participant in the federally funded Comprehensive Employment and Training Act (CETA) qualified as an "employee" under this section. Sutton v. Ward, 92 N.C. App. 215, 374 S.E.2d 277 (1988).

A worker employed by a city under a contract stipulating the wages to be received by the worker is an employee of the city within the meaning of this section, and the fact that the city obtains the money to pay the wages from the Reconstruction Finance Corporation is immaterial on the question of the relationship between the worker and the city. Mayze v. Town of Forest City, 207 N.C. 168, 176 S.E. 270 (1934).

A juror, regularly summoned and serving, is not an employee of the county within the meaning of the North Carolina Workers' Compensation Act. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

Deputized Policeman Aiding in Arrest. — Evidence that claimant was injured while attempting to aid a policeman in serving a warrant for a breach of the peace, and that claimant had been duly deputized by the policeman to aid in making the arrest, was sufficient to support the finding of the Industrial Commission that at the time of injury claimant was an employee of defendant town under a valid appointment. Tomlinson v. Town of Norwood, 208 N.C. 716, 182 S.E. 659 (1935).

Policeman Pursuing Offender beyond Jurisdiction. — For cases decided under this section as it stood prior to the 1949 amendment adding the proviso at the end of the first paragraph of subdivision (2), see Wilson v. Town of Mooresville, 222 N.C. 283, 22 S.E.2d 907 (1942); Taylor v. Town of Wake Forest, 228 N.C. 346, 45 S.E.2d 387 (1947).

Sheriff's Department is Local Governmental Entity. — In the injured party's suit against a sheriff and individual detention officers arising out of a five-day episode in the county detention center where she alleged that they ignored her requests for medical treatment, the trial court properly concluded that the office of North Carolina sheriff was a "person" under 42 U.S.C.S. § 1983 because (1) the state constitution created the office of sheriff, N.C. Const. art. VII, § 2, but included that provision within the article governing local governments, along with provisions for counties, cities, towns, and other governmental subdivisions, N.C. Const. art. VII, § 1; (2) state statutes, including N.C. Gen. Stat. §§ 17E-1, 160A-288.2, 143-166.50, and 97-2, characterized a sheriff's department as a local governmental entity; (3) there was no contention that the State would be potentially liable for any monetary judgment entered against the sheriff and the detention officers; and (4) the State did not have, with respect to a sheriff, the minimum degree of control required for Eleventh Amendment immunity. Boyd v. Robeson County, — N.C. App. —, 615 S.E.2d 296, 2005 N.C. App. LEXIS 520 (2005), cert. denied, — N.C. —, 615 S.E.2d 866 (2005).

Deputy Sheriffs. — The 1939 amendment including deputy sheriffs within the meaning of the term "employee," as used in this section, is not violative of N.C. Const., Art. I, § 32 or Art. II, § 24. Towe v. Yancey County, 224 N.C. 579, 31 S.E.2d 754 (1944).

The provision of c. 277 of the Laws of 1939 that deputy sheriffs shall be deemed employees of the county for the purpose of determining the rights of the parties under the Workers' Compensation Act does not apply to accidents occurring prior to the enactment of the amendment. Clark v. Sheffield, 216 N.C. 375, 5 S.E.2d 133 (1939).

For cases dealing with deputies and decided under this section as it stood prior to the amendment, see Saunders v. Allen, 208 N.C. 189, 179 S.E. 754 (1935); Borders v. Cline, 212 N.C. 472, 193 S.E. 826 (1937); Gowens v. Alamance County, 216 N.C. 107, 3 S.E.2d 339 (1939); Clark v. Sheffield, 216 N.C. 375, 5 S.E.2d 133 (1939).

Trial court did not abuse its discretion in extinguishing a county's subrogation lien against a deputy sheriff regarding a settlement that he received following an injury in the course of his employment because, based upon the fact that the county government was subject to the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., and its provisions regarding payment and compensation under the Act, there was specific statutory authority authorizing the deputy sheriff to seek a determination under G.S. 97-10.2(j) of the county's authority to file a lien against his settlement proceeds. Helsius v. Robertson, 174 N.C. App. 507, 621 S.E.2d 263, 2005 N.C. App. LEXIS 2469 (2005), appeal dismissed, review denied, 360 N.C. 363, 629 S.E.2d 851, recons. denied, 360 N.C. 533, 633 S.E.2d 815 (2006).

Police Officers. — Even if plaintiff's preexisting knee condition contributed to the injury, plaintiff's fall while pursuing a fleeing suspect at night was a risk attributable to his employment as a police officer for defendant and was compensable. Mills v. City of New Bern, 122 N.C. App. 283, 468 S.E.2d 587 (1996).

Teachers. — A person employed by a graded school district as teacher and director of athletics is an employee of a political subdivision of the State, and is entitled to the benefits of the compensation act under this section. Perdue v. State Bd. of Equalization, 205 N.C. 730, 172 S.E. 396 (1934).

A county board of education is the sole employer of one under contract to teach vocational agriculture in a county school, where such teacher's salary is paid in part from funds furnished as a gift to such board by the State and federal governments, and, as such sole employer, is liable, with its insurance carrier, under this Chapter for the death of such teacher from an injury by accident arising out of and in the course of his employment. Callihan v. Board of Educ., 222 N.C. 381, 23 S.E.2d 297 (1942).

Prisoner. — A prisoner is not an employee as defined by this section. Lawson v. North Carolina State Hwy. & Pub. Works Comm'n, 248 N.C. 276, 103 S.E.2d 366 (1958). See § 97-13(c).

C. Regular Employment of Four (Now Three) or More.

Editor's Note. — *Most of the annotations below were decided under this section prior to its amendment by Session Laws 1987, c. 729, s. 1, which decreased the regular employment requirement in subdivision (1) from four to three employees.*

"Regularly Employed". — The term "regularly employed" connotes employment of the same number of persons throughout the period with some constancy. Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968); Cousins v. Hood, 8 N.C. App. 309, 174 S.E.2d 297 (1970); Durham v. McLamb, 59 N.C. App. 165, 296 S.E.2d 3 (1982).

Subdivision (1) of this section does not define "regularly employed." Cousins v. Hood, 8 N.C. App. 309, 174 S.E.2d 297 (1970).

Having five (now three) or more employees is a jurisdictional prerequisite and must appear of record on appeal. Chadwick v. North Carolina Dep't of Conservation & Dev., 219 N.C. 766, 14 S.E.2d 842 (1941); Durham v. McLamb, 59 N.C. App. 165, 296 S.E.2d 3 (1982); Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501, aff'd, 318 N.C. 410, 348 S.E.2d 595 (1986).

If a person does not "regularly employ" five (now four) or more employees, he is not subject to and bound by the act. Cousins v. Hood, 8 N.C. App. 309, 174 S.E.2d 297 (1970).

Whether the employer had the required number of employees is a question of ju-

risdictional fact, and the reviewing court is required to review and consider the evidence on this matter and make an independent determination thereon. Durham v. McLamb, 59 N.C. App. 165, 296 S.E.2d 3 (1982).

Falling Below Minimum Requirement on Date of Injury. — If an employer has five (now four) or more "regularly employed" employees, the fact that he fell below the minimum requirement on the actual date of injury would not preclude coverage. Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968).

Number of workers on the job site on the date of injury, standing alone, is not determinative of the issue. If the defendant had four or more "regularly employed" employees, the fact that he fell below the minimum requirement on the actual date of injury would not preclude coverage. Durham v. McLamb, 59 N.C. App. 165, 296 S.E.2d 3 (1982).

The plaintiff has the burden of proving that the employer regularly employed five (now three) or more employees. Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501, aff'd, 318 N.C. 410, 348 S.E.2d 595 (1986).

Evidence Held Sufficient to Show Minimum Number of Persons Regularly Employed. — Evidence tending to show that the employer regularly employed three persons in his general mercantile business and that for more than two months prior to the accident in suit he had employed two other persons at stated weekly wages to deliver fertilizers by truck in the operation of his mercantile business supported the finding of the Industrial Commission that the employer had five or more persons regularly employed in his business and that he was therefore subject to the Act. Hunter v. Peirson, 229 N.C. 356, 49 S.E.2d 653 (1948), decided prior to 1975 amendment.

Claimant's brother was a "regular employee" of defendant service station operator where he was employed eight days prior to the accident in question to keep one of defendant's stations open at night beyond regular hours to see if this would increase business at the station and had worked for two hours every evening during the eight days, notwithstanding the fact that he was also a full-time State employee; consequently, defendant employer, who also employed four full-time employees at his two service stations, "regularly employed" five persons and was subject to the act. Cousins v. Hood, 8 N.C. App. 309, 174 S.E.2d 297 (1970), decided prior to 1975 amendment.

Plaintiff's testimony, which was corroborated by defendant's records, held competent evidence that defendant regularly employed five (now three) or more employees during the period of plaintiff's employment with defendant and that the Commission thus had jurisdiction. Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501, aff'd, 318 N.C. 410, 348 S.E.2d 595 (1986).

Defendants were subject to the Industrial Commission's jurisdiction where there was evidence that defendants employed, with some constancy, at least four people for the year 1987, even though there were only three regularly employed workers on the day plaintiff was injured. Grouse v. DRB Baseball Mgt., Inc., 121 N.C. App. 376, 465 S.E.2d 568 (1996).

Evidence Insufficient. — Where the record contained no evidence that defendant/"carrier" regularly employed three or more employees, no employer-employee relationship existed within the meaning of the Workers' Compensation Act. Williams v. ARL, Inc., 133 N.C. App. 625, 516 S.E.2d 187 (1999).

D. Casual Employment.

Casual Employment Defined. — Employment is casual when it is irregular, unpredictable, sporadic and brief in nature. Clark v. Waverly Mills, Inc., 12 N.C. App. 535, 183 S.E.2d 855 (1971).

When Casual Employee Is Not Entitled to Compensation. — For an employee to be excluded from benefits under the Workers' Compensation Act his employment must be casual, and in addition thereto, not in the course of the trade, business, profession or occupation of his employer. Clark v. Waverly Mills, Inc., 12 N.C. App. 535, 183 S.E.2d 855 (1971).

When Casual Employee Is Entitled to Compensation. — Section 97-13 of this Chapter, providing that the act shall not apply to casual employees, is not totally repugnant to this section, providing for compensation for an injury to an employee while "in the course of the trade, business," etc., and an employee is entitled to compensation even if the employment is casual if he is injured in the course of the trade, business, etc. Johnson v. Asheville Hosiery Co., 199 N.C. 38, 153 S.E. 591 (1930).

The restriction of this Act excluding injuries sustained in casual employment will not exclude an applicant under the provisions of the Act when he sustains injuries in the course of the general trade, business, etc., of the employer and material or expedient therein. Johnson v. Asheville Hosiery Co., 199 N.C. 38, 153 S.E. 591 (1930).

An accident is compensable if it happens in employment incident to the proper operation of a business even if the employment is casual. Boyd v. Mitchell, 48 N.C. App. 219, 268 S.E.2d 252 (1980).

Employment Held Casual. — A plaintiff's employment for a period of only two days to help prepare for an annual company picnic was strictly a chance employment for a brief period of time. It was not the sort of work that plaintiff could rely upon as a regular source of income.

There was no reasonable probability that she would be employed in future years to assist in preparing for the annual picnics. Thus, plaintiff's employment was "casual" within the meaning of subdivision (2) of this section. Clark v. Waverly Mills, Inc., 12 N.C. App. 535, 183 S.E.2d 855 (1971).

Employment Held Not Casual. — The painting of the interior of a machine room to give the employees therein a better light or for the protection of the permanent structure is not a casual employment and is one in the general course of business, and the act applies to an injury received by a worker engaged in such painting. Johnson v. Asheville Hosiery Co., 199 N.C. 38, 153 S.E. 591 (1930).

Plaintiff who had been employed full-time for three months prior to accident, and who also worked on Saturdays by choice and with the agreement of his employer, was not merely a casual employee. Murray v. Biggerstaff, 81 N.C. App. 377, 344 S.E.2d 550, cert. denied, 318 N.C. 696, 350 S.E.2d 858 (1986).

Employment continuously for five or six weeks in construction of facilities for defendant's plant may not be held to be either casual or not in the course of defendant's business. Smith v. Southern Waste Paper Co., 226 N.C. 47, 36 S.E.2d 730 (1946).

Where the evidence tended to show that the defendant operated a general mercantile business, which included the selling and delivery of commercial fertilizers, and that plaintiffs' intestates had been working for a period of more than two months at stated weekly wages in delivering the fertilizers by truck when they met with a fatal accident arising out of and in the course of their employment, it was held that decedents were not casual employees, and further, that the injury arose within the scope of the employer's regular business, and that therefore they were employees of defendant within the coverage of the Act. Hunter v. Peirson, 229 N.C. 356, 49 S.E.2d 653 (1948).

Eight-year-old child of part-time cashier who sustained an accidental injury on the premises of defendant's convenience store and service station, at which he stayed after school, and at which on some afternoons he did tasks about the place, such as carrying out the garbage, picking up trash and restocking the cigarette, candy and soft drink machines, for which he was paid a dollar or so, was at least a casual employee, whose employment was not excluded by the statute, since the work that he did was required in the operation of defendant's business. Fact that the child was too young to be lawfully employed was irrelevant. Lemmerman v. A.T. Williams Oil Co., 79 N.C. App. 642, 339 S.E.2d 820, aff'd, 318 N.C. 577, 350 S.E.2d 83 (1986).

E. Independent Contractors.

1. In General.

Act Inapplicable to Independent Contractor. — An independent contractor is not a person included within the terms of the Act, and the Industrial Commission has no jurisdiction to apply the Act to a person who is not subject to its provisions. Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965); Youngblood v. North State Ford Truck Sales, 321 N.C. 380, 364 S.E.2d 433; 322 N.C. 116, 367 S.E.2d 923 (1988), rehearing denied.

To establish that he was covered by the provisions of this Article, a worker had the burden of proving that he was either an employee of a subcontractor or the general contractor, rather than an independent subcontractor. Gordon v. West Constr. Co., 75 N.C. App. 608, 331 S.E.2d 259 (1985).

Meaning of Terms Not Changed. — Except as to public officers, the definition of "employee" contained in this section adds nothing to the common-law meaning of the term. Nor does it encroach upon or limit the common-law meaning of "independent contractor." These terms must be given their natural and ordinary meaning in their accepted legal sense. Hayes v. Board of Trustees, 224 N.C. 11, 29 S.E.2d 137 (1944). See also Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

Common-Law Tests Applicable. — The question whether one employed to perform specified work for another is to be regarded as an independent contractor or as an employee within the operation of the Act is determined by the application of the ordinary common-law tests. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966); Youngblood v. North State Ford Truck Sales, 321 N.C. 380, 364 S.E.2d 433, rehearing denied, 322 N.C. 116, 367 S.E.2d 923 (1988).

Whether a person is an independent contractor or an employee within the meaning of the Act is to be determined in accordance with the common law. Scott v. Waccamaw Lumber Co., 232 N.C. 162, 59 S.E.2d 425 (1950).

In the absence of pertinent statutory definitions, whether a person is an independent contractor, or a subcontractor who is an independent contractor, or an employee within the meaning of the act is to be determined by the application of the ordinary common-law tests. Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965).

In determining whether a relationship is one of employer-independent contractor or master and servant, North Carolina applies the common law right of control test. Pinckney v. United States, 671 F. Supp. 405 (E.D.N.C. 1987).

For discussion of the test for determin-

ing whether a worker is an employee or an independent contractor, see Denton v. South Mt. Pulpwood Co., 69 N.C. App. 366, 317 S.E.2d 433, cert. denied, 311 N.C. 753, 321 S.E.2d 131 (1984).

Who Is an Independent Contractor. — Generally an independent contractor is one who exercises independent employment and contracts to do a piece of work according to his own judgment and method, without being subject to his employer except as to the results of his work. Smith v. Southern Waste Paper Co., 226 N.C. 47, 36 S.E.2d 730 (1946); McCraw v. Calvine Mills, Inc., 233 N.C. 524, 64 S.E.2d 658 (1951); Millard v. Hoffman, Butler & Assocs., 29 N.C. App. 327, 224 S.E.2d 237, cert. denied, 290 N.C. 551, 226 S.E.2d 510 (1976); Youngblood v. North State Ford Truck Sales, 321 N.C. 380, 364 S.E.2d 433, rehearing denied, 322 N.C. 116, 367 S.E.2d 923 (1988).

When one undertakes to do a specific job under contract and the manner of doing it, including the employment, payment and control of the persons working with or under him, is left entirely to him, he will be regarded as an independent contractor, unless the person for whom the work is being done has retained the right to exercise control in respect to the manner in which the work is to be executed. McCraw v. Calvine Mills, Inc., 233 N.C. 524, 64 S.E.2d 658 (1951); Millard v. Hoffman, Butler & Assocs., 29 N.C. App. 327, 224 S.E.2d 237, cert. denied, 290 N.C. 551, 226 S.E.2d 510 (1976).

An independent contractor has been defined as one who exercises an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer, except as to the result of the work, and who has the right to employ and direct the action of other workers in the prosecution of the work without interference or right of control on the part of his employer. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

Generally speaking, an independent contractor is one who undertakes to produce a given result, where in the actual execution of the work he is not under the orders or control of the person for whom he does it, and where he may use his own discretion in matters and things not specified. One who represents another only as to the results of a piece of work, and not as to the means of accomplishing it, is an independent contractor and not a servant or employee. Bryson v. Gloucester Lumber Co., 204 N.C. 664, 169 S.E. 276 (1933); Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965).

Elements of Relationship of Employer and Independent Contractor. — The elements which earmark the relationship of employer and independent contractor, are generally as follows: The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his skill, knowledge, or training in the execution of the work; (c) is doing a specific piece of work at a fixed price, or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he thinks proper; (g) has full control over such assistants; and (h) selects his own time. The presence of no one of these indicia is controlling, nor is the presence of all required. Hayes v. Board of Trustees, 224 N.C. 11, 29 S.E.2d 137 (1944); Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970); Pinckney v. United States, 671 F. Supp. 405 (E.D.N.C. 1987).

There are many elements to be considered in determining whether a person in the execution of work for another is an employee or independent contractor, and no particular element is controlling. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

Right to Control Is Crucial. — The test is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has the right of control, it is immaterial whether he actually exercises it. Scott v. Waccamaw Lumber Co., 232 N.C. 162, 59 S.E.2d 425 (1950); McCraw v. Calvine Mills, Inc., 233 N.C. 524, 64 S.E.2d 658 (1951); Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966); Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970). See also Hinkle v. City of Lexington, 239 N.C. 105, 79 S.E.2d 220 (1953); Millard v. Hoffman, Butler & Assocs., 29 N.C. App. 327, 224 S.E.2d 237, cert. denied, 290 N.C. 551, 226 S.E.2d 510 (1976).

The test for determining whether a relationship between parties is that of employer and employee, or that of employer and independent contractor, is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing work, as distinguished from the right merely to require certain definite results conforming to the contract. Alford v. Victory Cab Co., 30 N.C. App. 657, 228 S.E.2d 43 (1976).

The right of an employer to supervise and control the activities of one working under him determines to a great extent whether that one is an employee. Hunter v. Hunter Auto Co., 204 N.C. 723, 169 S.E. 648 (1933).

The dominant factor in determining whether a hired hand is an employee or an independent contractor is the employer's authority to control how the person hired accomplishes the task to be done, and if that right to control exists, it makes no difference that it is not exercised. Youngblood v. North State Ford Truck Sales, 87 N.C. App. 35, 359 S.E.2d 256 (1987), aff'd, 321 N.C. 380, 364 S.E.2d 433 (1988).

As to the distinction between an independent contractor and an employee entitled to benefits, see also Cooper v. Colonial Ice Co., 230 N.C. 43, 51 S.E.2d 889 (1949), citing Johnson v. Asheville Hosiery Co., 199 N.C. 38, 153 S.E. 591 (1930); Creswell v. Charlotte News Publishing Co., 204 N.C. 380, 168 S.E. 408 (1933); Beach v. McLean, 219 N.C. 521, 14 S.E.2d 515 (1941); Hayes v. Board of Trustees, 224 N.C. 11, 29 S.E.2d 137 (1944); Smith v. Southern Waste Paper Co., 226 N.C. 47, 36 S.E.2d 730 (1946); Creighton v. Snipes, 227 N.C. 90, 40 S.E.2d 612 (1946); Bell v. Williamston Lumber Co., 227 N.C. 173, 41 S.E.2d 281 (1947); Perley v. Ballenger Paving Co., 228 N.C. 479, 46 S.E.2d 298 (1948); Youngblood v. North State Ford Truck Sales, 321 N.C. 380, 364 S.E.2d 433, rehearing denied, 322 N.C. 116, 367 S.E.2d 923 (1988).

Question of Law. — On undisputed facts the question whether one is an independent contractor or an employee is one of law reviewable by the court. Beach v. McLean, 219 N.C. 521, 14 S.E.2d 515 (1941).

Whether the facts found by the Commission are supported by competent evidence and whether the facts found by the Commission support the legal conclusion that the injured party was an employee are reviewable by the court as questions of law. Pearson v. Peerless Flooring Co., 247 N.C. 434, 101 S.E.2d 301 (1958).

2. Individuals Held to Be Independent Contractors.

Newsboy. — A newsboy engaged in selling papers is held not to be an employee of the newspaper within the meaning of that term as used in this section, the newsboy not being on the newspaper's payroll and being without authority to solicit subscriptions and being free to select his own methods of effecting sales, although some degree of supervision was exercised by the newspaper. Creswell v. Charlotte News Publishing Co., 204 N.C. 380, 168 S.E. 408 (1933).

Hauler of Lumber. — Deceased was an independent contractor where he hauled logs for defendant at a specified rate per thousand, employed his own helpers, and worked in his own way without any direction from defendant. Bryson v. Gloucester Lumber Co., 204 N.C. 664, 169 S.E. 276 (1933).

Electrician Rebuilding Line in "Off" Hours. — Where defendant contracted with plaintiff and two other electricians to rebuild in their "off" hours a part of its electric line for a lump sum of $30.00, the defendant having the holes dug and furnishing the poles, a truck, other tools, and two helpers and requiring that certain trees be not trimmed but disclaiming any knowledge of the work and leaving it up to the electricians, and plaintiff was killed by a live wire while so engaged, and thereafter the remaining electricians secured other help and completed the job, the relationship thus created was that of independent contractor. Hayes v. Board of Trustees, 224 N.C. 11, 29 S.E.2d 137 (1944).

Scallop Shucker. — Where, among other things, plaintiff went to work for defendant employer only when she heard work was available, she received no training or instruction from defendant as to how to shuck scallops, she used her own equipment, she was paid per pound of scallops shucked, she was under minimum supervision and set her own work hours, plaintiff was an independent contractor and not an employee for the purposes of this act. Spencer v. Johnson & Johnson, Seafood, Inc., 99 N.C. App. 510, 393 S.E.2d 291 (1990).

Hauler of Sand, Gravel and Concrete. — The evidence tended to show that deceased was a licensed contract hauler, and was engaged to haul sand, gravel and concrete from defendant's bins to defendant's concrete mixer along a route selected by defendant, but that defendant had no control over the number of hours deceased worked or whether deceased drove his own truck or employed a driver, and that deceased paid for his own gas and oil and made his own repairs to his truck. Deceased was paid a stipulated sum per load and was also paid the hourly wage of truck driver employed by defendant for time lost waiting in line when the concrete mixer broke down. Deceased was killed when struck by a train at a grade crossing while hauling for defendant on the route selected. It was held that, upon the evidence, deceased was an independent contractor and not an employee within the meaning of this section, and the judgment of the superior court affirming the award of compensation by the Industrial Commission, was reversed. Perley v. Ballenger Paving Co., 228 N.C. 479, 46 S.E.2d 298 (1948).

Carpet Installer. — A carpet installer who was basically free to set his own hours and determine which days of the week he worked, who was paid on a per-yard basis through a check voucher system which defendant employer used to pay independent contractors and bills of local vendors, who filed self-employment tax with his income tax return, who had considerable leeway in the manner in which he did his job, and whose occupation required special skill and training, was an independent contractor under the Workers' Compensation Act. Ramey v. Sherwin-Williams Co., 92 N.C. App. 341, 374 S.E.2d 472 (1988).

3. Individuals Held Not to Be Independent Contractors.

Operator of Service Station. — Deceased operated a service station for defendant on a commission basis, being required to keep the place open at certain hours, being told to whom to give credit, and being under the control of the president of the defendant company. The commission's conclusion that deceased was an employee was sustained. Russell v. Western Oil Co., 206 N.C. 341, 174 S.E. 101 (1934).

Salesman. — Deceased, at the time of his fatal injury, was engaged in selling the products of defendant. Letters to him from defendant's home office were introduced in evidence, which letters contained instructions for the collection of an account which, as an exception, had been charged directly to the purchaser by defendant, as was a letter stating that defendant would fill his orders C.O.D. without deducting commissions, and at the end of the week would then figure his commissions and send him a check therefor plus any difference "to make up the $25.00 salary," and also stating that a certain sum was due for social security and asking for his social security number. It was held that the evidence, with other evidence in the case, was sufficient to support the finding of the Industrial Commission that the deceased was an employee of the defendant, and not a jobber or independent contractor. Cloninger v. Ambrosia Cake Bakery Co., 218 N.C. 26, 9 S.E.2d 615 (1940).

Salesman Conducting Training in Use of Equipment. — Although plaintiff possessed specialized skill in the use of equipment which he sold and was training others to use when he was injured, as defendant retained the right to control the details of plaintiff's work by paying him on a time basis, providing all materials and assistance which he needed, setting his hours of work, and retaining the right to discharge him at any time, an employment relationship therefore existed between plaintiff and defendant at the time of plaintiff's injury. Youngblood v. North State Ford Truck Sales, 321 N.C. 380, 364 S.E.2d 433, rehearing denied, 322 N.C. 116, 367 S.E.2d 923 (1988).

Machinist Constructing Conveyor under Contract. — Where evidence tended to show that deceased, a machinist, contracted to construct a conveyor from materials furnished by defendant and in accordance with his rough sketch, hourly wages being the basis of his pay, and the parties appeared to have treated the contract as one of employment, such evidence was sufficient to sustain the finding of the Commission that deceased was an employee and not an independent contractor. Smith v. Southern Waste Paper Co., 226 N.C. 47, 36 S.E.2d 730 (1946).

Deliveryman for Ice Company. — Deceased employee was a deliveryman for defendant ice company. Defendant furnished a horse and wagon and all necessary equipment. Each morning in season, deceased obtained a load of ice for which he was charged. It was sold at defendant's regular retail price, and deceased was credited with the amount unsold at the end of the day. These facts were held sufficient to establish an employer-employee relation upon which the award of compensation was based. Cooper v. Colonial Ice Co., 230 N.C. 43, 51 S.E.2d 889 (1949), distinguishing Creswell v. Charlotte News Publishing Co., 204 N.C. 380, 168 S.E. 408 (1933).

Director of Sawmill Operations. — Evidence tending to show that defendant lumber company operated a sawmill as a part of its general business, that it owned the sawmill, controlled the premises where the work was performed, determined the amount of work to be done, and gave directions on occasion as to the dimensions of the lumber to be sawed, and that the person directing the sawmill operations worked exclusively for the lumber company, which had the power to discharge him at any time with or without cause, was held sufficient to support a finding that the director of the sawmill operations was a supervisory employee and not an independent contractor. Scott v. Waccamaw Lumber Co., 232 N.C. 162, 59 S.E.2d 425 (1950).

Mechanic Supervising Installation Under Contract. — Where findings included the fact that the seller of materials for construction of dry kilns recommended upon purchaser's request an expert mechanic to supervise their installation under contractual agreement that such mechanic should be considered an employee of the purchaser, and that the mechanic was merely supervising installation of the kilns because the purchaser had no foreman with sufficient experience and skill to supervise the installation in accordance with the plans and specifications furnished by the seller, such findings supported the legal conclusion that the mechanic was an employee of the purchaser rather than an independent contractor. Pearson v. Peerless Flooring Co., 247 N.C. 434, 101 S.E.2d 301 (1958).

Painter. — Plaintiff in painting defendant's mill was not an independent contractor where it appeared that defendant directed plaintiff's work, hired his helpers and purchased his supplies. Johnson v. Asheville Hosiery Co., 199 N.C. 38, 153 S.E. 591 (1930).

Where plaintiff was a painter of long experience, who had consistently worked for others for fixed hourly wages, and did not hold himself out as a painting contractor, and during his long experience had only once done a painting job for a lump sum, and it was inferred that he was employed by defendant employer because of the quality of his individual work, that he was not to employ or delegate the work to others, and that he was to be paid an hourly wage for such time as he worked, it was held that he was an employee rather than an independent contractor. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

Tractor Trailer Driver. — An employment relationship existed between plaintiff/driver and defendant/truck company where defendant deducted taxes, health insurance and social security costs from driver's checks, where "Contract Driver Handbook" set out provisions exercising control of plaintiff's time and manner of performance, and where trucks were owned, insured and maintained by defendant. Barber v. Going West Transp., Inc., 134 N.C. App. 428, 517 S.E.2d 914 (1999).

The lessor-driver, under a trip-lease agreement with an interstate commerce carrier, is deemed to be an employee of the carrier, for workers' compensation purposes, while operating the equipment under the carrier's Interstate Commerce Commission authority. Smith v. Central Transp., 51 N.C. App. 316, 276 S.E.2d 751 (1981).

F. Employees of Independent Contractors and Subcontractors.

Employee of Independent Contractor Cannot Recover against Principal. — Compensation is recoverable only against the employer of the injured worker, and therefore if the worker is an employee of an independent contractor, the employer of the independent contractor cannot be held liable for compensation. Scott v. Waccamaw Lumber Co., 232 N.C. 162, 59 S.E.2d 425 (1950). But see § 97-19.

Subdivision (1) of this Section Modified by § 97-19. — As a general proposition the only private employments covered by the Workers' Compensation Act are those "in which five (now four) or more employees are regularly employed in the same business or establishment." But this general rule is subject to the exception created by G.S. 97-19, which was manifestly enacted to protect the employees of financially irresponsible subcontractors who do not carry workers' compensation insurance, and to prevent principal contractors, immediate contractors, and subcontractors from relieving themselves of liability under the act by doing through subcontractors what they would otherwise do through the agency of direct employees. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

The North Carolina Workers' Compensation Act provides compensation to an injured plaintiff only if he is an "employee" of an insured employer, in fact and in law, at the time of the injury. An exception to the general rule is that the Act creates liability for a general contractor under G.S. 97-19. Carroll v. Daniels & Daniels Constr. Co., 327 N.C. 616, 398 S.E.2d 325 (1990).

Secondary Liability of Contractor to Employees of Subcontractor. — Where a contractor sublets a part of the contract to a subcontractor without requiring from the subcontractor a certificate that he has procured compensation insurance or has satisfied the Industrial Commission of his financial responsibility as a self-insurer under G.S. 97-93, such contractor is properly held secondarily liable for compensation to an employee of the subcontractor, even though the contractor regularly employs less than five employees. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

For cases in which claimants were held employees of independent contractors, see Beach v. McLean, 219 N.C. 521, 14 S.E.2d 515 (1941); McCraw v. Calvine Mills, Inc., 233 N.C. 524, 64 S.E.2d 658 (1951).

Agreement Changing Status of Independent Contractor to Foreman. — Defendant partners, general contractors, had sublet electrical work to one Elkins who had less than five employees, one of whom was plaintiff claimant. Elkins, having figured too low, persuaded defendants to let him go ahead under a new agreement whereby defendants were to pay for the materials and labor. There was evidence that one of the defendants was on the job "practically all the time" and that he gave instructions as to changing the location of some fixtures but not otherwise. It was held, three judges dissenting, that there was sufficient evidence to sustain the finding that Elkins became a mere foreman on this job and that plaintiff was defendants' employee. Graham v. Wall, 220 N.C. 84, 16 S.E.2d 691 (1941).

Estoppel of Carrier to Deny Employment Relationship. — Where a contractor and subcontractor had agreed that members of the subcontractor's work crew would be considered as "employees" of the contractor while working on a highway construction project, and the contractor was reimbursed by the subcontractor for wages it paid to the crew and for workers' compensation insurance premiums it paid on those wages upon the Industrial Commission's finding that a member of the subcontractor's work crew killed while working on the highway project, was in fact an employee of the subcontractor, the contractor's workers' compensation insurance carrier was estopped to deny that it was liable for a portion of the workers' compensation benefits due because of the employee's death if it accepted premiums for workers' compensation insurance on the deceased employee. Britt v. Colony Constr. Co., 35 N.C. App. 23, 240 S.E.2d 479 (1978).

Remand for Further Findings. — Where men working on lumbering jobs were injured it was contended that they were not in the employ of defendant but of independent subcontractors with whom the defendant had written agreements. The Commission found that the purported subcontractors were on the defendant's payroll (one as a superintendent) and that the injured men ate at a camp bearing defendant's name and received their pay by check direct from defendant; accordingly that the men were employees of, and entitled to compensation from, defendants. The Supreme Court remanded the cause for more specific findings of fact as to the making and performance of the alleged contract with "subcontractors" and as to the relationship of the parties, and for a separate finding of law as to who was the employer of claimants. Farmer v. Bemis Lumber Co., 217 N.C. 158, 7 S.E.2d 376 (1940); Cook v. Bemis Lumber Co., 217 N.C. 161, 7 S.E.2d 378 (1940).

While the evidence in a workers' compensation proceeding would have supported the Industrial Commission's conclusion that defendant insurer was estopped to deny that a pulpwood cutter was acting as an employee of the two defendant woodyards at the time of his death by accident while cutting pulpwood, the Commission's findings of fact were insufficient to support such conclusion, and the proceeding was therefore remanded for further findings of fact and conclusions of law based on the record. Allred v. Piedmont Woodyards, Inc., 32 N.C. App. 516, 232 S.E.2d 879 (1977).

G. Employees Lent by Employer.

Test of Employment. — Because of the statutory requirement that the employment be under an "appointment or contract of hire," the first question which must be answered in determining whether a lent employee has entered into an employment relationship with a special employer for purposes of this Act is: Did he make a contract of hire with the special employer? If this question cannot be answered "yes," the investigation is closed, and this must necessarily be so, since the employee loses certain rights along with those he gains when he strikes up a new employment relation. Collins v. James Paul Edwards, Inc., 21 N.C. App. 455, 204 S.E.2d 873, cert. denied, 285 N.C. 589, 206 S.E.2d 862 (1974).

The test for determining the liability of special employers in loaned employee cases is stated as follows: When a general employer lends an employee to a special employer, the special employer becomes liable for workers' compensation only if (a) the employee has made a contract of hire, express or implied, with the special employer; (b) the work being done is essentially that of the special employer; and (c) the special employer has a right to control the details of the work. When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workers' compensation. Henderson v. Manpower of Guilford County, Inc., 70 N.C. App. 408, 319 S.E.2d 690 (1984); Anderson v. Texas Gulf, Inc., 83 N.C. App. 634, 351 S.E.2d 109 (1986).

The three-prong "special employer" test as set out in Collins v. Edwards, 21 N.C. App. 455, 204 S.E.2d 873 (1974), is used to determine whether an employee may be deemed to have joint employers for purposes of the Worker's Compensation Act. Anderson v. Demolition Dynamics, Inc., 136 N.C. App. 603, 525 S.E.2d 471, 2000 N.C. App. LEXIS 105 (2000).

Presumption Regarding Continuance of General Employment. — In lent employee cases, the only presumption is the continuance of the general employment, which is taken for granted as the beginning point of any lent-employee problem. To overcome this presumption, it is not unreasonable to insist upon a clear demonstration that a new temporary employer has been substituted for the old. Failing this, the general employer should remain liable. Anderson v. Texas Gulf, Inc., 83 N.C. App. 634, 351 S.E.2d 109 (1986).

Consent to New Employment Relationship Not Shown. — Where there was no evidence nor any contention that a truck driver employed by a firm and a special contractor using the firm's trucks ever expressly consented to enter into any employment relationship with each other, and certainly there was no express "appointment or contract of hire" entered into between them, the facts did not show such acceptance by the driver of control and direction by the contractor's employees over his activities as a truck driver for the original employer as to warrant the conclusion that he impliedly consented to enter into a new and special employment relationship with the contractor. Collins v. James Paul Edwards, Inc., 21 N.C. App. 455, 204 S.E.2d 873, cert. denied, 285 N.C. 589, 206 S.E.2d 862 (1974).

"Contract for Employment" Prong of the Special Employer Test. — Although decedent, after being contacted by the second company, sought permission from the owner of the first company to work at the site of the second company and allegedly "accepted that assignment" by coming to the site, these actions standing alone did not conclusively satisfy the "contract for employment" prong of the special employer test necessary for proving an employer-employee relationship. Anderson v. Demolition Dynamics, Inc., 136 N.C. App. 603, 525 S.E.2d 471, 2000 N.C. App. LEXIS 105 (2000).

Lessee of Truck Held Liable for Compensation for Death of Driver. — Deceased was employed by X to drive a truck owned by X, but leased to other haulers and under their control. While in the course of hauling goods for one of the lessees, deceased met his death. The lease contract had provided that X provide compensation insurance. The court, in holding the lessee liable, found that such a contract could not be binding upon the employee as he was not a party to it. Whether the lessee could recover from X the amount the lessee was required to pay was not answered by the court. Roth v. McCord, 232 N.C. 678, 62 S.E.2d 64 (1950).

H. Apprentices.

CETA Employee. — Participant in the federally funded Comprehensive Employment and Training Act (CETA) qualified as an "apprentice" under this section. Sutton v. Ward, 92 N.C. App. 215, 374 S.E.2d 277 (1988).

As a matter of law, the participants in a laboratory assistantship program were acting as "apprentices" undergoing on-the-job training and hence would be considered employees subject to the provisions of workers' compensation. Wright v. Wilson Mem. Hosp., 30 N.C. App. 91, 226 S.E.2d 225, cert. denied, 290 N.C. 668, 228 S.E.2d 459 (1976).

While plaintiff may have been a student at a technical institute, when he entered the hospital to perform respiratory therapy, his status changed to apprentice, making him subject to the Workers' Compensation Act. Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487, cert. denied, 333 N.C. 169, 424 S.E.2d 406 (1992).

I. Agriculture.

The line of demarcation between agricultural and nonagricultural employment often becomes extremely attenuated, and the question in marginal factual situations must frequently turn upon whether the employment is a separable, commercial enterprise rather than a purely agricultural undertaking. Hinson v. Creech, 286 N.C. 156, 209 S.E.2d 471 (1974).

Departure from Agriculture. — When a farmer departs from his agricultural pursuits and clearly enters into a service business or another business remote from the direct production of agricultural products, his services cease to be "agriculture" within the meaning of subdivision (1) of this section. Hinson v. Creech, 286 N.C. 156, 209 S.E.2d 471 (1974).

The commercial processing of agricultural commodities for seed is not an agricultural activity. Murray v. Biggerstaff, 81 N.C. App. 377, 344 S.E.2d 550, cert. denied, 318 N.C. 696, 350 S.E.2d 858 (1986).

Plaintiff, who was employed to process oats, soybeans and barley through the gin process, and to do other work incidental to the ginning operation, was not a farm laborer under G.S. 97-13(b), and the fact that plaintiff was operating a tractor in a field in which crops were eventually to be planted when he was injured, during a one-time excursion out of the ginning process and into an activity more akin to farming or agricultural labor, did not interrupt his compensation coverage. Murray v. Biggerstaff, 81 N.C. App. 377, 344 S.E.2d 550, cert. denied, 318 N.C. 696, 350 S.E.2d 858 (1986).

Employees Held Not to Be Farm Laborers. — Where employee cleaned, graded, packaged and delivered eggs, kept records and collected for eggs delivered, her duties were sufficiently removed from the normal process of agriculture to prevent her exclusion from coverage as a "farm laborer." Hinson v. Creech, 286 N.C. 156, 209 S.E.2d 471 (1974).

When employers formed a business association with a registered trade name and sought to increase the profits of the business by selling and delivering eggs over stated routes to stores, institutions and individuals, thus subjecting their employees to the daily hazards of operating a motor vehicle upon the highways to places far removed from the farm, employers' business ceased to be agriculture and became part and parcel of the activities of the marketplace. Hinson v. Creech, 286 N.C. 156, 209 S.E.2d 471 (1974).

J. Sawmills and Logging.

For case involving injury to brakeman on a train used exclusively for moving timber from defendant's land to its mill, which was treated by the court as one for negligence and in which the Workers' Compensation Act was not mentioned, see Bateman v. Brooks, 204 N.C. 176, 167 S.E. 627 (1933).

K. National Guard.

Injury During Initial Training. — Plaintiff was an employee of the State when he was injured at federal mandatory initial training, required before serving as a member of the National Guard by 10 U.S.C. 511(d) (which did not exist when the second sentence of this subsection was written), and accordingly was entitled to compensation under the Worker's Compensation Act because his injury arose out of and in the course of his employment with the National Guard. Britt v. North Carolina Dep't of Crime Control & Pub. Safety, 108 N.C. App. 777, 425 S.E.2d 11 (1993).

Weekend Drill. — Plaintiff, injured while performing his duties as a member of the National Guard on a routine weekend drill, was entitled to worker's compensation for injuries. Duncan v. North Carolina Dep't of Crime Control & Pub. Safety, 113 N.C. App. 184, 437 S.E.2d 654 (1993).

Employment Found. — Plaintiff was a private in the national guard. He was paid 50¢ per drill by the State and $1.00 per week by the federal government. Although his services were voluntary, he was required to sign an enlistment contract which subjected him to the direction and control of the State. It was held that claimant was an employee. Baker v. State, 200 N.C. 232, 156 S.E. 917 (1931), decided prior to the 1943 amendment adding the second sentence of subdivision (2).

L. Executives.

Where a corporate employer with less than the minimum number of employees procures a policy of compensation insurance, such employer is presumed to have accepted the provisions of the Act, and such policy covers its executive officers notwithstanding the premium on the policy is based on the compensation of a single nonexecutive employee and the parties intended to cover him only, unless notice of nonacceptance by the executive officers is duly filed with the Industrial Commission. Laughridge v. South Mt. Pulpwood Co., 266 N.C. 769, 147 S.E.2d 213 (1966).

Prior Law. — For cases involving executives, decided before the passage of Session Laws 1955, c. 1055, making executives employees, see Hodges v. Home Mtg. Co., 201 N.C. 701, 161 S.E. 220 (1931); Hunter v. Hunter Auto Co., 204 N.C. 723, 169 S.E. 648 (1933); Jones v. Planters' Nat'l Bank & Trust Co., 206 N.C. 214, 173 S.E. 595 (1934); Nissen v. City of Winston-Salem, 206 N.C. 888, 175 S.E. 310 (1934); Rowe v. Rowe-Coward Co., 208 N.C. 484, 181 S.E. 254 (1935); Gassaway v. Gassaway & Owen, Inc., 220 N.C. 694, 18 S.E.2d 120 (1942); Pearson v. Newt Pearson, Inc., 222 N.C. 69, 21 S.E.2d 879 (1942).

M. Workers on Relief.

Person Recovering Federal Relief Held Not an Employee. — A person furnished work for the relief of himself and his family and paid with funds provided by the Federal Relief Administration is not an "employee" of the relief administrative agencies within the meaning of this section. Jackson v. North Carolina Emergency Relief Admin., 206 N.C. 274, 173 S.E. 580 (1934). See also Barnhardt v. City of Concord, 213 N.C. 364, 196 S.E. 310 (1938).

But a different result was reached when the injured party was employed by the superintendent of the water and light department of defendant town and paid from funds loaned defendant by the Reconstruction Finance Corporation. Mayze v. Town of Forest City, 207 N.C. 168, 176 S.E. 270 (1934).

III. AVERAGE WEEKLY WAGES.

A. In General.

The intent of the Act is to base compensation upon the normal income which the employee derived from his employment. Lovette v. Reliable Mfg. Co., 262 N.C. 288, 136 S.E.2d 685 (1964).

It seems reasonable that the legislature, having placed the economic loss caused by a worker's injury upon the employer for whom he was working at the time of the injury, would also relate the amount of that loss to the average weekly wages which that employer was paying the employee. Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

Requirements Under This Section. — There is no requirement of actual disablement in the asbestosis statutes, but the Commission must make findings sufficient to support its award of plaintiff's average weekly wage. Clark v. ITT Grinnell Indus. Piping, Inc., 141 N.C. App. 417, 539 S.E.2d 369, 2000 N.C. App. LEXIS 1416 (2000).

Results Must Be Fair and Just to Both Parties. — The dominant intent of subdivision (5) of this section is that results fair and just to both employer and employee be obtained. Joyner v. A.J. Carey Oil Co., 266 N.C. 519, 146 S.E.2d 447 (1966).

The Commission's calculation of plaintiff's average weekly wage was upheld where the Commission rejected the method used by the Moore court as unfair to the parties, relied upon plaintiff's earnings during his last year of employment, instead, and supported its decision based on the language of G.S. 97-2. Austin v. Continental Gen. Tire, 141 N.C. App. 397, 540 S.E.2d 824, 2000 N.C. App. LEXIS 1415 (2000), rev'd on other grounds, 354 N.C. 344, 553 S.E. 2d 680 (2001).

Earnings and Not Earning Capacity Are Basis for Award. — Under subdivision (5) of this section, "average weekly wages" of the employee "in the employment in which he was working at the time of the injury" are based on his earnings rather than his earning capacity. Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 94 S.E.2d 790 (1956).

Compensation Is Based on "Average Weekly Wages". — Under the Workers' Compensation Act, compensation for the injury or death of an employee is based on his average weekly wages. Lovette v. Reliable Mfg. Co., 262 N.C. 288, 136 S.E.2d 685 (1964).

Without Regard for Artificial Maximum on Income Imposed on Social Security Recipient. — To compute the plaintiff's average weekly wage from a consideration of the fact that he had an artificial maximum of $1680.00 placed on his earnings because he was retired and drawing social security benefits would not only produce results unfair to the employee but would ignore the well-established principle that an injured employee's average weekly wage must be computed from his actual earnings in the employment in which he is injured rather than his earning capacity. Wallace v.

Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

The determination of the plaintiff's 'average weekly wages' requires application of § 97-2(5) and case law and thus raises an issue of law; thus, any mistake made by either of the parties is not a basis for setting the agreement aside. Swain v. C & N Evans Trucking Co., 126 N.C. App. 332, 484 S.E.2d 845 (1997).

Subdivision (5) provides five possible methods of determining average weekly wages (the first three methods as specified in the first, second and third sentences of the first paragraph, respectively; the fourth method as specified in the second paragraph; and the fifth method, that specified for disabling injury to volunteer firemen). Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966), decided under subdivision (5) as it read in 1966.

And establishes a clear order of preference. When the first method of compensation can be used, it must be used. Hensley v. Caswell Action Comm., Inc., 296 N.C. 527, 251 S.E.2d 399 (1979).

"Results fair and just," within the meaning of the proviso to the second sentence of subdivision (5), consist of such "average weekly wages" as will most nearly approximate the amount which the injured employee would be earning were it not for the injury, in the employment in which he was working at the time of his injury. Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 94 S.E.2d 790 (1956); Joyner v. A.J. Carey Oil Co., 266 N.C. 519, 146 S.E.2d 447 (1966); Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

It is true that all provisions of subdivision (5) must be considered in order to ascertain the legislative intent; and the dominant intent is that results fair and just to both parties be obtained. Ordinarily, whether such results will be obtained by the second method is a question of fact, and in such case a finding of fact by the Commission controls decision. However, this does not apply if the finding of fact is not supported by competent evidence or is predicated on an erroneous construction of the statute. Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 94 S.E.2d 790 (1956).

When Special Method of Computation Employed. — When, in determining the amount to be awarded the dependents of a deceased employee, the methods of computing the "average weekly wage" enumerated in the first paragraph of subdivision (5) of this section would be unfair because of exceptional circumstances, the Industrial Commission is authorized by the second paragraph of said subdivision to use such other method of computation as would most nearly approximate the amount which the employee would be earning if living; the provisions of the second paragraph apply to all three of the methods of computation enumerated in the first paragraph, and such other method of computation may be invoked for exceptional reasons even though the employee had been constantly employed by the employer for 52 weeks prior to the time of the injury causing death. Early v. W. H. Basnight & Co., 214 N.C. 103, 198 S.E. 577 (1938). See also Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 94 S.E.2d 790 (1956); Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

The words "the foregoing" in the second paragraph of subdivision (5) clearly refer to the preceding paragraph. Clark v. Burton Lines, 272 N.C. 433, 158 S.E.2d 569 (1968).

Limitation on Use of Fourth Method of Computing Average Weekly Wage. — The fourth prescribed method of computing the employee's average weekly wage may not be used unless there has been a finding that use of the second method would produce results unfair and unjust to either the employee or employer. Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

Unusually severe or totally disabling injuries are not the exceptional reasons contemplated by the fourth method of subdivision (5). Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Fourth Method Sets Standard. — Fourth method of subdivision (5), while it prescribes no precise method for computing "average weekly wages," sets up a standard to which results fair and just to both parties must be related. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Average Weekly Wages Determined by Earnings in Employment in Which Injured. — Average weekly wages must ordinarily be determined by the employee's actual earnings in the employment in which he was injured during the 52 weeks, or such lesser period as he may have worked, immediately preceding his injury. Lovette v. Reliable Mfg. Co., 262 N.C. 288, 136 S.E.2d 685 (1964).

The intent of the legislature that average weekly wages determined by the fourth method be related to the employment in which the employee was injured is evidence by the fifth method, which relates only to a volunteer fireman injured "under compensable circumstances." Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

By computing the plaintiff's average weekly wage from his earnings from the employment in which he was injured, the employer's liability is in direct proportion to his payroll and the insurance premiums based thereon. This is fair and just. Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

Average Weekly Wages Related to Earnings Not Earning Capacity. — Nothing in the statute defining average weekly wages warranted a conclusion that plaintiff business owner was entitled to payment at the minimum rate of $30.00 per week based on a finding that his business failed to show a net profit for the fifty-two weeks preceding his injury. Under this section, average weekly wages must be related to an employee's earnings, not to his earning capacity. McAnelly v. Wilson Pallet & Crate Co., 120 N.C. App. 127, 460 S.E.2d 894 (1995).

When evaluating a disability, an employee's earning capacity must be measured by the employee's own ability to compete in the labor market, and employee ownership of a business can support a finding of earning capacity only to the extent the employee is actively involved in the personal management of that business and only to the extent that those management skills are marketable in the labor market. McGee v. Estes Express Lines, 125 N.C. App. 298, 480 S.E.2d 416 (1997).

Most Accurate Reflection. — The Industrial Commission correctly determined claimant's earning capacity as an independent contractor under the fourth method listed in subsection (5) by averaging plaintiff's net income for the years 1988 and 1989; this interpretation most accurately reflected claimant's earning capacity. Holloway v. T.A. Mebane, Inc., 111 N.C. App. 194, 431 S.E.2d 882 (1993).

Deduction of Expenses. — When an employee is paid a set price for doing a particular job, it is proper to deduct the expenses incurred in producing that revenue in calculating the average weekly wages; however, the Industrial Commission is not required to deduct the expenses if this method does not produce a fair result to the employer and employee. Craft v. Bill Clark Constr. Co., 123 N.C. App. 777, 474 S.E.2d 808 (1996).

Combining Wages from Other Employment Is Not Permitted. — When an employee who holds two separate jobs is injured in one of them, his compensation is based only upon his average weekly wages earned in the employment producing the injury. Joyner v. A.J. Carey Oil Co., 266 N.C. 519, 146 S.E.2d 447 (1966).

It would be unfair to the employer and his insurance carrier to compute the average weekly wage of an injured employee by combining his earnings from the employment where he was injured with his earnings from other employment, and thus burden the employer and his insurance carrier with a liability out of proportion to the employer's payroll and the insurance premium computed thereon. Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

Average Weekly Wages. — It is clear from its wording and the prior holdings of the North Carolina Supreme Court that this section establishes an order of preference for the calculation method to be used, and that the primary method is to calculate the total wages of the employee for the fifty-two weeks of the year prior to the date of injury and to divide that sum by fifty-two. McAninch v. Buncombe County Sch., 347 N.C. 126, 489 S.E.2d 375 (1997).

The definition of average weekly wages and the range of alternatives set forth in the five methods of computing such wages, as specified in subsection (5), do not allow the inclusion of wages or income earned in employment or work other than that in which the employee was injured. McAninch v. Buncombe County Sch., 347 N.C. 126, 489 S.E.2d 375 (1997).

Unless Employments Are Related. — The wage basis of an employee injured in one of two related employments in which he is concurrently employed should include his earnings from both employments. Most concurrent employment controversies therefore resolve themselves into the question of what employments are sufficiently related to come within the rule. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Fifth Method Is Only Exception to Exclusion of Other Earnings. — Except for the fifth method of subdivision (5), no wage-computation provision of the Workers' Compensation Act allows a consideration of any earnings except those earned in the employment in which the employee was injured. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Compensation of Volunteer Fireman. — Subdivision (5) of this section employs the term "principally" to distinguish a fireman's volunteer employment from his other, remunerative employment or employments, i.e., "the employment wherein he principally earned his livelihood." The statute insures that the injured volunteer fireman receives compensation commensurate with his proven earning ability, as demonstrated by the wages he receives for work done other than in his capacity as a volunteer fireman. Derebery v. Pitt County Fire Marshall, 318 N.C. 192, 347 S.E.2d 814 (1986).

The dictum in Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966), which suggests that subdivision (5) of this section does not permit a combination of a volunteer fireman's outside wages, is overruled. Derebery v. Pitt County Fire Marshall, 318 N.C. 192, 347 S.E.2d 814 (1986).

Where volunteer fireman, at the time he was injured, was earning $74.41 working part-time for one employer and $87.40 per week working part-time for another employer, the Commission should have considered his wages in both part-time employments to compute his average weekly wage. Derebery v. Pitt County Fire Marshall, 318 N.C. 192, 347 S.E.2d 814 (1986).

Part-Time Employees. — Appellate court reversed the North Carolina Industrial Commission's award of workers' compensation benefits in the amount of $129 per week to the widow of a part-time employee who died due to a work-related accident because the Commission had not identified the method it used to calculate the employee's average weekly wage; on remand, the Commission could use the fifth method allowed by G.S. 97-2(5) for calculating the employee's average weekly wage if it found that the second method allowed by G.S. 97-2(5) was unfair because of the employee's part-time status. Boney v. Winn Dixie, Inc., 163 N.C. App. 330, 593 S.E.2d 93, 2004 N.C. App. LEXIS 371 (2004).

A part-time job cannot be converted into a full-time job for the purpose of compensation. Joyner v. A.J. Carey Oil Co., 266 N.C. 519, 146 S.E.2d 447 (1966).

Nor may an intermittent part-time job be treated as a continuous one for the purpose of compensation. Joyner v. A.J. Carey Oil Co., 266 N.C. 519, 146 S.E.2d 447 (1966).

Basis for Compensation for Death of Minor. — Under subdivision (5) of this section, compensation for the death of a minor employee must be based on the average weekly wage of adults employed in a similar class of work by the same employer to which decedent would probably have been promoted had he not been killed, if such method can be used, and it is only when such method cannot be used that compensation may be based upon a wage sufficient to yield the maximum weekly compensation benefit. Hensley v. Caswell Action Comm., Inc., 296 N.C. 527, 251 S.E.2d 399 (1979).

Future Earnings Used To Calculate Wage of Professional Football Player. — The North Carolina Industrial Commission was justified in using a different method of computing the average weekly wage of a professional football player by using the future earnings covered by his contract as the basis for calculating his average weekly wage, because such method most accurately approximated the amount which the player would have been earning if it were not for the injury he sustained, and the nature of the NFL players' contract created exceptional reasons as to why it was not unfair to either party to use the future earnings covered by the player's contract as a basis for calculating his average weekly wage. Renfro v. Richardson Sports, Ltd. Partners, 172 N.C. App. 176, 616 S.E.2d 317, 2005 N.C. App. LEXIS 1435 (2005), cert. denied, 360 N.C. 535, 633 S.E.2d 821 (2006), cert. dismissed, 360 N.C. 535, 633 S.E.2d 821 (2006).

Employer's Report of Accident as Evidence of Average Wage. — While the employer's report of an accident to the Industrial Commission does not constitute a claim for compensation, a statement therein as to the employee's average weekly wage is competent upon the hearing after the filing of claim. Harris v. Asheville Contracting Co., 240 N.C. 715, 83 S.E.2d 802 (1954).

Conclusive Effect of Commission's Method of Computing Average Wage. — The Commission's method of computing the average wage is conclusive if there are any facts to support the Commission's findings. Munford v. West Constr. Co., 203 N.C. 247, 165 S.E. 696 (1932).

Ordinarily, whether the results reached in computing the claimant's average weekly wage will be fair and just to both parties is a question of fact, and in such case a finding of fact by the Commission controls the decision. Hendricks v. Hill Realty Group, Inc., 131 N.C. App. 859, 509 S.E.2d 801 (1998).

Scope of Review When Commission Finds Results of Computation "Fair and Just". — Where the North Carolina Industrial Commission made a finding that its use of the second method of computing the employee's average weekly wage produced results that were "fair and just to both sides," review was narrowed to a determination of whether the Commission's finding and conclusion in this regard was supported by the evidence. Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

Fair Labor Standards Act Inapplicable to Awards. — The Fair Labor Standards Act, 29 U.S.C. § 201 to 219, is not applicable to awards made pursuant to the North Carolina Workers' Compensation Act. Lovette v. Reliable Mfg. Co., 262 N.C. 288, 136 S.E.2d 685 (1964).

Award Held Proper. — Industrial commission did not err in awarding the claimant, as a temporary total disability benefit, his average weekly wage multiplied by the maximum percentage award he was entitled to under statutory law, for a two-month period rather than including the seven months that passed from his injury that occurred prior to the two-month period; the evidence did not show that claimant was disabled during that seven-month time period, and the claimant did not show that an alternate calculation should have been used to determine his average weekly wage used to determine the temporary total disability benefit award. France v. Murrow's Transfer, 163 N.C. App. 340, 593 S.E.2d 450, 2004 N.C. App. LEXIS 377 (2004).

North Carolina Industrial Commission's findings, under G.S. 97-29, as to an injured city employee's average weekly wage and compensation rate was supported by competent evidence based on the employee's total yearly earnings, longevity bonus, and overtime adjustment for longevity, which were then divided by the number of weeks the employee worked in the year. Cox v. City of Winston-Salem, 171 N.C. App. 112, 613 S.E.2d 746, 2005 N.C. App. LEXIS 1161 (2005).

B. Illustrative Cases.

Recently Promoted Salesman. — The Industrial Commission found upon supporting evidence that the deceased employee had been employed by defendant employer for a number of years, that he had been promoted successively from truck driver to stock clerk to salesman with increased wages from time to time, and that he had been given a raise in the last position less than three months prior to the time of injury resulting in death, part of the supporting evidence being testimony by the employee's superior that "with the business he was getting" he would have had further increases. It was held that the findings were sufficient in law to constitute "exceptional reasons" within the meaning of subdivision (5) of this section, and the employee's "average weekly wage" was properly fixed at the amount he was earning weekly at the time of the injury, it being patent that the wages he was then receiving were not temporary and uncertain, but constituted a fair basis upon which to compute the award to his dependents. Early v. Basnight & Co., 214 N.C. 103, 198 S.E. 577 (1938).

Pay Increases Within the 52 Weeks. — Plaintiff was employed practically continuously for 33 weeks prior to the injury resulting in death, but during that period his wages were twice increased. In the absence of a finding supported by evidence that the average weekly wage for the entire period of employment would be unfair, compensation should have been based thereon, and the computation of the average weekly wage on the basis of the wage during the period after the last increase in pay was not supported by the evidence. Mion v. Atlantic Marble & Tile Co., 217 N.C. 743, 9 S.E.2d 501 (1940).

Significant Increase in Commissions by Real Estate Agent. — Exceptional reasons existed to support calculation of a real estate agent's average weekly wage based on the 15 weeks of earnings prior to her death, where the agent made changes in the way that she performed her job, including purchase of a computer and increased hours worked per week, resulting in a significant increase in commissions earned over the previous year. Hendricks v. Hill Realty Group, Inc., 131 N.C. App. 859, 509 S.E.2d 801 (1998).

Award Based on Total Compensation Customarily Earned. — Claimant was employed as janitor, his compensation for such work being paid in part by the State School Commission, and was also employed in school maintenance work, his compensation for the maintenance work being paid exclusively by the municipal board of education. He was injured while engaged in duties pertaining exclusively to school maintenance work. It was held that an award computed on the basis of the total compensation customarily earned by claimant, rather than the compensation earned solely in school maintenance work, upon the Commission's finding of exceptional conditions, was proper. Casey v. Board of Educ., 219 N.C. 739, 14 S.E.2d 853 (1941).

Similarly Situated Employee's Average Weekly Wage. — Under G.S. 97-2(5), the employee's average weekly wage was determined by average weekly wage of a similar situated employee who had been employed for more than one year, because the employee's employment prior to her injury extended over a period of less than 52 weeks. Munoz v. Caldwell Mem'l Hosp., 171 N.C. App. 386, 614 S.E.2d 448, 2005 N.C. App. LEXIS 1265 (2005).

Reduction in Wages After Sale of Plant. — The plant in which claimant worked was sold. Before sale, claimant was a foreman. After sale, he continued to work in a lower classification and at a lower pay rate. The Supreme Court affirmed the action of the Commission in considering the wage earned as foreman in determining claimant's average weekly wage when disablement occurred before claimant had worked 52 weeks at the lower rate. Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952).

Reduction as a Result of Bankruptcy. — Where, as a result of the bankruptcy of first company decedent worked at, employee's wages at second company were depressed, Industrial Commission erred by failing to consider evidence of employee's wages at first company during the 52 weeks preceding his death. Johnson v. Barnhill Contracting Co., 121 N.C. App. 55, 464 S.E.2d 313 (1995).

Compensation Provided in Contract of Employment. — Where the employer did not contend that plaintiff's employment was casual and offered no evidence as to the amount of wages earned by others engaged in similar employment in that community during the 52 weeks previous to plaintiff's injury, the employer could not object that the commission, in view of the fact that the employee had worked for the employer less than 40 hours at the time of his injury, fixed the employee's average weekly wage in accordance with the compensation under the contract of employment at the time of the injury, there being evidence that the employee had theretofore earned wages in excess of this sum for appreciable periods in other employments of like nature. Harris v. Asheville Contracting Co., 240 N.C. 715, 83 S.E.2d 802 (1954).

College Student Employed Part-Time. — It was improper for the Commission, in undertaking to apply the method of computing average weekly wages provided in the third sentence of subdivision (5), to determine the average weekly wages of a part-time employee to be the amount he would have earned had he been a full-time employee. Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 94 S.E.2d 790 (1956).

In a proceeding for compensation for the death of a college student employed part-time during vacation and after school for a period of 11 weeks in which he worked from 171/2 to 51 hours a week, there was no factual basis for application of the method of determining average weekly wages provided in the third sentence of subdivision (5), where there was no evidence as to the average weekly amount being earned during the 52 weeks previous to decedent's injury by a person of the same grade and character employed in the same class of employment, and no evidence as to the average weekly amount a part-time worker in the same employment had earned during the 52 weeks previous to decedent's injury, while working for the particular employer or any other employer in the same locality or community. Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 94 S.E.2d 790 (1956).

The average weekly wages of a college student working part-time for a period of 11 weeks in which he worked from 171/2 hours to 51 hours a week should have been computed by the method provided in the second sentence of subdivision (5) of this section, where the evidence did not warrant a finding of fact or conclusion of law that such method would not obtain results fair and just to both parties. Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 94 S.E.2d 790 (1956).

Pulpwood Cutter. — The Industrial Commission erred in determining a pulpwood cutter's average weekly wage based on all of the proceeds of sales of pulpwood to two woodyards, where the evidence showed that the cutter was assisted in his work part of the time by his two sons and that they received part of the proceeds from the sales of pulpwood for their labor. Allred v. Piedmont Woodyards, Inc., 32 N.C. App. 516, 232 S.E.2d 879 (1977).

As to calculation of compensation for the death of pulpwood cutter who was not paid a salary or wages, but received a certain amount for each cord of pulpwood delivered to employer, where decedent owned a truck and other equipment which he used in cutting and preparing the pulpwood, see Baldwin v. Piedmont Woodyards, Inc., 58 N.C. App. 602, 293 S.E.2d 814 (1982).

Where contractor was held liable for the payment of compensation for the death of a subcontractor engaged in cutting and hauling timber, the Commission should have considered a reasonable rate of depreciation on the equipment of the subcontractor as a business expense in determining the subcontractor's earnings, or alternatively, the Commission might have considered what the subcontractor would have been required to pay someone else to perform his work, or his income as reported on tax returns from earlier years showing his own income derived from similar work. Christian v. Riddle & Mendenhall Logging, 117 N.C. App. 261, 450 S.E.2d 510 (1994).

Potentially Full-time Brick Mason. — The full Commission correctly chose the second method listed in subdivision (5) of this section to calculate plaintiff brick mason's average weekly wages, instead of the fifth method, since plaintiff, unlike a seasonal worker, could conceivably work every week, full-time for his employer; however, the Commission erred in computing plaintiff's daily wage by dividing his total earnings by the number of days worked, then multiplying this "daily wage rate" by seven for an average weekly wage, where this section does not authorize such calculation and no evidence supported a finding that plaintiff worked seven days a week. Bond v. Foster Masonry, Inc., 139 N.C. App. 123, 532 S.E.2d 583, 2000 N.C. App. LEXIS 803 (2000).

Distributive Education Student. — The Industrial Commission erred in determining a deceased minor employee's average weekly wage on the basis of 11 weeks during the summer when he worked full-time; the Commission should have averaged the 11 weeks of full-time with the 41 weeks of part-time employment contemplated in the minor employee's distributive education job at the undisputed hourly wage rate of $2.65 in order to reach a result fair and just to both the employee and employer. Mabry v. Bowers Implement Co., 48 N.C. App. 139, 269 S.E.2d 165 (1980).

Plaintiff farmer who was injured as a volunteer fireman should be compensated based on what he would have earned from his labor as a farmer had he not been injured. York v. Unionville Volunteer Fire Dep't, 58 N.C. App. 591, 293 S.E.2d 812 (1982).

Trailer Truck Driver. — Where trailer truck driver's job was properly classified as "seasonal," the Industrial Commission's determination of plaintiff's average weekly wage was not supported by the evidence and the matter, would be remanded for recalculation and entry of related findings. Barber v. Going West Transp., Inc., 134 N.C. App. 428, 517 S.E.2d 914 (1999).

Deductions from Farmer's Gross Income in Calculating Income. — Farm income of injured volunteer fireman who was a farmer could not be properly calculated without deducting from gross income interest on money which was borrowed to finance crop production, depreciation on equipment used to produce the crops, license fees for things used in crop production, and taxes on land used to produce crops. York v. Unionville Volunteer Fire Dep't, 58 N.C. App. 591, 293 S.E.2d 812 (1982).

Football Player. — The Court upheld the

Commission's finding that a football player, who was injured in a pre-season game before being officially accepted as a player on the active roster, earned an average weekly wage of $ 1,653.85 based on a contract amount of $ 85,000 and a $ 1,000 signing bonus divided by 52 weeks. Larramore v. Richardson Sports Ltd. Partners, 141 N.C. App. 250, 540 S.E.2d 768, 2000 N.C. App. LEXIS 1305 (2000), aff'd, 353 N.C. 520, 546 S.E.2d 87 (2001).

Manager-Trainee. — Where the plaintiff-manager-trainee's weekly wages were undisputed, the Commission was justified in calculating his wage using his actual wages and was not required to use the wage of a comparable employee. Sims v. Charmes/Arby's Roast Beef, 142 N.C. App. 154, 542 S.E.2d 277, 2001 N.C. App. LEXIS 46 (2001), cert. denied, 353 N.C. 729, 550 S.E.2d 782 (2001).

Lodging in Lieu of Wages. — The Commission's finding that the value of plaintiff's lodging was $100 per week, and that plaintiff received lodging in lieu of additional wages, was supported by substantial competent evidence. Shah v. Johnson, 140 N.C. App. 58, 535 S.E.2d 577, 2000 N.C. App. LEXIS 1089 (2000).

Travel "Allowance" in Lieu of Wages. — Award of workers' compensation benefits by the Industrial Commission was upheld as the Commission's finding that a per diem "allowance" paid to the employee was "in lieu of wages" under G.S. 97-2(5) was supported by evidence; the allowance was paid regardless of whether employee traveled and was spent at the employee's complete discretion. Greene v. Conlon Constr. Co., — N.C. App. —, 646 S.E.2d 652, 2007 N.C. App. LEXIS 1430 (2007).

Combining Earnings of Injured Claimant and Replacement Employee. — The calculation of the claimant's average weekly wage by combining his earnings during the year he was injured with the earnings of the person hired to replace him was fair to the employer and the claimant. Davis v. Taylor-Wilkes Helicopter Serv., Inc., 145 N.C. App. 1, 549 S.E.2d 580, 2001 N.C. App. LEXIS 562 (2001).

IV. COMPENSABLE INJURIES, GENERALLY.

The threefold conditions antecedent to the right to compensation under the North Carolina Workers' Compensation Act are: (1) That claimant suffered a personal injury by accident; (2) that such injury arose in the course of the employment; and (3) that such injury arose out of the employment. Wilson v. Town of Mooresville, 222 N.C. 283, 22 S.E.2d 907 (1942); Taylor v. Town of Wake Forest, 228 N.C. 346, 45 S.E.2d 387 (1947); Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949); Matthews v. Carolina Std. Corp., 232 N.C. 229, 60 S.E.2d 93 (1950); Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971); Loflin v. Loflin, 13 N.C. App. 574, 186 S.E.2d 660, cert. denied, 281 N.C. 154, 187 S.E.2d 585 (1972); Gallimore v. Marilyn's Shoes, 292 N.C. 399, 233 S.E.2d 529 (1977); King v. Exxon Co., 46 N.C. App. 750, 266 S.E.2d 37 (1980); Hollar v. Montclair Furn. Co., 48 N.C. App. 489, 269 S.E.2d 667 (1980).

In order for the death of an employee to be compensable it must result from an injury by an accident arising out of and in the course of the employment. Slade v. Willis Hosiery Mills, 209 N.C. 823, 184 S.E. 844 (1936); McGill v. Town of Lumberton, 215 N.C. 752, 3 S.E.2d 324 (1939); Ashley v. F-W Chevrolet Co., 222 N.C. 25, 21 S.E.2d 834 (1942); Gilmore v. Hoke County Bd. of Educ., 222 N.C. 358, 23 S.E.2d 292 (1942); Berry v. Colonial Furn. Co., 232 N.C. 303, 60 S.E.2d 97 (1950); Bell v. Dewey Bros., 236 N.C. 280, 72 S.E.2d 680 (1952); Poteete v. North State Pyrophyllite Co., 240 N.C. 561, 82 S.E.2d 693 (1954); Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963); Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Gamble v. Stutts, 262 N.C. 276, 136 S.E.2d 688 (1964); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966); Andrews v. County of Pitt, 269 N.C. 577, 153 S.E.2d 67 (1967); Clark v. Burton Lines, 272 N.C. 433, 158 S.E.2d 569 (1968); Calhoun v. Kimbrell's, Inc., 6 N.C. App. 386, 170 S.E.2d 177 (1969); Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972); Bartlett v. Duke Univ., 17 N.C. App. 598, 195 S.E.2d 371, rev'd on other grounds, 284 N.C. 230, 200 S.E.2d 193 (1973); Stewart v. North Carolina Dep't of Cors., 29 N.C. App. 735, 225 S.E.2d 336 (1976); Gallimore v. Marilyn's Shoes, 30 N.C. App. 628, 228 S.E.2d 39 (1976), rev'd on other grounds, 292 N.C. 399, 233 S.E.2d 529 (1977); Barham v. Food World, Inc., 300 N.C. 329, 266 S.E.2d 676, rehearing denied, 300 N.C. 562, 270 S.E.2d 105 (1980).

Disability as Fourth Condition. — An employee must establish a fourth essential element, that his injury caused him disability, unless it is included in the schedule of injuries made compensable by G.S. 97-31 without regard to loss of wage-earning power. Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968); Loflin v. Loflin, 13 N.C. App. 574, 186 S.E.2d 660, cert. denied, 281 N.C. 154, 187 S.E.2d 585 (1972).

Except in the case of certain occupational diseases, compensation may not be awarded under the Act unless there is proof of a disability due to an injury, which injury was the result of an accident arising out of and in the course of the employment. Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967).

Where the Industrial Commission's ruling that a worker failed to prove his disability or his need for further medical attention was supported by competent evidence in the record, the issue of the worker's refusal of light duty work was not reached; no physician had prohibited the worker from working or found that he could not work as a result of his knee and hip complaints and there were no treatment recommendations for the worker. Springer v. McNutt Serv. Group, Inc., 160 N.C. App. 574, 586 S.E.2d 554, 2003 N.C. App. LEXIS 1833 (2003).

"Compensability" and "Disability" Distinguished. — North Carolina General Statutes and ample case law distinguished between the separate concepts of "compensability" and "disability;" where neither a Form 21 nor a Form 26 was filed, nor was a prior award by the industrial commission entered, an injured employee was not entitled to a presumption of continuing disability based on the insurer's admission of compensability, and the industrial commission erred in placing on the insurer the burden to show that the injured employee was capable of returning to gainful employment. Clark v. Wal-Mart, 360 N.C. 41, 619 S.E.2d 491, 2005 N.C. LEXIS 990 (2005).

Effect of Disease. — To establish his claim for the death of decedent, plaintiff must show (1) death resulting from an injury by accident, (2) arising out of and in the course of decedent's employment by the defendant, and (3) not including a disease in any form, except where it results naturally and unavoidably from the accident. Lewter v. Abercrombie Enters., 240 N.C. 399, 82 S.E.2d 410 (1954).

Finding of Injury Required. — The fact that plaintiff sustained an injury is a critical fact upon which her right to compensation depends; thus, a specific finding of that fact is required by the Commission. Jackson v. Fayetteville Area Sys. of Transp., 78 N.C. App. 412, 337 S.E.2d 110 (1985).

More must be shown than an injury while at work to sustain a claim for compensation. Hargus v. Select Foods, Inc., 271 N.C. 369, 156 S.E.2d 737 (1967).

To be compensable the injury must spring from the employment. Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

Or Have Its Origin Therein. — To be compensable an injury must spring from the employment or have its origin therein. Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964); Clark v. Burton Lines, 272 N.C. 433, 158 S.E.2d 569 (1968); Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972).

Reasonable Relationship to Employment Is Sufficient. — An appellate court is justified in upholding a compensation award if the accident is fairly traceable to the employment as a contributing cause or if any reasonable relationship to employment exists. Hoffman v. Ryder Truck Lines, 306 N.C. 502, 293 S.E.2d 807 (1982).

Injury Must Occur at a Judicially Cognizable Point in Time. — The specific traumatic incident provision of G.S. 97-2(6) requires plaintiff to prove an injury at a judicially cognizable point in time. Judicially cognizable does not mean "ascertainable on an exact date," but instead should be read to describe a showing by plaintiff which enables the Commission to determine when, within a reasonable period, the specific injury occurred; the evidence must show that there was some event that caused the injury, not a gradual deterioration, and if the window during which the injury occurred can be narrowed to a judicially cognizable period, then the statute is satisfied. Ruffin v. Compass Group USA, 150 N.C. App. 480, 563 S.E.2d 633, 2002 N.C. App. LEXIS 592 (2002).

Evidence that the employee's injury occurred in early May 2000, was sufficient to support a determination that the employee's injury occurred at a judicially cognizable point in time. Goforth v. K-Mart Corp., 167 N.C. App. 618, 605 S.E.2d 709, 2004 N.C. App. LEXIS 2378 (2004).

Specific Hour of Injury Need Not Be Alleged. — While the case law interpreting the specific traumatic incident provision of subsection (6) requires the plaintiff to prove an injury at a cognizable time, this does not compel the plaintiff to allege the specific hour or day of the injury. Fish v. Steelcase, Inc., 116 N.C. App. 703, 449 S.E.2d 233 (1994), cert. denied, 339 N.C. 737, 454 S.E.2d 650 (1995).

When Death Is Compensable. — In order for a claimant to recover workers' compensation benefits for death, he must prove that death resulted from an injury (1) by accident; (2) arising out of his employment; and (3) in the course of the employment. Pickrell v. Motor Convoy, Inc., 322 N.C. 363, 368 S.E.2d 582 (1988).

Death by suicide is compensable if a work-connected injury causes insanity which in turn induces the suicide. Painter v. Mead Corp., 258 N.C. 741, 129 S.E.2d 482 (1963).

Finding that plaintiff experienced pain as a result of what occurred while performing her duties was not a sufficient finding that plaintiff sustained an injury. Jackson v. Fayetteville Area Sys. of Transp., 78 N.C. App. 412, 337 S.E.2d 110 (1985).

Back Injuries. — By amending the second sentence of subdivision (6) to say that an accident with respect to back injuries includes an injury that is the "result of a specific traumatic incident," the General Assembly intended to relax the requirement that there be some unusual circumstance that accompanied the injury; the use of the words "specific" and "incident" means that the trauma or injury must not have developed gradually but must have occurred at a cognizable time. Bradley v. E.B. Sportswear, Inc., 77 N.C. App. 450, 335 S.E.2d 52 (1985).

The General Assembly recognized the complex nature of back injuries, and did not intend to limit the definition of specific traumatic incident to an instantaneous occurrence. Richards v. Town of Valdese, 92 N.C. App. 222, 374 S.E.2d 116 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Nothing in subsection (6) precludes compensation for a back injury which occurs in the normal work routine. Fish v. Steelcase, Inc., 116 N.C. App. 703, 449 S.E.2d 233 (1994), cert. denied, 339 N.C. 737, 454 S.E.2d 650 (1995).

Aggravation of Pre-Existing Back Injury. — Industrial commission properly awarded workers' compensation benefits to a worker pursuant to G.S. 97-2(6) for a back injury; the evidence established that the worker's back problems were a result of an accident, which substantially aggravated his pre-existing back condition. Moore v. Fed. Express, 162 N.C. App. 292, 590 S.E.2d 461, 2004 N.C. App. LEXIS 127 (2004).

Employee was entitled to ongoing disability compensation because knee injuries and medical restrictions prevented him from performing his job, and any attempt to obtain sedentary work would have been futile in light of his (1) age of 61, (2) lack of work experience, (3) lack of training and education, (4) lack of transferable skills, and (5) physical impairment. Weatherford v. Am. Nat'l Can Co., 168 N.C. App. 377, 607 S.E.2d 348, 2005 N.C. App. LEXIS 261 (2005).

Preexisting Neurological Disorders. — North Carolina Industrial Commission properly terminated an employee's temporary total disability benefits because ample evidence supported the Commission's finding that the employee's condition was caused by a preexisting, rare neurological disorder and not by a work-related slip-and-fall accident. Drakeford v. Charlotte Express, 158 N.C. App. 432, 581 S.E.2d 97, 2003 N.C. App. LEXIS 1147 (2003).

Mental Impairments. — As long as the resulting disability meets statutory requirements, mental impairments are compensable under the Act. Jordan v. Central Piedmont Community College, 124 N.C. App. 112, 476 S.E.2d 410 (1996).

Employee who alleged that he slipped and fell, injuring his back, while still suffering from a prior work-related injury to his ribs, did not show that employer knew its conduct was substantially certain to cause serious injury or death, since the job he was performing when he fell had been performed the same way for many years without injury, the job involved typical hazards involved with welding, he was a certified welder, falling was not a significant hazard of this particular job, and no O.S.H.A. violations were established with regard to this job. Bullins v. Abitibi-Price Corp., 124 N.C. App. 530, 477 S.E.2d 691 (1996).

Chronic Fatigue Syndrome. — Evidence that an employee of a waste company whose job was to collect and dispose of raw sewage developed chronic fatigue syndrome and other ailments after being accidentally sprayed with raw sewage and that the employee's illnesses were most probably the result of the accident supported a ruling of the North Carolina Industrial Commission awarding the employee permanent workers' compensation disability benefits. Norton v. Waste Mgt., Inc., 146 N.C. App. 409, 552 S.E.2d 702, 2001 N.C. App. LEXIS 938 (2001).

Injury During Normal and Routine Job Activities Without Accident. — Employee was not entitled to compensation for shoulder injuries and for psychological trauma, which was aggravated therefrom, where it was found that the injuries were caused when the employee was engaged in her normal work duties and there was no accidental injury that occurred under G.S. 97-2(6). Harrison v. Lucent Techs., 156 N.C. App. 147, 575 S.E.2d 825, 2003 N.C. App. LEXIS 80 (2003), cert. denied, 357 N.C. 164, 580 S.E.2d 365 (2003).

Attorney's Malpractice. — Attorney's malpractice in failing to timely file a third-party tort action was not an injury under G.S. 97-2(6) for purposes of an employer's right of subrogation. Grant Constr. Co. v. McRae, 146 N.C. App. 370, 553 S.E.2d 89, 2001 N.C. App. LEXIS 947 (2001).

Expert Testimony. — Where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury. Click v. Pilot Freight Carriers, Inc., 300 N.C. 164, 265 S.E.2d 389 (1980).

Testimony Attesting Medical Certainty Not Required. — Although a doctor testified that he could not opine to a reasonable degree of certainty whether the employee's fall at work caused his injury, testimony attesting medical certainty was not required to award disability benefits; the doctor testified that the employee's symptoms were consistent with an injury occurring from a fall and that he had no indication that everyday activities caused the injury. Adams v. Metals USA, 168 N.C. App. 469, 608 S.E.2d 357, 2005 N.C. App. LEXIS 343 (2005), aff'd, — N.C. —, 619 S.E.2d 495 (N.C. 2005).

Determination Depends on Facts of Each Case. — The question of whether compensation is recoverable under this act depends upon whether the accident complained of arises out of and in the course of the employment of the one injured, and its determination depends largely upon the facts of each particular case as matters of fact and conclusions of law. Harden v. Thomasville Furn. Co, 199 N.C. 733, 155 S.E. 728 (1930).

Common-Law Rules of Negligence Are Inapplicable. — The words "out of and in the course of the employment," used in connection with compensable injuries, are not to be construed by the rules controlling in negligent default cases at common law; an accidental injury is compensable if there is a causal relation between the employment and injury, if the injury is one which, after the event, may be seen to have had its origin in the employment, and it need not be shown that it is one which ought to have been foreseen or expected. Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930); Ashley v. F-W Chevrolet Co., 222 N.C. 25, 21 S.E.2d 834 (1942); Lee v. F.M. Henderson & Assocs., 284 N.C. 126, 200 S.E.2d 32 (1973).

In compensation cases the Commission finds the facts. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

The findings of fact of the Commission are conclusive if supported by competent evidence in the record even if the record also contains evidence which would support a contrary finding. Blalock v. Roberts Co., 12 N.C. App. 499, 183 S.E.2d 827 (1971).

Where there is any competent evidence in support of the finding of the Industrial Commission that the accident in question arose out of and in the course of employment, the finding is conclusive on the courts upon appeal. Latham v. Southern Fish & Grocery Co., 208 N.C. 505, 181 S.E. 640 (1935).

The finding of fact of the Industrial Commission that the disease causing an employee's death resulted naturally and unavoidably from an accident is conclusive on appeal when supported by competent evidence. Doggett v. South Atl. Whse. Co., 212 N.C. 599, 194 S.E. 111 (1937).

If the Commission's findings have evidentiary support in the record, they are conclusive. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

If the findings made by the Commission are supported by competent evidence, they must be accepted as final truth. Blalock v. Roberts Co., 12 N.C. App. 499, 183 S.E.2d 827 (1971).

Whether an injury arose out of and in the course of employment is a mixed question of law and fact, and where there is evidence to support the commissioner's findings in this regard, the court is bound by those findings. Barham v. Food World, Inc., 300 N.C. 329, 266 S.E.2d 676, rehearing denied, 300 N.C. 562, 270 S.E.2d 105 (1980). See also Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963).

When Findings Are Reviewable on Appeal. — Where there is no conflicting evidence and the Industrial Commission decides as a matter of law that there is no sufficient competent evidence that the injury to plaintiff was "by accident arising out of and in the course of employment," the question is one of law and is reviewable by the court upon appeal. Massey v. Board of Educ., 204 N.C. 193, 167 S.E. 695 (1933).

Scope of Appellate Review. — Where the evidence is such that several inferences appear equally plausible, the finding of the Industrial Commission is conclusive on appeal, and courts are not at liberty to reweigh the evidence and set aside the finding simply because other conclusions might have been reached. Rewis v. New York Life Ins. Co., 226 N.C. 325, 38 S.E.2d 97 (1946).

The determination of whether an accident arises out of and in the course of employment under this section is a mixed question of law and fact, and the appellate court may review the record to determine if the findings and conclusions are supported by sufficient evidence. Gallimore v. Marilyn's Shoes, 292 N.C. 399, 233 S.E.2d 529 (1977); Williams v. Hydro Print, Inc., 65 N.C. App. 1, 308 S.E.2d 478 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 297 (1984).

Remand for Findings. — Where in proceedings under this Act there was no finding or adjudication in reference to the contention of the employer that the claimant's injury was occasioned by his willful intention to injure his assailant, a fellow servant, the cause would be remanded for a definite determination of the question. Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930).

V. ACCIDENT.

***Editor's Note.** — Earlier cases dealing with back injuries should be read in light of the 1983 amendment to subdivision (6) of this section, which modified the definition of "injury" with respect to back injuries so as to cover "specific traumatic incidents." Caskie v. R.M. Butler & Co., 85 N.C. App. 266, 354 S.E.2d 242 (1987).*

The Workers' Compensation Act does not provide compensation for all injuries, but only for injuries by accident. O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964); Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965); Hargus v. Select Foods, Inc., 271 N.C. 369, 156 S.E.2d 737 (1967).

An injury, to be compensable, must result from an accident, which is to be considered as a separate event preceding and causing the injury; the mere fact of injury does not of itself establish the fact of accident. Bigelow v. Tire Sales Co., 12 N.C. App. 220, 182 S.E.2d 856

(1971); Beamon v. Stop & Shop Grocery, 27 N.C. App. 553, 219 S.E.2d 508 (1975).

There must be an accident, followed by an injury by such accident which results in harm to the employee, before the employee may be compensated. Jackson v. North Carolina State Hwy. Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

Absent an accident, i.e., a fortuitous event, the death or injury of an employee while performing his regular duties in the usual and customary manner is not compensable. O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964); Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967); Jackson v. North Carolina State Hwy. Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968); Norris v. Kivettco, Inc., 58 N.C. App. 376, 293 S.E.2d 594 (1982).

Where the plaintiff was not injured by accident as contemplated by this section, his injury is not compensable. Gray v. Durham Transf. & Storage, Inc., 10 N.C. App. 668, 179 S.E.2d 883 (1971).

Under the Workers' Compensation Act, an injury arising out of and in the course of employment is compensable only if it is caused by an accident. Davis v. Raleigh Rental Center, 58 N.C. App. 113, 292 S.E.2d 763 (1982).

An Injury, to be Compensable, Must Result From an Accident. — Industrial commission properly denied the employee's workers' compensation claim, as the meeting at which the employee received a performance rating, did not constitute a workplace accident; the meeting was not an unexpected, unusual or untoward occurrence, and was not an interruption of the work routine and the introduction of unusual conditions likely to result in unexpected consequences. Pitillo v. N.C. Dep't of Envtl. Health & Natural Res., 151 N.C. App. 641, 566 S.E.2d 807, 2002 N.C. App. LEXIS 882 (2002).

When an employee suffered a minor physical injury at work, and later suffered a disabling psychological injury in the course of the employer's investigation of the physical injury because she thought she was being accused of suing her employer, the evidence established that her disability was caused by the mental injury, rather than the physical injury, and she was not eligible for workers' compensation benefits because the mental injury did not qualify as an accident, for workers' compensation purposes, because it was not an unlooked for and untoward event involving the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences. Smith v. Hous. Auth. of Asheville, 159 N.C. App. 198, 582 S.E.2d 692, 2003 N.C. App. LEXIS 1429 (2003).

The terms "injury" and "accident," as used in the act, are not synonymous. Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967); Russell v. Pharr Yarns, Inc., 18 N.C. App. 249, 196 S.E.2d 571 (1973); Beamon v. Stop & Shop Grocery, 27 N.C. App. 553, 219 S.E.2d 508 (1975); Reams v. Burlington Indus., 42 N.C. App. 54, 255 S.E.2d 586 (1979). But see Keller v. Electric Wiring Co., 259 N.C. 222, 130 S.E.2d 342 (1963), indicating that injury by accident and accidental injury are synonymous terms; Swindell v. Davis Boat Works, Inc., 78 N.C. App. 393, 337 S.E.2d 592 (1985); Lewter v. Abercrombie Enters., Inc., 240 N.C. 399, 82 S.E.2d 410 (1954), cert. denied and appeal dismissed.

The mere fact of injury does not of itself establish the fact of accident. Key v. Wagner Woodcraft, Inc., 33 N.C. App. 310, 235 S.E.2d 254 (1977); Reams v. Burlington Indus., 42 N.C. App. 54, 255 S.E.2d 586 (1979).

The accident must be a separate event preceding and causing the injury. Key v. Wagner Woodcraft, Inc., 33 N.C. App. 310, 235 S.E.2d 254 (1977); Searsey v. Perry M. Alexander Constr. Co., 35 N.C. App. 78, 239 S.E.2d 847, cert. denied, 294 N.C. 736, 244 S.E.2d 154 (1978); Davis v. Raleigh Rental Center, 58 N.C. App. 113, 292 S.E.2d 763 (1982).

Accident and injury are considered separate. Ordinarily, the accident must precede the injury. Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962); Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Injury and accident are separate, and there must be an accident which produces the injury before the employee can be awarded compensation. O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964); Jackson v. North Carolina State Hwy. Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968); Porter v. Shelby Knit, Inc., 46 N.C. App. 22, 264 S.E.2d 360 (1980); Poe v. Acme Bldrs., 69 N.C. App. 147, 316 S.E.2d 338, cert. denied, 311 N.C. 762, 321 S.E.2d 143 (1984); Jackson v. Fayetteville Area Sys. of Transp., 88 N.C. App. 123, 362 S.E.2d 569 (1987).

Which Is Unforeseen or Unusual. — An "accident" within the meaning of this Act is an unlooked for and untoward event which is not expected or designed by the injured employee. Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930); McNeely v. Carolina Asbestos Co., 206 N.C. 568, 174 S.E. 509 (1934); Slade v. Willis Hosiery Mills, 209 N.C. 823, 184 S.E. 844 (1936); Love v. Town of Lumberton, 215 N.C. 28, 1 S.E.2d 121 (1939); Brown v. Carolina Aluminum Co., 224 N.C. 766, 32 S.E.2d 320 (1944); Edwards v. Piedmont Publishing Co., 227 N.C. 184, 41 S.E.2d 592 (1947); Gabriel v. Town of Newton, 227 N.C. 314, 42 S.E.2d 96 (1947); Hensley v. Farmers Fed'n Coop., 246 N.C. 274, 98 S.E.2d 289 (1957); Harding v. Thomas & Howard Co., 256 N.C.

427, 124 S.E.2d 109 (1962); Searsey v. Perry M. Alexander Constr. Co., 35 N.C. App. 78, 239 S.E.2d 847, cert. denied, 294 N.C. 736, 244 S.E.2d 154 (1978); Porter v. Shelby Knit, Inc., 46 N.C. App. 22, 264 S.E.2d 360 (1980); Gladson v. Piedmont Stores/Scotties Disct. Drug Store, 57 N.C. App. 579, 292 S.E.2d 18, cert. denied, 306 N.C. 556, 294 S.E.2d 370 (1982); Diaz v. United States Textile Corp., 60 N.C. App. 712, 299 S.E.2d 843, cert. denied, 308 N.C. 386, 302 S.E.2d 250 (1983); Adams v. Burlington Indus., Inc., 61 N.C. App. 258, 300 S.E.2d 455 (1983); Poe v. Acme Bldrs., 69 N.C. App. 147, 316 S.E.2d 338, cert. denied, 311 N.C. 762, 321 S.E.2d 143 (1984).

While there need be no appreciable separation in time between the accident and the resulting injury, there must be some unforeseen or unusual event other than the bodily injury itself. Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967); Norris v. Kivettco, Inc., 58 N.C. App. 376, 293 S.E.2d 594 (1982).

An "accident" within the contemplation of this Chapter is an unusual and unexpected or fortuitous occurrence, there being no indication that the legislature intended to put upon the usual definition of this term any further refinements. Smith v. Cabarrus Creamery Co., 217 N.C. 468, 8 S.E.2d 231 (1940).

Unusualness and unexpectedness are the essence of an accident. Davis v. Raleigh Rental Center, 58 N.C. App. 113, 292 S.E.2d 763 (1982).

North Carolina Industrial Commission properly concluded that a plaintiff employee's wrist injuries had not occurred by accident under G.S. 97-2(6) where she was not performing unusual or unexpected job duties when she exerted force to move a pad underneath a healthcare facility resident or took manual blood pressure readings; those actions were normal job duties for a certified nursing assistant. Evans v. Wilora Lake Healthcare, — N.C. App. —, 637 S.E.2d 194, 2006 N.C. App. LEXIS 2294 (2006).

Or Involves a Result Produced by a Fortuitous Cause. — The term "accident" as used in the act has been defined as (1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause. Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962); O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964); Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967); Pulley v. Migrant & Seasonal Farm-Workers Ass'n, 30 N.C. App. 94, 226 S.E.2d 227 (1976); Kennedy v. Martin Marietta Chems., 34 N.C. App. 177, 237 S.E.2d 542 (1977); Reams v. Burlington Indus., 42 N.C. App. 54, 255 S.E.2d 586 (1979); Norris v. Kivettco, Inc., 58 N.C. App. 376, 293 S.E.2d 594 (1982); Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Injury by accident is an injury produced by a fortuitous cause. Kennedy v. Martin Marietta Chems., 34 N.C. App. 177, 237 S.E.2d 542 (1977).

The term "accident," under this Chapter, is an unlooked for and untoward event, and a result produced by a fortuitous cause. Davis v. Raleigh Rental Center, 58 N.C. App. 113, 292 S.E.2d 763 (1982).

Injuries Which Are Natural and Probable Result of Employment Are Not Compensable. — An injury, in order to be compensable, must result from an accident, and injuries which are not the result of any fortuitous occurrence, but are the natural and probable result of the employment, are not compensable. Smith v. Cabarrus Creamery Co., 217 N.C. 468, 8 S.E.2d 231 (1940).

An injury must involve more than the carrying on of the usual and customary duties in the usual way to justify an award of compensation. Davis v. Raleigh Rental Center, 58 N.C. App. 113, 292 S.E.2d 763 (1982).

No matter how great the injury, if it is caused by an event that involves both an employee's normal work routine and normal working conditions it will not be considered to have been caused by accident. Searsey v. Perry M. Alexander Constr. Co., 35 N.C. App. 78, 239 S.E.2d 847, cert. denied, 294 N.C. 736, 244 S.E.2d 154 (1978); King v. Exxon Co., 46 N.C. App. 750, 266 S.E.2d 37 (1980).

If the employee is performing his regular duties in the usual and customary manner, and is injured, there is no "accident" and the injury is not compensable. Porter v. Shelby Knit, Inc., 46 N.C. App. 22, 264 S.E.2d 360 (1980).

Accident involves the interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences. Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962); Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963); Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965); Gray v. Durham Transf. & Storage, Inc., 10 N.C. App. 668, 179 S.E.2d 883 (1971); Southards v. Byrd Motor Lines, 11 N.C. App. 583, 181 S.E.2d 811 (1971); Bigelow v. Tire Sales Co., 12 N.C. App. 220, 182 S.E.2d 856 (1971); Garmon v. Tridair Indus., Inc., 14 N.C. App. 574, 188 S.E.2d 523 (1972); Dunton v. Daniel Constr. Co., 19 N.C. App. 51, 198 S.E.2d 8 (1973); Beamon v. Stop & Shop Grocery, 27 N.C. App. 553, 219 S.E.2d 508 (1975); Key v. Wagner Woodcraft, Inc., 33 N.C. App. 310, 235 S.E.2d 254 (1977); Smith v. Burlington Indus., Inc., 35 N.C. App. 105, 239 S.E.2d 845 (1978); Curtis v. Carolina Mechanical Sys., 36 N.C. App. 621, 244 S.E.2d 690 (1978); Gladson v. Piedmont Stores/Scotties Disct. Drug Store, 57

N.C. App. 579, 292 S.E.2d 18, cert. denied, 306 N.C. 556, 294 S.E.2d 370 (1982); Davis v. Raleigh Rental Center, 58 N.C. App. 113, 292 S.E.2d 763 (1982); Norris v. Kivettco, Inc., 58 N.C. App. 376, 293 S.E.2d 594 (1982); Adams v. Burlington Indus., Inc., 61 N.C. App. 258, 300 S.E.2d 455 (1983); Poe v. Acme Bldrs., 69 N.C. App. 147, 316 S.E.2d 338, cert. denied, 311 N.C. 762, 321 S.E.2d 143 (1984); Sanderson v. Northeast Constr. Co., 77 N.C. App. 117, 334 S.E.2d 392 (1985).

Professional Football Player. — Though an injury sustained while playing football may not be an unusual occurrence, such injury is not a probable, intended consequence of the employment and constitutes an unlooked for and untoward event that was not expected or designed; as such, sufficient evidence supported the findings of fact that a plaintiff, a professional football player, sustained a compensable injury by accident arising out of and in the course of his employment when his testimony explained that there was a technique he used to initiate a block by having his wrist in an upward position but, instead, his hand was forced into an awkward position wherein his wrist went downward and such testimony indicated that although he was engaging in his normal work duty of blocking an offensive lineman, he was injured because he was forced by another player into utilizing an unusual and awkward blocking or work technique that was not normally used in his normal work routine. Renfro v. Richardson Sports, Ltd. Partners, 172 N.C. App. 176, 616 S.E.2d 317, 2005 N.C. App. LEXIS 1435 (2005), cert. denied, 360 N.C. 535, 633 S.E.2d 821 (2006), cert. dismissed, 360 N.C. 535, 633 S.E.2d 821 (2006).

Football player's leg injury was a compensable injury by accident where the player sustained an injury while playing in the fifteenth game of the season, the injury was unusual in that the player had attempted to block numerous extra point attempts without sustaining a broken leg and torn tendons in his ankle, it was unexpected that one or more players would fall on the back of the injured player's leg causing a career-ending injury, and for such an injury to occur required a force of 3000 pounds per square inch. Swift v. Richardson Sports, Ltd., 173 N.C. App. 134, 620 S.E.2d 533, 2005 N.C. App. LEXIS 1898 (2005).

Willful or Criminal Assault by Third Person. — Injuries resulting from an assault are caused by "accident' when, from the employee's perspective, the assault was unexpected and was without design on her part. Hauser v. Advanced Plastiform, Inc., 133 N.C. App. 378, 514 S.E.2d 545 (1999).

Death by Gunshot. — Industrial Commission did not err in concluding that plaintiffs were entitled to a presumption of compensability, where defendants failed to rebut the presumption that the death of an employee who died from a gunshot wound was accidental and arose out of his employment. Horton v. Powell Plumbing & Heating of N.C., Inc., 135 N.C. App. 211, 519 S.E.2d 550 (1999).

Plaintiff, who had been employed by defendant for five years in an office job before her work-related injury and who testified that she was not yet proficient in defendant's filling department, was not performing her usual work routine at the time of accidental injury on her fifth day on the production line; thus, the commission's conclusion that the plaintiff suffered an injury by accident was accordingly upheld. Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

Circumstances sufficient to constitute an interruption of a given work routine typically involve an undertaking by the employee of duties not usual and customary. Poe v. Acme Bldrs., 69 N.C. App. 147, 316 S.E.2d 338, cert. denied, 311 N.C. 762, 321 S.E.2d 143 (1984).

The assigning of an employee to a particular task where the work routine for the employee involves a variety of tasks does not necessarily constitute an interruption of the work. Poe v. Acme Bldrs., 69 N.C. App. 147, 316 S.E.2d 338, cert. denied, 311 N.C. 762, 321 S.E.2d 143 (1984).

An injury which occurs under normal work conditions is not considered an accident arising out of employment, and work conditions may be considered normal despite the presence of changed circumstances. Trudell v. Seven Lakes Heating & Air Conditioning Co., 55 N.C. App. 89, 284 S.E.2d 538 (1981).

An injury which occurs under normal work conditions is not considered an accident arising out of employment. Poe v. Acme Bldrs., 69 N.C. App. 147, 316 S.E.2d 338, cert. denied, 311 N.C. 762, 321 S.E.2d 143 (1984).

Once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an "injury by accident" under the Workers' Compensation Act. Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

No matter how great the injury, if it is caused by an event that involves both an employee's normal work routine and normal working conditions it will not be considered to have been caused by an accident. Swindell v. Davis Boat Works, Inc., 78 N.C. App. 393, 337 S.E.2d 592 (1985), cert. denied and appeal dismissed, 316 N.C. 385, 342 S.E.2d 908 (1986).

The Industrial Commission's conclusion of law that plaintiff did not sustain a compensable injury was adequately supported by its finding that plaintiff's back pain was not the result of any interruption of her normal work routine, in that plaintiff was doing her usual job in her usual and customary manner, and was not the result of any specific traumatic incident, in that plaintiff had experienced back pain over an extended period of time. Causby v. Bernhardt Furn. Co., 83 N.C. App. 650, 351 S.E.2d 106 (1986).

There must be some new circumstance not a part of usual work routine in order to find that an accident has occurred. Swindell v. Davis Boat Works, Inc., 78 N.C. App. 393, 337 S.E.2d 592 (1985), cert. denied and appeal dismissed, 316 N.C. 385, 342 S.E.2d 908 (1986).

North Carolina Industrial Commission's finding that pulling wire sometimes in awkward positions was a normal part of a workers' compensation claimant's job routine was not dispositive of whether the claimant's injury was by accident under G.S. 97-2(6); the dispositive question was whether the totality of the conditions under which the claimant worked at the time of the injury were "usual tasks in the usual way" expected of an electrician working for the employer. Griggs v. Eastern Omni Constructors, 158 N.C. App. 480, 581 S.E.2d 138, 2003 N.C. App. LEXIS 1187 (2003).

Accident Must Have Had Origin in a Risk Connected with Employment. — To be compensable, the accident need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence. Pittman v. Twin City Laundry & Cleaners, 61 N.C. App. 468, 300 S.E.2d 899 (1983).

An accident has a reasonable relationship to the employment when it is the result of a risk or hazard incident to the employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

And some risk inherent to the employment must be a contributing proximate cause of the injury and the risk must be enhanced by the employment and must be one to which the worker would not have been equally exposed apart from the employment. Pittman v. Twin City Laundry & Cleaners, 61 N.C. App. 468, 300 S.E.2d 899 (1983).

There must be competent evidence to support the inference that the accident in question resulted in the injury complained of, i.e., some evidence that the accident at least might have or could have produced the particular disability in question. Click v. Pilot Freight Carriers, Inc., 300 N.C. 164, 265 S.E.2d 389 (1980).

Death from injury by accident implies a result produced by a fortuitous cause. Slade v. Willis Hosiery Mills, 209 N.C. 823, 184 S.E. 844 (1936); Hensley v. Farmers Fed'n Coop., 246 N.C. 274, 98 S.E.2d 289 (1957); Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962); O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964); Jackson v. North Carolina State Hwy. Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

Physical exertion may in and of itself be the precipitating cause of an injury by accident within the meaning of this section. Hollar v. Montclair Furn. Co., 48 N.C. App. 489, 269 S.E.2d 667 (1980).

Evidence of the necessity of extreme exertion is sufficient to bring into an event causing an injury the necessary element of unusualness and unexpectedness from which accident may be inferred. Porter v. Shelby Knit, Inc., 46 N.C. App. 22, 264 S.E.2d 360 (1980).

Extra exertion by the employee, resulting in injury, may qualify as an injury by accident. Jackson v. North Carolina State Hwy. Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

It is well-settled in this State that an extra or unusual degree of exertion by an employee while performing a job may constitute the unforeseen or unusual event or condition necessary to make any resulting injury an injury "by accident." Jackson v. Fayetteville Area Sys. of Transp., 88 N.C. App. 123, 362 S.E.2d 569 (1987).

Injury arising out of lifting objects in the ordinary course of an employee's business is not caused by accident where such activity is performed in the ordinary manner, free from confining or otherwise exceptional conditions and surroundings. Beamon v. Stop & Shop Grocery, 27 N.C. App. 553, 219 S.E.2d 508 (1975); Curtis v. Carolina Mechanical Sys., 36 N.C. App. 621, 244 S.E.2d 690 (1978).

Injury to Nurse Lifting Patient. — Where labor and delivery nurse injured herself while lifting the legs of a 263 pound woman in order to facilitate delivery, the evidence did not support the Industrial Commission's denial of compensation based on the finding that plaintiff's injuries "occurred while performing her usual employment duties in the usual way." Calderwood v. Charlotte-Mecklenburg Hosp. Auth., 135 N.C. App. 112, 519 S.E.2d 61 (1999).

Where employee was not engaged in his routine duties in his customary fashion at the time he sustained an injury to his back, the injury was accidental and compensable. Sanderson v. Northeast Constr. Co., 77 N.C. App. 117, 334 S.E.2d 392 (1985), decision prior to the 1983 amendment to subdivision (6).

Insufficient to Show that Activity Caused No Pain in Past. — It is insufficient as a matter of law to show only that in the past a regular activity caused no pain and that the same activity now causes pain; there must be a specific fortuitous event, rather than a gradual build-up of pain, in order to show injury by accident. Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Damage to heart tissue clearly precipitated or caused by "overexertion" constitutes an injury by accident. Weaver v. Swedish Imports Maintenance, Inc., 61 N.C. App. 662, 301 S.E.2d 736 (1983).

Death from Heart Disease. — Ordinarily a death from heart disease is not an injury by accident arising out of and in the course of the employment, nor an occupational disease, so as to be compensable. Bellamy v. Morace Stevedoring Co., 258 N.C. 327, 128 S.E.2d 395 (1962).

Cardiac Arrhythmia. — Defendant presented sufficient evidence to rebut the presumption under Pickrell v. Motor Convoy, Inc., 322 N.C. 363, 368 S.E.2d 582 (1988), that decedent sustained an injury by accident, where the evidence indicated that there was nothing unusual about the route, the hours, or the amount or type of deliveries required of decedent on the day of his death, and that the cause of his death was cardiac arrhythmia, which was a sudden, fatal irregular heart beat, precipitated by the severe ischemic heart disease, and where the autopsy revealed no evidence of trauma. Bason v. Kraft Food Serv., Inc., 140 N.C. App. 124, 535 S.E.2d 606, 2000 N.C. App. LEXIS 1099 (2000).

Heart Attack. — When one is carrying on his usual work in the usual way and suffers a heart attack, the injury does not arise by accident out of and in the course of employment. Jackson v. North Carolina State Hwy. Comm'n., 272 N.C. 697, 158 S.E.2d 865 (1968).

Deaths from heart attacks which occur in the usual course of employment are not compensable. Jackson v. North Carolina State Hwy Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

Where an injury is caused by a heart attack, the plaintiff must show that it was precipitated by some unusual or extraordinary exertion. Dillingham v. Yeargin Constr. Co., 82 N.C. App. 684, 348 S.E.2d 143 (1986), rev'd on other grounds, 320 N.C. 499, 358 S.E.2d 380 (1987).

Evidence that the room temperature in the nuclear power plant was 85 degrees and that the worker suffered heat exhaustion while wearing a radiation suit which inhibited his body's ability to radiate heat unequivocally demonstrated that the worker was exposed to an increased risk of heat-related illness because of his employment and that the worker's subsequent cardiac arrest was a compensable "accident." Dillingham v. Yeargin Constr. Co., 320 N.C. 499, 358 S.E.2d 380, cert. denied, 320 N.C. 639, 360 S.E.2d 84 (1987).

Heart Attack Held to Be Accident. — Where decedent's heart attack followed a period of unusually high exertion which was unusual and not a normal part of his work routine, there was competent evidence to support the findings that death was an accident within the meaning of the Workers' Compensation Act. Wall v. North Hills Properties, Inc., 125 N.C. App. 357, 481 S.E.2d 303 (1997), cert. denied, 346 N.C. 289, 487 S.E.2d 573 (1997).

Death of a fireman from heart failure brought on by excitement and exhaustion in fighting a fire is not the result of an accident within the meaning of the Workers' Compensation Act, heat, smoke, excitement, and physical exertion being the ordinary and expected incidents of the employment. Neely v. City of Statesville, 212 N.C. 365, 193 S.E. 664 (1937). See also Lewter v. Abercrombie Enters., 240 N.C. 399, 82 S.E.2d 410 (1954).

Amendment to G.S. 97-53 by Session Laws 1949, c. 1078, so as to make certain heart diseases compensable as occupational diseases when contracted by firemen was held unconstitutional in Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E.2d 22 (1951) and Davis v. City of Winston-Salem, 234 N.C. 95, 66 S.E.2d 28 (1951). See 30 N.C.L. Rev. 98 (1951).

Aneurysm Caused by Stress and Excitement While Deputy Sheriff Performed CPR. — Employee's aneurysm, caused by stress and excitement while the employee was performing cardiopulmonary resuscitation (CPR) on a victim while working as deputy sheriff, was compensable; CPR was seldom done by deputies, and the testimony of the employee's doctor as to cause of the aneurysm was unequivocal and not speculative. Ferreyra v. Cumberland County, 175 N.C. App. 581, 623 S.E.2d 825, 2006 N.C. App. LEXIS 186 (2006).

Injury While Shifting Position. — Where plaintiff, a carpenter, was hired to perform a number of tasks connected with employer's home improvement business, injury which occurred when he shifted his position while shingling a roof was deemed to have occurred under normal work conditions, and was not compensable as an injury suffered as the result of an accident. Poe v. Acme Bldrs., 69 N.C. App. 147, 316 S.E.2d 338, cert. denied, 311 N.C. 762, 321 S.E.2d 143 (1984).

Rupture of Intervertebral Disc. — To sustain an award of compensation in ruptured or slipped disc cases, the injury to be classed as arising by accident must involve more than merely carrying on the usual and customary duties in the usual way. Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962); Byrd v. Farmers Fed'n Coop., 260 N.C. 215, 132 S.E.2d 348 (1963); Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965); Dunton v. Daniel Constr. Co., 19 N.C. App. 51, 198 S.E.2d 8 (1973); Pulley v. Migrant & Seasonal Farm-Workers Ass'n, 30 N.C. App. 94, 226 S.E.2d 227 (1976); Key v. Wagner Woodcraft, Inc., 33 N.C. App. 310, 235 S.E.2d 254 (1977).

An injury to the back from a herniated disc does not arise by accident if the employee at the time is merely carrying on his usual and customary duties in the usual way. Byrd v. Farmers Fed'n Coop., 260 N.C. 215, 132 S.E.2d 348 (1963).

Degenerative disc condition which is a gradual deterioration occurring over the years is excluded from the definition of "accident." Griffitts v. Thomasville Furn. Co., 65 N.C. App. 369, 309 S.E.2d 277 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 884 (1984).

Back Injury. — A back injury or hernia suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

Back Injury Resulting from Specific Traumatic Incident at Cognizable Time. — Where a 57-year-old woman, who performed secretarial tasks for her employer, suffered back pain the day after she helped carry a heavy, unwieldy spotlight up a flight of steps while walking backwards and bending over at the waist, and where the activity was not within her normal work routine, the claimant's injury resulted from a specific traumatic incident that occurred at a cognizable time. Beam v. Floyd's Creek Baptist Church, 99 N.C. App. 767, 394 S.E.2d 191 (1990).

Specific Traumatic Incidents. — A specific traumatic incident need not involve unusual conditions or a departure from the claimant's normal work routine. Lettley v. Trash Removal Serv., 91 N.C. App. 625, 372 S.E.2d 747 (1988).

Back injuries that occur gradually, over long periods of time, are not specific traumatic incidents; however, events which occur contemporaneously, during a cognizable time period, and which cause a back injury, do fit the definition intended by the legislature. Richards v. Town of Valdese, 92 N.C. App. 222, 374 S.E.2d 116 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

A "specific traumatic incident" could occur during a "cognizable time" of two hours but in every case there must be evidence of proximate cause between the "specific traumatic incident" and the injury. Livingston v. James C. Fields & Co., 93 N.C. App. 336, 377 S.E.2d 788 (1989).

Specific Traumatic Incident Not Shown. — Finding that employee suffered a cervical spine condition as the result of a specific traumatic incident was not supported by competent evidence; the evidence showed that the employee experienced pain on a particular date, but the employee presented no evidence linking that pain to the occurrence of an injury. Chambers v. Transit Mgmt., 360 N.C. 609, 636 S.E.2d 553, 2006 N.C. LEXIS 1195 (2006).

"Specific traumatic incident" amendment to subdivision (6) was intended to supplement the law related to back injuries, not to supplant it. The effect of the amendment was to eliminate the need to show an external cause or unusual conditions in order for a worker to receive compensation for a back injury. Instead, what may be shown is that the back injury arose in the course of the employment and that the injury was "the direct result of a specific traumatic incident of the work assigned." Caskie v. R.M. Butler & Co., 85 N.C. App. 266, 354 S.E.2d 242 (1987).

The 1983 amendment to subdivision (6) relaxes the requirement that there be some unusual circumstance that accompanies a back injury. Richards v. Town of Valdese, 92 N.C. App. 222, 374 S.E.2d 116 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Back injuries that occur gradually, over long periods of time, are not specific traumatic incidents; however, events which occur contemporaneously, during a cognizable time period, and which cause a back injury, do fit the definition intended by the legislature. Glynn v. Pepcom Indus., Inc., 122 N.C. App. 348, 469 S.E.2d 588 (1996).

The onset of pain is not a "specific traumatic incident" that will determine whether compensation for a back injury will be allowed pursuant to the act; rather, pain is as a general rule the result of a "specific traumatic incident." Roach v. Lupoli Constr. Co., 88 N.C. App. 271, 362 S.E.2d 823 (1987).

Injury to Back Must Be Causally Related. — Even if a specific traumatic incident occurs to constitute a compensable "injury by accident" there must be a "disabling physical injury to the back arising out of and causally related to such incident." Lettley v. Trash Removal Serv., 91 N.C. App. 625, 372 S.E.2d 747 (1988).

Back Injury and Pain Need Not Occur Simultaneously. — Just because claimant felt pain for the first time hours after he allegedly injured his back did not mean that the "specific traumatic incident" could not have occurred when he said it did. Logic dictates that injury and pain do not have to occur simultaneously for claimant to establish that he sustained a compensable injury. Roach v. Lupoli Constr. Co., 88 N.C. App. 271, 362 S.E.2d 823 (1987).

Evidence Supported Finding of Back Injury. — Based on evidence that repeated lifting of cases of cigarettes, coupled with twisting and contorting in a cramped area to reach in behind and on top of cigarette display rack, was not part of plaintiff's job routine, and the commission's finding that plaintiff had never performed as much repetitious lifting and stacking of cases on a single day as she did on the date of her back injury, under existing case law, without deciding the issue of specific traumatic incident, the commission should have concluded that plaintiff's back injury was an injury by accident arising out of and in the course of employment, thereby qualifying as a compensable injury under the first sentence of subdivision (6). Caskie v. R.M. Butler & Co., 85 N.C. App. 266, 354 S.E.2d 242 (1987).

Where volunteer fireman could point to a series of contemporaneous events which could have caused his back injury, it was error for the commission to conclude as a matter of law that employee suffered no injury as a result of a specific traumatic injury. Richards v. Town of Valdese, 92 N.C. App. 222, 374 S.E.2d 116 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Evidence Insufficient to Find Back Injury. — Where plaintiff injured her back during her previous employment, was treated for back pain over a period of time, and the pain which plaintiff experienced during her employment with defendant was in the same area of her back that had been injured during plaintiff's prior employment, there was competent evidence to support the Commission's findings and conclusion that plaintiff's back condition was neither caused by nor aggravated by an injury, by accident or by specific traumatic incident at her new employment. Thompson v. Tyson Foods, Inc., 119 N.C. App. 411, 458 S.E.2d 746 (1995).

Employer's Knowledge of Earlier Injury Did Not Make Injury Compensable. — Finding of the Commission that plaintiff's back injury was not accidental, in that the evidence failed to disclose an interruption of plaintiff's normal work routine, which involved the regular and repetitive lifting, albeit without usage of his left hand, was supported by the evidence, despite plaintiff's argument that because his employer knew of disability certificate given him by his physician following an earlier hand injury but nonetheless assigned him duties which involved lifting heavy objects, the injury occurred as a matter of law outside his normal work routine. Pittman v. Inco, Inc., 78 N.C. App. 134, 336 S.E.2d 637 (1985), cert. denied, 315 N.C. 589, 341 S.E.2d 28 (1986).

Death by violent means is prima facie evidence of death by accident. McGill v. Town of Lumberton, 215 N.C. 752, 3 S.E.2d 324 (1939).

The burden of proving suicide is upon the party seeking to establish it. McGill v. Town of Lumberton, 215 N.C. 752, 3 S.E.2d 324 (1939).

Employee Found Dead or Injured at His Place of Employment. — Deceased was required to report to work before daylight. On the particular morning in question, he was told to return later in the day. At daylight he was found in a dying condition at the base of an unlighted platform on defendant's premises. Deceased had to cross the platform to leave the premises. It was held that there was sufficient evidence to sustain the finding that the accident arose out of deceased's employment. Morgan v. Cleveland Cloth Mills, 207 N.C. 317, 177 S.E. 165 (1934).

Where claimants' evidence tended to show that deceased was employed as chief of police of defendant municipality and that deceased died as a result of a shot from a pistol while he was in office, proof of death by violence raised a presumption of accidental death, casting the burden of going forward with the evidence upon the employer and insurance carrier to show that deceased killed himself; and claimants' evidence was sufficient to support the finding of the Industrial Commission that death resulted from an accident arising out of and in the course of the employment. McGill v. Town of Lumberton, 218 N.C. 586, 11 S.E.2d 873 (1940).

Evidence tending to show that deceased came to his death as a result of a pistol wound while at a place where he had a right to be in the course of his employment, without evidence that he was authorized to keep a pistol or to use it in the business of the employer, was insufficient to support an award of compensation on the ground that in the absence of a showing of suicide it would be presumed that the death resulted from an accident, since, even so, there was neither presumption nor evidence to support the necessary basis for compensation that the accident arose out of the employment. Bolling v. Belk-White Co., 228 N.C. 749, 46 S.E.2d 838 (1948).

Intentional Injurious Acts Excluded. — The qualifications that an accident cannot be expected or designed operate narrowly to exclude intentional injurious acts. Searsey v. Perry M. Alexander Constr. Co., 35 N.C. App. 78, 239 S.E.2d 847, cert. denied, 294 N.C. 736, 244 S.E.2d 154 (1978).

Injury Resulting from Fellow Employees' Negligence. — An injury suffered by an employee while engaged in his master's business within the scope of his employment proximately resulting from the negligence of fellow employees is, as to the employee, an "accident" arising out of and in the course of his employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Acts of negligence of the employee do not bar compensation for an original injury arising out of and in the course of employment. Starr v. Charlotte Paper Co., 8 N.C. App. 604, 175 S.E.2d 342 (1970); Bartlett v. Duke Univ., 17 N.C. App. 598, 195 S.E.2d 371, rev'd on other grounds, 284 N.C. 230, 200 S.E.2d 193 (1973).

Injury by Accident Distinguished from Occupational Disease. — An injury by accident, as that term is ordinarily understood, is distinguished from an occupational disease in that the former rises from a definite event, the time and place of which can be fixed, while the latter develops gradually over a long period of time. Henry v. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

Accident Held Compensable. — North Carolina Industrial Commission did not err in determining that the employee was injured as a result of a compensable accident arising out of and in the course of the employee's employment, rather than as a result of an idiopathic condition independent of the employee's employment, where there was contradictory evidence as to whether the employee had a seizure, there were no witnesses to the fall, and there was evidence that being atop a ladder was dangerous. Rackley v. Coastal Painting, 153 N.C. App. 469, 570 S.E.2d 121, 2002 N.C. App. LEXIS 1186 (2002).

Determination by the North Carolina Industrial Commission's that the employee's work-related injury was compensable was supported by competent evidence and in accordance with applicable law; the employee was asked to do the weaving for the three days while the weaver was on vacation, the bobbins weighed between 20 and 22 pounds, and lifting was not a regular part of the employee's job. Moose v. Hexcel-Schwebel, 163 N.C. App. 177, 592 S.E.2d 615, 2004 N.C. App. LEXIS 309 (2004).

VI. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

A. In General.

"Out of and in the Course of" Construed. — An accident arises out of and in the course of the employment when it occurs while the employee is engaged in some activity or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business. Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966); Clark v. Burton Lines, 272 N.C. 433, 158 S.E.2d 569 (1968); Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969); Martin v. Bonclarken Ass'y, 296 N.C. 540, 251 S.E.2d 403 (1979); Long v. Asphalt Paving Co., 47 N.C. App. 564, 268 S.E.2d 1 (1980); Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (1982); Powers v. Lady's Funeral Home, 306 N.C. 728, 295 S.E.2d 473 (1982).

The words "out of" refer to the origin or cause of the accident. The words "in the course of" refer to the time, place, and circumstances under which an accident occurs. Ridout v. Rose's 5-10-25¢ Stores, 205 N.C. 423, 171 S.E. 642 (1933); Plemmons v. White's Serv., 213 N.C. 148, 195 S.E. 370 (1938); Wilson v. Town of Mooresville, 222 N.C. 283, 22 S.E.2d 907 (1942); Brown v. Carolina Aluminum Co., 224 N.C. 766, 32 S.E.2d 320 (1944); Taylor v. Town of Wake Forest, 228 N.C. 346, 45 S.E.2d 387 (1947); Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949); Matthews v. Carolina Std. Corp., 232 N.C. 229, 60 S.E.2d 93 (1950); Berry v. Colonial Furn. Co., 232 N.C. 303, 60 S.E.2d 97 (1950); Bell v. Dewey Bros., 236 N.C. 280, 72 S.E.2d 680 (1952); Sweatt v. Rutherford County Bd. of Educ., 237 N.C. 653, 75 S.E.2d 738 (1953); Lewter v. Abercrombie Enters., 240 N.C. 399, 82 S.E.2d 410 (1954); Zimmerman v. Elizabeth City Freezer Locker, 244 N.C. 628, 94 S.E.2d 813 (1956); Hardy v. Small, 246 N.C. 581, 99 S.E.2d 862 (1957); Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962); Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962); Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966); Clark v. Burton Lines, 272 N.C. 433, 158 S.E.2d 569 (1968); Robinson v. North Carolina State Hwy. Comm'n, 13 N.C. App. 208, 185 S.E.2d 333 (1971); Enroughty v. Black Indus., Inc., 13 N.C. App. 400, 185 S.E.2d 597, cert. denied, 280 N.C. 721, 186 S.E.2d 923 (1972); Battle v. Bryant Elec. Co., 15 N.C. App. 246, 189 S.E.2d 788, cert. denied, 281 N.C. 755, 191 S.E.2d 353 (1972); Lee v. F.M. Henderson & Assocs., 17 N.C. App. 475, 195 S.E.2d 48, aff'd, 284 N.C. 126, 200 S.E.2d 32 (1973); Bartlett v. Duke Univ., 17 N.C. App. 598, 195 S.E.2d 371, rev'd on other grounds, 284 N.C. 230, 200 S.E.2d 193 (1973); Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976); Goldston v. Goldston Concrete Works, Inc., 29 N.C. App. 717, 225 S.E.2d 332, cert. denied, 290 N.C. 660, 228 S.E.2d 452 (1976); Gallimore v. Marilyn's Shoes, 292 N.C. 399, 233 S.E.2d 529 (1977); Barham v. Food World, Inc., 300 N.C. 329, 266 S.E.2d 676, rehearing denied, 300 N.C. 562, 270 S.E.2d 105 (1980); Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (1982); Pittman v. Twin City Laundry & Cleaners, 61 N.C. App. 468, 300 S.E.2d 899 (1983).

An accident occurring during the course of employment does not ipso facto arise out of it. Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972); Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976); Smith v. Dacotah Cotton Mills, Inc., 31 N.C. App. 687, 230 S.E.2d 772 (1976).

As the phrases "arising out of" and "in the course of" are not synonymous; they involve two ideas and impose a double condition, both of which must be satisfied in order to bring a case within the act. Sweatt v. Rutherford County Bd. of Educ., 237 N.C. 653, 75 S.E.2d 738 (1953); Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972); Battle v. Bryant Elec. Co., 15 N.C. App. 246, 189 S.E.2d 788, cert. denied, 281 N.C. 755, 191 S.E.2d 353 (1972); Gallimore v. Marilyn's Shoes, 292 N.C. 399, 233 S.E.2d 529 (1977); Martin v. Bonclarken Ass'y, 296 N.C. 540, 251 S.E.2d 403 (1979); Barham v. Food World, Inc., 300 N.C. 329, 266 S.E.2d 676, rehearing denied, 300 N.C. 562, 270 S.E.2d 105 (1980); Brown v. Jim Brown's Serv. Station, 45 N.C. App. 255, 262 S.E.2d 700 (1980); Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (1982); Powers v. Lady's Funeral Home, 57 N.C. App.

25, 290 S.E.2d 720, rev'd on other grounds, 306 N.C. 728, 295 S.E.2d 473 (1982).

To be compensable under the act an injury must arise out of and be received in the course of employment. Two ideas are involved here. The words "in the course of" refer to the time, place, and circumstances surrounding the accident, while the words "arising out of" have reference to the causal connection between the injury and the employment. Davis v. North State Veneer Corp., 200 N.C. 263, 156 S.E. 859 (1931); Parrish v. Armour & Co., 200 N.C. 654, 158 S.E. 188 (1931); Walker v. Wilkins, Inc., 212 N.C. 627, 194 S.E. 89 (1937); McGill v. Town of Lumberton, 215 N.C. 752, 3 S.E.2d 324 (1939); Matthews v. Carolina Std. Corp., 232 N.C. 229, 60 S.E.2d 93 (1950); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968); Forsythe v. INCO, 95 N.C. App. 742, 384 S.E.2d 30 (1989).

The phrase "arising out of and in the course of employment" encompasses two separate and distinct concepts — "out of" and "in the course of" — both of which must be satisfied in order for particular injuries to be compensable under the act. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968); Murray v. Biggerstaff, 81 N.C. App. 377, 344 S.E.2d 550, cert. denied, 318 N.C. 696, 350 S.E.2d 858 (1986).

The term "arising out of" refers to the origin of the injury or the causal connection of the injury to the employment, while the term "in the course of" refers to the time, place and circumstances under which the injury occurred. Schmoyer v. Church of Jesus Christ of Latter Day Saints, 81 N.C. App. 140, 343 S.E.2d 551, cert. denied, 318 N.C. 417, 349 S.E.2d 600 (1986).

But They Are Not Applied Entirely Independently. — In practice, the "course of employment" and "arising out of employment" tests are not, and should not be, applied entirely independently; they are both parts of a single test of work-connection, and therefore deficiencies in the strength of one factor are sometimes allowed to be made up by strengths in the other. Lee v. F.M. Henderson & Assocs., 284 N.C. 126, 200 S.E.2d 32 (1973); Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976).

Deficiencies in One Factor May Be Made Up by the Other. — Since the terms of the Workers' Compensation Act should be liberally construed in favor of compensation, deficiencies in one factor are sometimes allowed to be made up by strength in the other. Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (1982).

Natural Consequences of Primary Injury Arising Out of and in Course of Employment. — When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. Thus, a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury. Starr v. Charlotte Paper Co., 8 N.C. App. 604, 175 S.E.2d 342 (1970).

Mixed Question of Law and Fact. — Whether an injury by accident arises out of and in the course of the employment is a mixed question of law and of fact. Hardy v. Small, 246 N.C. 581, 99 S.E.2d 862 (1957); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966); Enroughty v. Black Indus., Inc., 13 N.C. App. 400, 185 S.E.2d 597, cert. denied, 280 N.C. 721, 186 S.E.2d 923 (1972); Lee v. F.M. Henderson & Assocs., 17 N.C. App. 475, 195 S.E.2d 48, aff'd, 284 N.C. 126, 200 S.E.2d 32 (1973); Goldston v. Goldston Concrete Works, Inc., 29 N.C. App. 717, 225 S.E.2d 332, cert. denied, 290 N.C. 660, 228 S.E.2d 452 (1976); Long v. Asphalt Paving Co., 47 N.C. App. 564, 268 S.E.2d 1 (1980); Schmoyer v. Church of Jesus Christ of Latter Day Saints, 81 N.C. App. 140, 343 S.E.2d 551, cert. denied, 318 N.C. 417, 349 S.E.2d 600 (1986); Pittman v. International Paper Co., 132 N.C. App. 151, 510 S.E.2d 705, 1999 N.C. App. LEXIS 92 (1999), cert. denied, 350 N.C. 310, 534 S.E.2d 596 (1999), aff'd, 351 N.C. 42, 519 S.E.2d 524 (1999).

Conclusive Effect of Commission's Findings. — Whether an employee sustained an injury by accident arising out of and in the course of his employment with the defendant employer resulting in his death is a mixed question of law and fact, and the finding of the Commission as to the factual portion is conclusive if supported by any competent evidence. McManus v. Chick Haven Farms, 4 N.C. App. 177, 166 S.E.2d 526 (1969).

The issue of whether a particular accident arises out of and in the course of employment is a mixed question of fact and law, and appellate review is limited on appeal to the question of whether the findings and conclusions are supported by competent evidence. Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (1982).

Whether an injury arose out of and in the course of employment is a mixed question of fact and law, and where there is evidence to support the Commission's findings, the appellate court is bound by them. Hemric v. Reed & Prince Mfg. Co., 54 N.C. App. 314, 283 S.E.2d 436 (1981), cert. denied, 304 N.C. 726, 288 S.E.2d 806 (1982); Hoffman v. Ryder Truck Lines, 306 N.C. 502, 293 S.E.2d 807 (1982).

Injury While Performing Task Which Was Not Part of Job. — Where it was not a part of the plaintiff's job to clean tote tank, the tote tank was not supposed to be cleaned and the cleaning of it did not further the business of the employer, the Industrial Commission was correct in concluding that plaintiff was "not about his work" when he was overcome by fumes while cleaning the tote tank. Parker v. Burlington Indus., Inc., 78 N.C. App. 517, 337 S.E.2d 589 (1985).

Where the employer did not own or control the public street on which plaintiff was injured, where plaintiff was not performing any duties for employer at the time of the injury and was not exposed to any greater danger than that of the public generally, plaintiff did not suffer an injury arising out of and in the course of his employment. Royster v. Culp, Inc., 343 N.C. 279, 470 S.E.2d 30 (1996).

Cocktail waitress's injuries sustained when she tried to escape from a guest of the resort who had kidnapped and sexually assaulted her, arose out of and in the course of her employment, even though the attack occurred after the employee's workday ended when she stopped on a resort road to assist the guest, who she assumed had car trouble. Culpepper v. Fairfield Sapphire Valley, 93 N.C. App. 242, 377 S.E.2d 777, aff'd, 325 N.C. 702, 386 S.E.2d 174 (1989).

If employee does something which he is not specifically ordered not to do by a then present superior and the thing he does furthers the business of the employer although it is not a part of the employee's job, an injury sustained by accident while he is so performing is in the course of employment. This has been characterized as "being about his work." Parker v. Burlington Indus., Inc., 78 N.C. App. 517, 337 S.E.2d 589 (1985).

A volunteer fireman, who is injured by the negligence of a fellow volunteer fireman, at a time when both are acting in the course and scope of their duties, is barred from pursuing a negligence action against the fellow fireman. Hix v. Jenkins, 118 N.C. App. 103, 453 S.E.2d 551 (1995).

Insect Stings. — To be compensable, an insect sting must be an injury by accident which arose out of and in the course of plaintiff's employment. Minter v. Osborne Co., 127 N.C. App. 134, 487 S.E.2d 835 (1997), cert. denied, 347 N.C. 401, 494 S.E.2d 415 (1997).

The increased risk test is the appropriate test for ascertaining whether an employee's injuries from an insect sting arose out of his employment. Minter v. Osborne Co., 127 N.C. App. 134, 487 S.E.2d 835 (1997), cert. denied, 347 N.C. 401, 494 S.E.2d 415 (1997).

Where plaintiff failed to show that he was at an increased risk of being stung than a member of the general public, the sting was not an accident or an injury arising out of the employment. Minter v. Osborne Co., 127 N.C. App. 134, 487 S.E.2d 835 (1997), cert. denied, 347 N.C. 401, 494 S.E.2d 415 (1997).

Injury Suffered in the Course of Employment. — In-home caregiver was injured in the course of her employment and her injuries arose out of her employment when the caregiver fell from a tree in her client's yard while picking a pear for her and the client to eat; thus her injury was compensable under G.S. 97-2(6). McGrady v. Olsten Corp., 159 N.C. App. 643, 583 S.E.2d 371, 2003 N.C. App. LEXIS 1520 (2003).

Employee sustained an injury to his back as a direct result of a specific traumatic incident arising out of and in the course of employment where the employee's testimony and the accident report established that the employee sustained a lower back injury while lifting a hoist off a drum; a subsequent car accident while en route to a doctor's appointment was not an intervening cause that precluded compensation for aggravation of the employee's work-related injury since the accident was not the fault of the employee. Cannon v. Goodyear Tire & Rubber Co., 171 N.C. App. 254, 614 S.E.2d 440, 2005 N.C. App. LEXIS 1254 (2005).

North Carolina Industrial Commission did not err by finding that an injured professional football player sustained a compensable injury by accident arising out of and in the course of his employment, under G.S. 97-2(6), as there was evidence to support the Commission's finding that the injury which the player suffered while playing during a game was unusual. Swift v. Richardson Sports, Inc., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 725 (Apr. 5, 2005).

Because there was evidence to support the finding by the North Carolina Industrial Commission that a police officer's injuries, which occurred on the officer's lunch break when a drunk driver ran over her after hitting the officer's car, arose out of the assault and thus out of her employment, as it could be inferred that the driver acted as such due to the fact that the employee was a police officer, the decision to award the employee benefits was affirmed. Rose v. City of Rocky Mount, — N.C. App. —, 637 S.E.2d 251, 2006 N.C. App. LEXIS 2413 (2006).

Stock handler, who repetitively moved 40-pound boxes, was injured in the course of employment because he suffered two injuries to his back while working, and although the second injury aggravated a preexisting condition from another work injury, it was compensable under G.S. 97-2(6). Ard v. Owens-Illinois, — N.C. App. —, 642 S.E.2d 257, 2007 N.C. App. LEXIS 684 (2007).

B. Arising Out of.

"Arising out of" relates to the origin or cause of the accident. Taylor v. Twin City

Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971), rev'd on other grounds, 281 N.C. 234, 188 S.E.2d 350 (1972); Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972); Battle v. Bryant Elec. Co., 15 N.C. App. 246, 189 S.E.2d 788, cert. denied, 281 N.C. 755, 191 S.E.2d 353 (1972); Strickland v. King, 32 N.C. App. 222, 231 S.E.2d 193, rev'd on other grounds, 293 N.C. 731, 239 S.E.2d 243 (1977); Powers v. Lady's Funeral Home, 57 N.C. App. 25, 290 S.E.2d 720, rev'd on other grounds, 306 N.C. 728, 295 S.E.2d 473 (1982).

The phrase "arising out of" has reference to the origin or cause of the accident. But this is not to say that the accident must have been caused by the employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

The term "arising out of" refers to the origin or causal connection of the accidental injury to the employment. For an accident to "arise out of" an employment, there must be some causal connection between the employment and the injury. Bare v. Wayne Poultry Co., 70 N.C. App. 88, 318 S.E.2d 534 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 484 (1985).

Rule of Causal Relation Enunciated. — An injury to be compensable must be shown to have resulted from an accident arising out of and in the course of the employment. This principle has come to be known and referred to as the rule of causal relation, i.e., that injury to be compensable must spring from the employment. This rule of causal relation is the very sheet anchor of the Workers' Compensation Act. It has kept the act within the limits of its intended scope — that of providing compensation benefits for industrial injuries, rather than branching out into the field of general health insurance benefits. Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E.2d 22 (1951); Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964).

The requirement that an injury to be compensable must be shown to have resulted from an accident arising out of and in the course of the employment is known and referred to as the "rule of causal relation." Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

The rule of causal relation is the very sheet anchor of the Workers' Compensation Act, and prevents the act from being a general health and insurance benefit act. Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

There Must Be a Causal Connection Between Employment and Injury. — The accident "arises out of" the employment when it occurs in the course of the employment and is the result of a risk involved therein or incident thereto, or to the conditions under which it is required to be performed. There must be some causal connection between the employment and the injury. Bolling v. Belk-White Co., 228 N.C. 749, 46 S.E.2d 838 (1948); Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964); Lee v. F.M. Henderson & Assocs., 284 N.C. 126, 200 S.E.2d 32 (1973).

An injury "arises out of" the employment when it occurs in the course of the employment and is a natural and probable consequence or incident of it, so that there is some causal relation between the accident and the performance of some service of the employment. Rewis v. New York Like Ins. Co, 226 N.C. 325, 38 S.E.2d 97 (1946); Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976).

There must be some causal relation between the employment and the injury. Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968); Stubblefield v. Watson Elec. Constr. Co., 277 N.C. 444, 177 S.E.2d 882 (1970); Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971), rev'd on other grounds, 281 N.C. 234, 188 S.E.2d 350 (1972); Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976); Gallimore v. Marilyn's Shoes, 30 N.C. App. 628, 228 S.E.2d 39 (1976), rev'd on other grounds, 292 N.C. 399, 233 S.E.2d 529 (1977); Hensley v. Caswell Action Comm., Inc., 35 N.C. App. 544, 241 S.E.2d 852 (1978), rev'd on other grounds, 296 N.C. 527, 251 S.E.2d 399 (1979); Pittman v. Twin City Laundry & Cleaners, 61 N.C. App. 468, 300 S.E.2d 899 (1983).

For an accident to arise out of the employment there must be some causal connection between the injury and the employment. When an injury cannot fairly be traced to the employment as a contributing proximate cause, or if it comes from a hazard to which the employee would have been equally exposed apart from the employment, or from the hazard common to others, it does not arise out of the employment. In such a situation the fact that the injury occurred on the employer's premises is immaterial. Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

An injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the injury and the performance of some service of the employment. Clark v. Burton Lines, 272 N.C. 433, 158 S.E.2d 569 (1968); Lee v. F.M. Henderson & Assocs., 17 N.C. App. 475, 195 S.E.2d 48, aff'd, 284 N.C. 126, 200 S.E.2d 32 (1973); Smith v. Dacotah Cotton Mills, Inc., 31 N.C. App. 687, 230 S.E.2d 772 (1976); Powers v. Lady's Funeral Home, 57 N.C. App. 25, 290 S.E.2d 720, rev'd on other grounds, 306 N.C. 728, 295 S.E.2d 473 (1982); Fortner v. J.K. Holding Co., 83 N.C. App. 101, 349 S.E.2d 296 (1986), aff'd, 319 N.C. 640, 357 S.E.2d 167 (1987).

The injury arises "out of" the employment when there is apparent to the rational mind upon consideration of all the circumstances a causal connection between the conditions under which the work is required to be performed and the resulting injury. Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972); Patterson v. Gaston County, 62 N.C. App. 544, 303 S.E.2d 182, cert. denied, 309 N.C. 822, 310 S.E.2d 351 (1983).

The term "arising out of" requires an employee to demonstrate a causal connection between the injury complained of and an accident which occurred in the course of employment. Buck v. Procter & Gamble Mfg. Co., 52 N.C. App. 88, 278 S.E.2d 268 (1981).

For an injury to be compensable under the North Carolina Workers' Compensation Act, it must be proximately caused by an accident arising out of and in the course of the employment, according to G.S. 97-2(6); where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury. Sufficient medical evidence supported a determination by the North Carolina Industrial Commission that an employee suffered a work related injury entitling her to temporary total disability compensation where her doctor testified that her third neck injury, one that occurred in the course of her employment, was the injury that caused a ruptured disc, and where medical records and the employee's testimony supported the medical findings. Towns v. Epes Transp., 163 N.C. App. 566, 594 S.E.2d 113, 2004 N.C. App. LEXIS 421 (2004), cert. denied, 358 N.C. 549, 600 S.E.2d 468 (2004).

Finding that the employee's left ankle injury was causally related to the employee's compensable right wrist injury was supported by sufficient evidence, including the employee's testimony that the employee could have broken the fall that caused the ankle injury if the employee's wrist had not been injured. Everett v. N.C. Indus. Comm'n No. 102217 Well Care & Nursing Servs., — N.C. App. —, 636 S.E.2d 824, 2006 N.C. App. LEXIS 2313 (2006).

But there is no requirement that the injury should be foreseen if it resulted from the employment, nor does the employment have to be the "sole" cause of the injury. Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971), rev'd on other grounds, 281 N.C. 234, 188 S.E.2d 350 (1972); Gallimore v. Marilyn's Shoes, 30 N.C. App. 628, 228 S.E.2d 39 (1976), rev'd on other grounds, 292 N.C. 399, 233 S.E.2d 529 (1977).

While there must be some causal connection between the employment and the injury, nevertheless it is sufficient if the injury is one which, after the event, may be seen to have had its origin in the employment, and it need not be shown that it is one which should have been foreseen or expected. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949); Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951); Hinkle v. City of Lexington, 239 N.C. 105, 79 S.E.2d 220 (1953); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Starr v. Charlotte Paper Co., 8 N.C. App. 604, 175 S.E.2d 342 (1970); Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971), rev'd on other grounds, 281 N.C. 234, 188 S.E.2d 350 (1972); Goldston v. Goldston Concrete Works, Inc., 29 N.C. App. 717, 225 S.E.2d 332, cert. denied, 290 N.C. 660, 228 S.E.2d 452 (1976); Gallimore v. Marilyn's Shoes, 30 N.C. App. 628, 228 S.E.2d 39 (1976), rev'd on other grounds, 292 N.C. 399, 233 S.E.2d 529 (1977).

The words "out of" as used in the act refer to the origin or cause of the accident and import that there must be some causal relation between the employment and the injury, but not that the injury ought to have been foreseen or expected. Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955).

And Fact That Injury Could Not Have Been Anticipated Is Immaterial. — If it can be seen that the injury had its origin in the employment, it arises out of such employment, and the fact that it could not have been anticipated is immaterial. Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930).

Injury Arises Out of Employment Where Reasonable Relationship Exists. — Where any reasonable relationship to employment exists, or employment is a contributory cause, the court is justified in upholding the award as "arising out of employment." Kiger v. Bahnson Serv. Co., 260 N.C. 760, 133 S.E.2d 702 (1963); Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968); Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972); Bartlett v. Duke Univ., 284 N.C. 230, 200 S.E.2d 193 (1973); Brown v. Jim Brown's Serv. Station, 45 N.C. App. 255, 262 S.E.2d 700 (1980).

Injury Must Spring or Originate from Employment. — "Arising out of" has been defined to mean coming from the work the employee is to do, or out of the services he is to perform, and as a natural result of one of the risks of the employment. The injury must spring from the employment or have its origin therein. Bolling v. Belk-White Co., 228 N.C. 749, 46 S.E.2d 838 (1948); Hinkle v. City of

Lexington, 239 N.C. 105, 79 S.E.2d 220 (1953); Lewter v. Abercrombie Enters., Inc., 240 N.C. 399, 82 S.E.2d 410 (1954); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968). See Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951).

Employment Must Contribute in Some Reasonable Degree Thereto. — In order for an accident to arise out of the employment it is not required that a hazard of the employment be the sole cause of the accident, but it is sufficient if the physical aspects of the employment contribute in some reasonable degree toward bringing about or intensifying the condition which renders the employee susceptible to the accident and consequent injury. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951).

Recreational Activities Arranged by Employer. — Appellate court erred in affirming the North Carolina Industrial Commission's decision that found the employee was entitled to temporary total disability workers' compensation benefits based on a cervical strain injury the employee sustained when the go-cart the employee was driving at a "Fun Day" recreational event arranged by the employer struck another go-cart; the employee, who was a volunteer emergency medical services captain for the employer, was not required to attend or participate in the recreational event, and thus was not injured in activity "arising out of" the employment of the employee. Frost v. Salter Path Fire & Rescue, 361 N.C. 181, 639 S.E.2d 429, 2007 N.C. LEXIS 35 (2007).

Paid Break from Employer's Premises. — In making the determination whether an injury that occurred off the employer's premises during a scheduled break is within the scope of employment, there are several factors to consider: (1) the duration of the break period; (2) whether the employee is paid during the break period; (3) whether the employer provides a place for employees to take breaks, including vending facilities; (4) whether the employer permits off-premises breaks, or has acquiesced in such despite policies against such breaks; and (5) the proximity of the off-premises location where the employee was injured to the employment site. Shaw v. Smith & Jennings, Inc., 130 N.C. App. 442, 503 S.E.2d 113 (1998), cert. denied, 349 N.C. 363, 525 S.E.2d 175 (1998).

The Pickrell presumption that the employee's death arose out of his employment applied in a widow's action to recover death benefits, even though the medical cause of death was known to be positional asphyxia, where the employee was found dead in a one-vehicle accident while on a paid break from his employer's premises. Shaw v. Smith & Jennings, Inc., 130 N.C. App. 442, 503 S.E.2d 113 (1998), cert. denied, 349 N.C. 363, 525 S.E.2d 175 (1998).

And the Risk of Injury Must Be Incidental to Employment. — "Arising out of" means arising out of the work the employee is to do, or out of the service he is to perform. The risk must be incidental to the employment. Bell v. Dewey Bros., 236 N.C. 280, 72 S.E.2d 680 (1952); Hinkle v. City of Lexington, 239 N.C. 105, 79 S.E.2d 220 (1953); Poteete v. North State Pyrophyllite Co., 240 N.C. 561, 82 S.E.2d 693 (1954); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

To have its origin in the employment, an injury must come from a risk which might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service when he entered employment. Bartlett v. Duke Univ., 284 N.C. 230, 200 S.E.2d 193 (1973).

Where the cause of the accident is unexplained but the accident is a natural and probable result of a risk of the employment, the finding of the Industrial Commission that the accident arose out of the employment will be sustained. Battle v. Bryant Elec. Co., 15 N.C. App. 246, 189 S.E.2d 788, cert. denied, 281 N.C. 755, 191 S.E.2d 353 (1972).

Employment Must Be a Contributing Proximate Cause to Injury. — Where an injury cannot fairly be traced to the employment as a contributing proximate cause, it does not arise out of the employment. Lewter v. Abercrombie Enters., Inc., 240 N.C. 399, 82 S.E.2d 410 (1954); Poteete v. North State Pyrophyllite Co., 240 N.C. 561, 82 S.E.2d 693 (1954); Hardy v. Small, 246 N.C. 581, 99 S.E.2d 862 (1957); Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966); Bartlett v. Duke Univ., 284 N.C. 230, 200 S.E.2d 193 (1973); Eaton v. Klopman Mills, Inc., 2 N.C. App. 363, 163 S.E.2d 17 (1968); Battle v. Bryant Elec. Co., 15 N.C. App. 246, 189 S.E.2d 788, cert. denied, 281 N.C. 755, 191 S.E.2d 353 (1972).

The test of whether an accidental injury "arises out of" the employment is whether a contributing proximate cause of the injury was a risk inherent or incidental to the employment and one to which the employee would not have been equally exposed apart from the employment. Fortner v. J.K. Holding Co., 83 N.C. App. 101, 349 S.E.2d 296 (1986), aff'd, 319 N.C. 640, 357 S.E.2d 167 (1987).

To determine whether an injury or death by accident arose out of the employment, it is necessary to examine the findings of specific crucial facts. The basic question is whether the employment was a contributing cause of the injury. Roberts v. Burlington Indus., Inc., 321 N.C. 350, 364 S.E.2d 417 (1988).

Where a hospital employee was assaulted and injured by a man when she was going from her office to the morgue to retrieve records, and the employer acknowledged that the assault upon the employee occurred "in the course of" her employment but argued that it did not "arise out of" her employment, the evidence supported the finding that the employment was a contributing cause of the injury; thus, the employee was awarded total disability compensation, medical expenses, and psychological expenses under G.S. 97-2(6). D'Aquisto v. Mission St. Joseph's Health Sys., 171 N.C. App. 216, 614 S.E.2d 583, 2005 N.C. App. LEXIS 1269 (2005), rev'd on other grounds, review improvidently denied, in part, 360 N.C. 567, 633 S.E.2d 89 (2006).

But Need Not Be the Sole Causative Force. — Where a claimant's right to recovery is based on an injury by accident, the employment need not be the sole causative force to render the injury compensable. Walston v. Burlington Indus., 49 N.C. App. 301, 271 S.E.2d 516 (1980), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982).

As the Moving Force Can Be Something Other than Employment. — When one speaks of an event "arising out of employment," the initiative, the moving force, is something other than the employment; the employment is thought of more as a condition out of which the event arises than as the force producing the event in affirmative fashion. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

No Competent Evidence of Causation. — North Carolina Industrial Commission properly found that no competent evidence supported a conclusion that a workers' compensation claimant's back injury occurred as a result of a traumatic incident where the claimant's credibility as it related to his testimony about the events that caused his back injury and the competency of his medical causation evidence were at issue; the claimant's medical evidence of causation was little more than speculation. Rogers v. Smoky Mt. Petroleum Co., 172 N.C. App. 521, 617 S.E.2d 292, 2005 N.C. App. LEXIS 1779 (2005).

Employment Must Put Employee in Place of Accident. — For an accident to "arise out of" the employment, it is necessary that the conditions or obligations of the employment put the employee in the position or at the place where the accident occurs. Pittman v. Twin City Laundry & Cleaners, 61 N.C. App. 468, 300 S.E.2d 899 (1983).

And Subject Him to Additional Risks Incident Thereto. — Where the conditions and obligations of the employment required the claimant to be at a place where the accident occurred, subjecting him to additional risks incident thereto, the injury arose out of the employment. Powers v. Lady's Funeral Home, 306 N.C. 728, 295 S.E.2d 473 (1982).

Hazard Must Not Be Common to Public. — An accident arises out of employment when it is the result of a risk or hazard incident to the employment and is not from a hazard common to the public. Martin v. Bonclarken Ass'y, 35 N.C. App. 489, 241 S.E.2d 848, rev'd on other grounds, 293 N.C. 540, 251 S.E.2d 403 (1979).

Where an injury cannot fairly be traced to the employment as a contributing proximate cause, or comes from a hazard to which the worker would have been equally exposed apart from the employment or from a hazard common to others, it does not arise out of the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. Bryan v. Loving Co., 222 N.C. 724, 24 S.E.2d 751 (1943); Pope v. Goodson, 249 N.C. 690, 107 S.E.2d 524 (1959); Smith v. Dacotah Cotton Mills, Inc., 31 N.C. App. 687, 230 S.E.2d 772 (1976).

Occurrence on Employer's Premises Is Not Dispositive. — Even though an accident occurred on the employer's premises at a time when the employee was within the compass of his employment, this alone is insufficient to justify a finding that the injury arose out of the employment. Strickland v. King, 293 N.C. 731, 239 S.E.2d 243 (1977).

Employee Must Be Engaged in Authorized Activity in Furtherance of Employer's Business. — An accident arises out of employment when it occurs while the employee is engaged in some activity or duty which he is authorized to undertake, and which is calculated to further, indirectly or directly, the employer's business. Smith v. Central Transp., 51 N.C. App. 316, 276 S.E.2d 751 (1981).

And Must Be Acting for Employer's Benefit at Time of Accident. — Compensability of a claim basically turns upon whether or not the employee was acting for the benefit of his employer to any appreciable extent when the accident occurred. Such a determination depends largely upon the unique facts of each particular case; in close cases, the benefit of the doubt concerning this issue should be given to the employee in accordance with the established policy of liberal construction and application of the Workers' Compensation Act. Hoffman v. Ryder Truck Lines, 306 N.C. 502, 293 S.E.2d 807 (1982).

Preexisting Injury Barred Recovery. — North Carolina Industrial Commission properly found that a claimant's preexisting back injury barred his recovery where: (1) through the year, the claimant received pain treatment and physical therapy for a preexisting back injury; (2) the claimant's testimony of a subsequent back injury was not supported by other competent evidence; and (3) the expert medical testimony failed to establish that the claimant's current back problem was either caused or aggravated by an accident or specific traumatic work-related event. Rogers v. Smoky Mt. Petroleum Co., 172 N.C. App. 521, 617 S.E.2d 292, 2005 N.C. App. LEXIS 1779 (2005).

Whether an accident "arises out of the employment" is a mixed question of law and fact. Ridout v. Rose's 5-10-25¢ Stores, 205 N.C. 423, 171 S.E. 642 (1933); Matthews v. Carolina Std. Corp., 232 N.C. 229, 60 S.E.2d 93 (1950); Poteete v. North State Pyrophyllite Co., 240 N.C. 561, 82 S.E.2d 693 (1954); Alford v. Quality Chevrolet Co., 246 N.C. 214, 97 S.E.2d 869 (1957); Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962); Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962); Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964); Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964); Smith v. Dacotah Cotton Mills, Inc., 31 N.C. App. 687, 230 S.E.2d 772 (1976).

Which Must Be Determined on a Case-by-Case Basis. — The term "arising out of employment" must be interpreted in the light of the facts and circumstances of each case. Plemmons v. White's Serv., 213 N.C. 148, 195 S.E. 370 (1938); Taylor v. Town of Wake Forest, 228 N.C. 346, 45 S.E.2d 387 (1947); Berry v. Colonial Furn. Co., 232 N.C. 303, 60 S.E.2d 97 (1950); Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964); Clark v. Burton Lines, 272 N.C. 433, 158 S.E.2d 569 (1968).

Whether the injury "arose out of" the employment is to be decided on the facts of the individual case and cannot be precisely defined. Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971), rev'd on other grounds, 281 N.C. 234, 188 S.E.2d 350 (1972); Gallimore v. Marilyn's Shoes, 30 N.C. App. 628, 228 S.E.2d 39 (1976), rev'd on other grounds, 292 N.C. 399, 233 S.E.2d 529 (1977).

Claimant Failed to Meet His Burden of Proof. — North Carolina Industrial Commission properly held that a claimant failed to show that he sustained a work-related back injury where: (1) he claimed having reported the injury to his supervisor, but his co-workers testified that he did not mention an injury to them, nor did they notice any change in the claimant's physical activities during the day; (2) he did not report the injury to his treating physician when he went for a previously-scheduled epidural injection; (3) he did not inform a second doctor that he had been undergoing treatment for back pain; and (4) he erroneously informed the second doctor that he had been out of work. Rogers v. Smoky Mt. Petroleum Co., 172 N.C. App. 521, 617 S.E.2d 292, 2005 N.C. App. LEXIS 1779 (2005).

Effect of Commission's Findings. — Whether an accident arises out of the employment is a mixed question of fact and law, and the finding of the Commission is conclusive if supported by any competent evidence; otherwise, not. Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976).

Whether an accident grew out of the employment is a mixed question of law and fact which the court has the right to review on appeal. If the detailed findings of fact force a conclusion opposite that reached by the Commission, it is the duty of the court to reverse the Commission. Warren v. City of Wilmington, 43 N.C. App. 748, 259 S.E.2d 786 (1979).

Claimant Lacked Credibility. — North Carolina Industrial Commission properly considered all of the competent evidence and properly found that a workers' compensation claimant lacked credibility. Rogers v. Smoky Mt. Petroleum Co., 172 N.C. App. 521, 617 S.E.2d 292, 2005 N.C. App. LEXIS 1779 (2005).

C. In the Course of.

Time, Place and Circumstances. — The words "in the course of" as used in the act refer to the time, place, and circumstances under which the injury occurs. Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955); Alford v. Quality Chevrolet Co., 246 N.C. 214, 97 S.E.2d 869 (1957); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Martin v. Bonclarken Ass'y, 296 N.C. 540, 251 S.E.2d 403 (1979); Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (1982); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968); Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971), rev'd on other grounds, 281 N.C. 234, 188 S.E.2d 350 (1972); Gallimore v. Marilyn's Shoes, 30 N.C. App. 628, 228 S.E.2d 39 (1976), rev'd on other grounds, 292 N.C. 399, 233 S.E.2d 529 (1977); Strickland v. King, 32 N.C. App. 222, 231 S.E.2d 193, rev'd on other grounds, 293 N.C. 731, 239 S.E.2d 243 (1977); Brown v. Jim Brown's Serv. Station, 45 N.C. App. 255, 262 S.E.2d 700 (1980); Powers v. Lady's Funeral Home, 57 N.C. App. 25, 290 S.E.2d 720, rev'd on other grounds, 306 N.C. 728, 295 S.E.2d 473 (1982); Patterson v. Gaston County, 62 N.C. App. 544, 303 S.E.2d 182, cert. denied, 309 N.C. 822, 310 S.E.2d 351 (1983); Bare v. Wayne Poultry Co., 70 N.C. App. 88, 318 S.E.2d 534 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 484 (1985).

It is the conjunction of all three factors, time, place and circumstances, that brings a particular accident within the concept of course of employment. If, in addition to this, the accident arose out of employment, then any injury resulting therefrom is compensable under the act. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Time, Place and Circumstances. — Where an employee was struck and fatally injured by a car while walking to work across a shopping mall parking lot, his injuries were not compensable, as the North Carolina Industrial

Commission properly found that the employee was not exposed to any traffic danger greater than the public in general. Deseth v. LensCrafters, Inc., 160 N.C. App. 180, 585 S.E.2d 264, 2003 N.C. App. LEXIS 1736 (2003).

What Time Is Covered. — With respect to time, the course of employment begins a reasonable time before actual work begins, and continues for a reasonable time after work ends, and includes intervals during the workday for rest and refreshment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

With respect to time, the course of employment begins a reasonable time before work begins and continues for a reasonable time after work ends. Pittman v. Twin City Laundry & Cleaners, 61 N.C. App. 468, 300 S.E.2d 899 (1983).

What Place Is Covered. — With respect to place, the course of employment includes the premises of the employer. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968); Gallimore v. Marilyn's Shoes, 30 N.C. App. 628, 228 S.E.2d 39 (1976), rev'd on other grounds, 292 N.C. 399, 233 S.E.2d 529 (1977).

"Time and place" do not necessarily mean the regular hours of employment and on the premises of the employer. If the employee is doing work at the direction and for the benefit of the employer, the time and place of work are for the benefit of the employer and a part of the employment of the employee. This satisfies the condition of time and place although the work is done off the premises of the employer and after regular working hours. Brown v. Jim Brown's Serv. Station, 45 N.C. App. 255, 262 S.E.2d 700 (1980).

Going to and from Work. — An employee may be in the course of his employment when he is on the way to the place of his duties, leaving the place of his duties at the end of the day, or leaving upon learning that there was no work for him to do. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

The time of employment includes the working hours as well as such reasonable time as is required to pass to and from the employer's premises. Gallimore v. Marilyn's Shoes, 30 N.C. App. 628, 228 S.E.2d 39 (1976), rev'd on other grounds, 292 N.C. 399, 233 S.E.2d 529 (1977).

What Activity Is Covered. — Where the employee is engaged in activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business, the circumstances are such as to be within the course of employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968); Pittman v. Twin City Laundry & Cleaners, 61 N.C. App. 468, 300 S.E.2d 899 (1983).

The fact that the employee is not engaged in the actual performance of the duties of his job does not preclude an accident from being one within the course of employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

With respect to circumstances, injuries within the course of employment include those sustained while the employee is doing what a man so employed may reasonably do within a time which he is employed and at a place where he may reasonably be during that time to do that thing. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968); Brown v. Jim Brown's Serv. Station, 45 N.C. App. 255, 262 S.E.2d 700 (1980).

An accident arising "in the course of" the employment is one which occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing; or one which occurs in the course of the employment and as the result of a risk involved in the employment, or incident to it, or to conditions under which it is required to be performed. Clark v. Burton Lines, 272 N.C. 433, 158 S.E.2d 569 (1968); Goldston v. Goldston Concrete Works, Inc., 29 N.C. App. 717, 225 S.E.2d 332, cert. denied, 290 N.C. 660, 228 S.E.2d 452 (1976); Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (1982).

The words "in the course of" the employment refer to the time, place, and circumstances of the accident, and an accident arises in the course of the employment if it occurs while the employee is engaged in a duty which he is authorized or directed to undertake or in an activity incidental thereto. Battle v. Bryant Elec. Co., 15 N.C. App. 246, 189 S.E.2d 788, cert. denied, 281 N.C. 755, 191 S.E.2d 353 (1972).

An injury occurs "in the course of" the employment when the injury occurs during the period of employment at a place where an employee's duties are calculated to take him, and under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business. Fortner v. J.K. Holding Co., 83 N.C. App. 101, 349 S.E.2d 296 (1986), aff'd, 319 N.C. 640, 357 S.E.2d 167 (1987).

Injury During Hours and at Place of Employment While Engaged in Duties. — A conclusion that an injury arose in the course of the employment is required where there is evidence that it occurred during the hours of the employment and at the place of the employment while the claimant was actually engaged in the performance of the duties of the employment. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968); Pittman v. Twin City Laundry & Cleaners, 61 N.C. App. 468, 300 S.E.2d 899 (1983).

Injury While Performing Task Which

Was Not Part of Job. — Where it was not a part of the plaintiff's job to clean tote tank, the tote tank was not supposed to be cleaned and the cleaning of it did not further the business of the employer, the Industrial Commission was correct in concluding that plaintiff was "not about his work" when he was overcome by fumes while cleaning the tote tank. Parker v. Burlington Indus., Inc., 78 N.C. App. 517, 337 S.E.2d 589 (1985).

Performance of Special Errand. — Where automobile accident occurred as plaintiff was in route from worksite to a hospital in order to transport a fellow employee, even though travel was not an incident of plaintiff's employment as a roofer and construction worker, the journey was brought into the course of employment because plaintiff was performing a "special errand" that directly benefited the employer. Aaron v. New Fortis Homes, Inc., 127 N.C. App. 711, 493 S.E.2d 305 (1997).

The decedent's fatal accident occurred in the course of his employment with his employer, where the decedent was killed in a one-vehicle accident while on a paid break, there was no food or drink on the employer's premises, and the employer acquiesced in allowing employees to go off the job site to obtain refreshments. Shaw v. Smith & Jennings, Inc., 130 N.C. App. 442, 503 S.E.2d 113 (1998), cert. denied, 349 N.C. 363, 525 S.E.2d 175 (1998).

An employee's kidnapping and murder by a former co-employee arose out of and in the course of her employment with employer, where the employee had prepared an informational sheet on unemployment benefits and she had been directed by her employer to talk to the former employee regarding his unemployment benefits. Hauser v. Advanced Plastiform, Inc., 133 N.C. App. 378, 514 S.E.2d 545 (1999).

Employee who was injured when thrown from a pick-up truck while riding from residence to a site where supervisor wanted employee to pick up a dump truck was on a special errand for employer and was covered under North Carolina's Workers' Compensation Act. Osmond v. Carolina Concrete Specialties, 151 N.C. App. 541, 568 S.E.2d 204, 2002 N.C. App. LEXIS 906 (2002), review denied, 356 N.C. 676, 577 S.E.2d 631 (2003).

If employee does something which he is not specifically ordered not to do by a then present superior and the thing he does furthers the business of the employer although it is not a part of the employee's job, an injury sustained by accident while he is so performing is in the course of employment. This has been characterized as "being about his work." Parker v. Burlington Indus., Inc., 78 N.C. App. 517, 337 S.E.2d 589 (1985).

Preliminary preparations by an employee, reasonably essential to the proper performance of some required task or service, are generally regarded as being within the scope of employment, and any injury suffered while in the act of preparing to do a job is compensable. Thompson v. Refrigerated Transp. Co., 32 N.C. App. 693, 236 S.E.2d 312 (1977).

In tending to his personal physical needs, an employee is indirectly benefiting his employer. Therefore, the course of employment continues when the employee goes to the washroom, takes a smoke break, takes a break to partake of refreshment, goes on a personal errand involving temporary absence from his post of duty, or voluntarily leaves his post to assist another employee. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Activities which an employee undertakes in pursuit of his personal comfort constitute part of the circumstances of the course of employment. Dayal v. Provident Life & Accident Ins. Co., 71 N.C. App. 131, 321 S.E.2d 452 (1984).

Mealtime is within the course of employment, even where such time is completely free for the employees. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

When an employee is required to live on the premises, either by his contract of employment or by the nature of the employment, and is continuously on call, whether or not actually on duty, the entire period of his presence on the premises pursuant to this requirement is deemed included in the course of employment. Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976).

Living in Company Housing. — Where migrant farm worker who lived in company housing was injured while taking a shower after work, although the nature of his employment arguably required that he live on the premises, at the time of his injury he was not on call, and the connection between his employment and his injury was not sufficient to establish that the injury arose out of and in the course of his employment. Jauregui v. Carolina Vegetables, 112 N.C. App. 593, 436 S.E.2d 268 (1993).

Accident While Off-Duty. — Ordinarily, when an employee is off duty the relationship of master and servant is suspended; therefore, there is no causal relation between the employment and an accident which happens during such time. Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962).

Evidence Was Sufficient to Show Plaintiff's Injurious Exposure Occurred During Course of Employment. — Where the record disclosed that plaintiff did not continue earning wages after 1969, her unsuccessful attempts to work during the years 1969 to 1980, when considered in conjunction with the medical evidence, merely demonstrated her total incapacity to earn wages; thus the commission's determination that plaintiff's last injurious exposure to the hazards of her occupational disease occurred while she was employed in 1968, and its order that employer and its carrier in 1968 pay her an award under the provisions of G.S. 97-29 in effect on October 1, 1968, would be affirmed. Gregory v. Sadie Cotton Mills, Inc., 90 N.C. App. 433, 368 S.E.2d 650, cert. denied, 322 N.C. 835, 371 S.E.2d 277 (1988).

Where an employee, who was a traveling nursing assistant, had traveled to a patient's home, left on a personal errand, and was injured in an automobile accident on her return to the patient's home, the full North Carolina Industrial Commission's award of temporary total disability benefits was upheld on appeal, because the personal errand had been completed and the employee had resumed her business travel route when the accident occurred; thus, the accident was properly determined to have occurred in the course of employment, making the injury compensable. Chavis v. TLC Home Health Care, 172 N.C. App. 366, 616 S.E.2d 403, 2005 N.C. App. LEXIS 1770 (2005).

Mall Parking Lot Is Not Employer's Premises. — Where an employee was struck and killed by a car while walking to work across a shopping mall parking lot, he did not sustain an injury by accident while in the course and scope of his employment under G.S. 97-2(6); since the right of the employer under its lease to use the parking lot and its obligation to share in the lot's maintenance costs was not sufficient control over the lot to allow a finding that it was within the employer's premises, the limited exception to the coming and going rule was inapplicable. Deseth v. LensCrafters, Inc., 160 N.C. App. 180, 585 S.E.2d 264, 2003 N.C. App. LEXIS 1736 (2003).

Performance of Special Errand. — Where an employee was struck and fatally injured by a car while walking to work across a shopping mall parking lot, the fact that he was carrying work-related materials and was responsible for opening his employer's store did not mean he was running a "special errand" for his employer that made his injuries compensable. Deseth v. LensCrafters, Inc., 160 N.C. App. 180, 585 S.E.2d 264, 2003 N.C. App. LEXIS 1736 (2003).

D. Risks Incident to the Employment.

The injury must come from a risk which might have been contemplated by a reasonable person as incidental to the service when he entered the employment. Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972).

When Risk Is Incidental to Employment. — A risk may be said to be incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected with the service owing to the special nature of the employment. Goodwin v. Bright, 202 N.C. 481, 163 S.E. 576 (1932); Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972); Smith v. Dacotah Cotton Mills, Inc., 31 N.C. App. 687, 230 S.E.2d 772 (1976).

The causative danger need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence. Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972); Bartlett v. Duke Univ., 284 N.C. 230, 200 S.E.2d 193 (1973); Patterson v. Gaston County, 62 N.C. App. 544, 303 S.E.2d 182, cert. denied, 309 N.C. 822, 310 S.E.2d 351 (1983).

But must have been peculiar to the work and not common to the neighborhood, as well as incidental to the character of the business and not independent of the relation of master and servant. Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962); Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972); Bartlett v. Duke Univ., 284 N.C. 230, 200 S.E.2d 193 (1973).

Injury by accident is not compensable if it results from a hazard to which the public generally is subject. Battle v. Bryant Elec. Co., 15 N.C. App. 246, 189 S.E.2d 788, cert. denied, 281 N.C. 755, 191 S.E.2d 353 (1972).

When the cause of injury is known and is independent of, unrelated to, and apart from the employment, and results from a hazard to which others are equally exposed, compensation will not be allowed. Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963); Battle v. Bryant Elec. Co., 15 N.C. App. 246, 189 S.E.2d 788, cert. denied, 281 N.C. 755, 191 S.E.2d 353 (1972).

Injury Due to Peculiar Hazard of Employee's Location. — A causal relation exists between the accident and the employment when the duties of the employment require the employee to be in a place at which he is exposed to a risk of injury to which he would not otherwise be subject, and while there he is injured by an accident due to the peculiar hazard of that location. Stubblefield v. Watson Elec. Constr. Co., 277 N.C. 444, 177 S.E.2d 882 (1970); Hensley v. Caswell Action Comm., Inc., 35 N.C. App. 544, 241 S.E.2d 852 (1978), rev'd on other grounds, 296 N.C. 527, 251 S.E.2d 399 (1979).

Accident Caused Partly or Solely by Idiopathic Condition. — Where the accident and resultant injury arise out of both the idiopathic condition of the workman and hazards incident to the employment, the employer is liable. But not so where the idiopathic condition is the sole cause of the injury. Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963).

Where the employment subjects a worker to a special or particular hazard from the elements, such as excessive heat or cold likely to produce sunstroke or freezing, death or disability resulting from such cause usually comes within the purview of the compensation acts; the test is whether the employment subjects the worker to a greater hazard or risk than that to which he or she otherwise would be exposed. Dillingham v. Yeargin Constr. Co., 320 N.C. 499, 358 S.E.2d 380, cert. denied, 320 N.C. 639, 360 S.E.2d 84 (1987).

Risk of Injury from Lightning. — The generally recognized rule is that where the injured employee is by reason of his employment peculiarly or specially exposed to a risk of injury from lightning, that is, one greater than other persons in the community, death or injury resulting from this source usually is compensable as an injury by accident arising out of and in the course of the employment. Pope v. Goodson, 249 N.C. 690, 107 S.E.2d 524 (1959).

Increased Risk of Assault While Going from One Part to Another Part of Workplace. — Substantial evidence supported the conclusion under G.S. 97-2(6) that hospital employee who went from one part of the hospital to another part while on business was subjected to an increased risk of assault because there were fewer people present along her route. D'Aquisto v. Mission St. Joseph's Health Sys., 171 N.C. App. 216, 614 S.E.2d 583, 2005 N.C. App. LEXIS 1269 (2005), rev'd on other grounds, review improvidently denied, in part, 360 N.C. 567, 633 S.E.2d 89 (2006).

VII. INJURIES WHILE ACTING FOR BENEFIT OF SELF OR THIRD PERSON.

Acts which are necessary to the health and comfort of an employee while at work, though personal to himself and not technically acts of service, such as visits to the washroom, are incidental to the employment. Rewis v. New York Life Ins. Co., 226 N.C. 325, 38 S.E.2d 97 (1946).

Activities which are undertaken for the personal comfort of the employee are considered part of the "circumstances" element of the course of employment. Spratt v. Duke Power Co., 65 N.C. App. 457, 310 S.E.2d 38 (1983).

Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment. Spratt v. Duke Power Co., 65 N.C. App. 457, 310 S.E.2d 38 (1983).

Personal Comfort Not Applicable. — Nurse's dropping off time reports required to be turned into office that day on her way to patient's home was not a distinct and total departure on a personal errand. Munoz v. Caldwell Mem'l Hosp., 171 N.C. App. 386, 614 S.E.2d 448, 2005 N.C. App. LEXIS 1265 (2005).

Acts of employee for the benefit of third persons generally preclude recovery of compensation for accidental injuries sustained during the performance of such acts, usually on the ground that they are not incidental to any service which the employee is obligated to render under his contract of employment, and the injuries therefore cannot be said to arise out of and in the course of the employment. Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976).

An injury to an employee while he is performing acts for the benefit of third persons is not compensable if the acts are performed solely for the benefit or purpose of the employee or third person. Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971). See also Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963).

Even If Employee Was Acting with Consent of Employer. — Where an employee at the time of his injury is performing acts for his own benefit, and not connected with his employment, the injury does not arise out of his employment. This is true even if the acts are performed with the consent of the employer and the employee is on the payroll at the time. Lewis v. W.B. Lea Tobacco Co, 260 N.C. 410, 132 S.E.2d 877 (1963); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

And Even If He Was Injured While on a Mission for Employer. — If employee's acts are not connected with his employment but are for the benefit of himself and third persons at the time of his injury, he is not entitled to compensation, even if he is injured while he is required by his employer to be away from his home and place of regular employment for a period of time on a mission for his employer. Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963); Burton v. American Nat'l Ins. Co, 10 N.C. App. 499, 179 S.E.2d 7 (1971).

Unless Employee's Acts Were of Benefit to Employer. — Whether an injury to an employee received while performing acts for the benefit of third persons arises out of the employment depends upon whether the acts of the employee are for the benefit of the employer to any appreciable extent, or whether the acts are solely for the benefit or purpose of the employee or a third person. Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955).

An injury to an employee while he is performing acts for the benefit of third persons is not compensable unless the acts benefit the employer to an appreciable extent. Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963); Hales v. North Hills Constr. Co., 5 N.C. App. 564, 169 S.E.2d 24 (1969); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971); Roberts v. Burlington Indus., Inc., 321 N.C. 350, 364 S.E.2d 417 (1988).

Where competent proof exists that the employee understood, or had reasonable grounds to believe, that the act for the benefit of a third person resulting in injury was incidental to his employment, or was such as would prove beneficial to his employer's interests, or was encouraged by the employer in the performance of the act or similar acts for the purpose of creating a feeling of good will, or authorized so to do by common practice or custom, compensation may be recovered, since then a causal connection between the employment and the accident may be established. Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976).

Plaintiff, who was injured when she fell off a chair in her home while hanging plants on her porch, which plants she had been instructed by her employer to dispose of incident to the closing of employer's place of business, was not entitled to compensation. Fortner v. J.K. Holding Co., 83 N.C. App. 101, 349 S.E.2d 296 (1986), aff'd, 319 N.C. 640, 357 S.E.2d 167 (1987); Fortner v. J.K. Holding Co., 319 N.C. 640, 357 S.E.2d 167 (1987).

Employee Killed While Assisting Injured Pedestrian. — Death of employee who, while returning home from a business trip, was struck by a car and killed as he assisted an injured pedestrian who had no connection to the employee's duties or his employer's business did not arise out of the employment and thus was not compensable under the Workers' Compensation Act. Roberts v. Burlington Indus., Inc., 321 N.C. 350, 364 S.E.2d 417 (1988).

Special Errand and Dual Purpose Rule. — Plaintiff employee, who was injured while on her way to a company gathering with her supervisor, the company president, when she was asked to run several errands for her supervisor, i.e. to go by the post office, to go by the mall to pick up pictures of her supervisor's vacation, and to turn the car around and go look at a "trailer for rent," the reasons for which gathering were to alleviate office tensions, celebrate several birthdays and cement relationships, was entitled to compensation under the special errand rule and the dual purpose rule. McBride v. Peony Corp., 84 N.C. App. 221, 352 S.E.2d 236 (1987).

As to statement and application of "dual purpose rule," see Felton v. Hospital Guild, 57 N.C. App. 33, 291 S.E.2d 158, aff'd by divided S. Ct. as law of case but without precedential value, 307 N.C. 121, 296 S.E.2d 297 (1982).

Fall While in Rest Room. — Evidence tending to show that the employee was suffering from a disease which weakened him and subjected him to frequent fainting spells, that during the course of his employment he went to the men's washroom, and while there felt faint, and in seeking fresh air, went to the open window, slipped on the tile floor, and fell through the window to his death, held sufficient to support the finding of the Industrial Commission that his death was the result of an accident arising out of and in the course of his employment. Rewis v. New York Life Ins. Co., 226 N.C. 325, 38 S.E.2d 97 (1946).

Vacation Pleasure Trip Furnished by Employer. — An accidental injury received by an employee while riding in a truck on a vacation pleasure trip does not arise out of the employment, notwithstanding the fact that the employer furnished the vacation trip as a matter of goodwill and personal relations among the employees and paid the entire expenses of the trip in accordance with its agreement entered into at the time of the employment as a part of the remuneration and inducement to its employees. Berry v. Colonial Furn. Co., 232 N.C. 303, 60 S.E.2d 97 (1950).

The fact that a pleasure trip for the benefit of the employee is without expense to the employee does not entitle him to compensation for injury received while on such trip, even if all or a portion of the expense is borne by the employer as a gesture of goodwill. Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

Recreational and Social Activities. — Where, as a matter of goodwill, an employer at his own expense provides an occasion for recreation or an outing for his employees and invites them to participate, but does not require them to do so, and an employee is injured while engaged in the activities incident thereto, such injury does not arise out of the employment. Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

In determining whether employee injuries incurred at employer-sponsored recreational and social activities arise out of and in the course of the employment, several questions should be considered: (1) Did the employer in fact sponsor the event? (2) To what extent was attendance really voluntary? (3) Was there some degree of encouragement to attend evidenced by such factors as: (a) taking a record of attendance; (b) paying for the time spent; (c) requiring the employee to work if he did not attend; or (d) maintaining a known custom of attending? (4) Did the employer finance the occasion to a substantial extent? (5) Did the employees regard the activity as an employment benefit to which they were entitled as of right? (6) Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards? Martin v. Mars

Mfg. Co., 58 N.C. App. 577, 293 S.E.2d 816, cert. denied, 306 N.C. 742, 295 S.E.2d 759 (1982).

Injury at Picnic. — Attending a good-will picnic at the invitation of the employer was held not to invoke the relation of the master and servant where the employee did no work and was not paid for attendance, nor penalized for nonattendance, nor ordered to go. Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943).

Plaintiff was not entitled to compensation for a broken ankle suffered while playing volleyball at an annual picnic for faculty members in the radiology department in defendant school, where it was not clear that the radiology department in fact sponsored the picnic; attendance at the picnic was voluntary; no record of attendance was taken; participants were not paid for the time spent at the picnic, nor was any employee required to work at the medical school if he did not attend; the picnic, while certainly an annual custom, was not an event that employee regarded as being a benefit to which he was entitled as a matter of right, and the radiology department did not utilize the picnic as an opportunity to give a "pep" talk or grant awards. Chilton v. Bowman Gray School of Medicine, 45 N.C. App. 13, 262 S.E.2d 347 (1980).

Injury at Christmas Party. — Evidence established a sufficient nexus between injury and employment where employee injured her ankle while dancing at an annual Christmas party sponsored and paid for by employer, where wages were paid for the time employees spent at the party and where the plant manager considered the party an employee fringe benefit, one definite purpose of which was to improve employer-employee relations, and made a 20 to 30 minute speech praising the employees for their work and presenting service awards. Martin v. Mars Mfg. Co., 58 N.C. App. 577, 293 S.E.2d 816, cert. denied, 306 N.C. 742, 295 S.E.2d 759 (1982).

Injury While Washing Personal Car. — Claimant, employed as a night watchman, was injured on the employer's premises during his hours of duty when his trouser leg was caught on the bumper of his car, causing him to fall, as he was washing his personal car for his own purposes with the implied consent of the employer. There was no causal relationship between his employment and the injury, and therefore the injury did not arise out of the employment and was not compensable. Bell v. Dewey Bros., 236 N.C. 280, 72 S.E.2d 680 (1952).

Injury While Maintaining or Traveling in Personal Airplane. — When a person owns an airplane which he maintains and keeps for his personal use as well as for use when traveling for his employer, he is not protected by workers' compensation while he is doing something to maintain the airplane and not doing anything else to promote the employer's business. The Workers' Compensation Act was not intended to cover accidents which occur while an employee is repairing his own property which he uses for himself and for his employer. Pollock v. Reeves Bros., Inc., 70 N.C. App. 199, 319 S.E.2d 286 (1984), rev'd on other grounds, 313 N.C. 287, 328 S.E.2d 282 (1985).

Where employee was killed in accident while traveling in fellow employee's airplane, where the purpose of the trip was related to employer's business, and where employees were acting in the course of their employment at the time of the accident, the accident was fairly traceable to the employment as a contributing cause and the death of employee was an injury by accident arising out of and in the course of his employment. Pollock v. Reeves Bros., Inc., 313 N.C. 287, 328 S.E.2d 282 (1985).

Employee Assisting Another Contractor on Same Job. — Evidence to the effect that deceased employee was working under the direct supervision and instruction of his superior in attempting to make repairs on a drum that actually belonged to another contractor working on the same job and that the two contractors on prior occasions had assisted each other without charges sustained the finding that the injury arose out of and in the course of employment. Butler v. Jones Plumbing & Heating Co., 244 N.C. 525, 94 S.E.2d 556 (1956).

Voluntarily Helping Another Employee. — Claimant was employed as a lumber piler and was instructed to stay away from the saws, but there was evidence that on the day of his injury he was instructed to leave his regular job and to perform some work in the vicinity of one of the saws, and that while waiting at the place designated he started to assist another employee, in the absence of the regular sawyer, in cutting off a board, and suffered an injury when his hand came in contact with the saw. Two men were usually required to operate the saw. The court held that the evidence was sufficient to sustain the finding of the Industrial Commission that the injury arose out of and in the course of his employment. Riddick v. Richmond Cedar Works, 227 N.C. 647, 43 S.E.2d 850 (1947).

The employee's injury arose out of and during the course of employment, where she sustained an injury when she slipped and fell in the employer's icy parking lot after she temporarily left her work station to aid her co-employee, who also was the wife of the claimant's nephew. Choate v. Sara Lee Prods., 133 N.C. App. 14, 514 S.E.2d 529 (1999), aff'd, 351 N.C. 46, 519 S.E.2d 523 (1999).

Employee off Duty and on Personal Errand. — The Commission found facts which clearly showed that the deceased employee, although temporarily assigned to work in a distant town in another state, with board and room furnished by the power company for which the emergency work was being done, was off duty and upon a personal errand, unrelated to any duty in connection with his employment when he was struck by an automobile and killed. Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962).

Injury While Working on Doghouse in Employer's Shop. — Injury to plaintiff salesman's hand, sustained while he was operating a power saw in defendant employer's shop, arose out of and in the course of his employment where plaintiff was working in the shop at the specific instruction of his employer but without any specific assignment, plaintiff had previously obtained permission to work on a doghouse in the shop during working hours when he had nothing else to do, plaintiff was allowed to use scrap material of the employer to build the doghouse, and plaintiff was operating the saw at the time of the injury to cut wood for the doghouse. Lee v. F.M. Henderson & Assocs., 17 N.C. App. 475, 195 S.E.2d 48, aff'd, 284 N.C. 126, 200 S.E.2d 32 (1973).

Assistance to Dump Truck Driver. — Findings of fact by the Industrial Commission that deceased employee drove his employer's truck to the city dump to dispose of trash from the employer's plant, and that the employee was killed at the city dump while trying to help a third party operate the dump mechanism on the third party's truck were held to support the Commission's determination that deceased was not acting for the benefit of his employer to any appreciable extent and that deceased's injuries did not arise out of and in the course of his employment. Short v. Slane Hosiery Mills, 4 N.C. App. 290, 166 S.E.2d 479 (1969).

Truck driver shot by security guards while trying to stop robber did not suffer injuries arising out of and in the course of his employment. Roman v. Southland Transp. Co., 350 N.C. 549, 515 S.E.2d 214 (1999).

Hunting Trip. — Evidence that an employee customarily acted as chauffeur, cook and valet to a company official on the official's trips to his cottage at a resort and that while on such a trip he went on a hunting trip with the official's sons and was fatally injured in an automobile accident was insufficient to support a finding that the accident arose out of the employment. Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963).

Group Picture. — At the suggestion of her foreman, plaintiff joined with other employees to have a group picture taken for the sole benefit of the photographer. This was done during shifts. Plaintiff was injured by the collapse of the seat prepared by the photographer. It was held that it was error for the Commission to find that the injury arose out of the employment. Beavers v. Lily Mill & Power Co., 205 N.C. 34, 169 S.E. 825 (1933).

Assistance to Third Person in Reciprocity for Aid Requested for Employer's Benefit. — An employee sent to fix flat tires went to a filling station and requested free use of its air pump, but before inflation of the tires was completed, the filling station operator asked him to help push a stalled car, and while he was doing so he was struck by another car, resulting in permanent injury. It was held that the courtesies and assistance extended by the employee were in reciprocity for the courtesy of free air requested by the employee for the employer's benefit, so that the employee had reasonable ground to apprehend that refusal to render the assistance requested of him might well have resulted in like refusal of the courtesy requested by him, and therefore the findings supported the conclusion that the accident arose out of and in the course of employment. Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955).

VIII. INJURIES WHILE GOING TO AND FROM WORK.

A. In General.

Injury Suffered Going to or Returning from Work Is Not Generally Compensable. — As a general rule an injury suffered by an employee while going to or returning from his work does not arise out of and in the course of his employment. Bray v. W.H. Weatherly & Co., 203 N.C. 160, 165 S.E. 332 (1932); Hardy v. Small, 246 N.C. 581, 99 S.E.2d 862 (1957); Humphrey v. Quality Cleaners & Laundry, 251 N.C. 47, 110 S.E.2d 467 (1959); Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968); Franklin v. Wilson County Bd. of Educ., 29 N.C. App. 491, 224 S.E.2d 657 (1976); Robertson v. Shepherd Constr. Co., 44 N.C. App. 335, 261 S.E.2d 16 (1979), cert. denied, 299 N.C. 545, 265 S.E.2d 405 (1980); Barham v. Food World, Inc., 300 N.C. 329, 266 S.E.2d 676, rehearing denied, 300 N.C. 562, 270 S.E.2d 105 (1980); Powers v. Lady's Funeral Home, 306 N.C. 728, 295 S.E.2d 473 (1982). See also Hunt v. State, 201 N.C. 707, 161 S.E. 203 (1931); Lassiter v. Carolina Tel. & Tel. Co., 215 N.C. 227, 1 S.E.2d 542 (1939); Schmoyer v. Church of Jesus Christ of Latter Day Saints, 81 N.C. App. 140, 343 S.E.2d 551, cert. denied, 318 N.C. 417, 349 S.E.2d 600 (1986).

An employee is not engaged in the prosecution of his employer's business while operating his personal car to the place where he is to perform the duties of his employment, nor while leaving his place of employment to go to his home. Ellis v. American Serv. Co., 240 N.C. 453, 82 S.E.2d 419 (1954).

The disallowance of recovery in the usual coming and going case is based, not upon the ground that the circumstances (i.e., the employee's going to or leaving work) are not within the course of employment, but upon considerations of time and place. In addition, the question of arising out of is not satisfied in many of these cases, especially where the injury is due to the hazards of the public highway, i.e., risks common to the general public. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Unless Transportation Is Part of Employment Contract. — An injury sustained by an employee while going to or from work does not arise in the course of his employment and is not compensable unless the employer is under a contractual duty to transport employee or furnishes the means of transportation as an incident of the contract of employment. Whittington v. A.J. Schnierson & Sons, 255 N.C. 724, 122 S.E.2d 724 (1961).

An injury sustained in accidents occurring off the employer's premises while the employee is going to or returning from work is compensable when it is established that the employer, as an incident of the contract of employment, provides the means of transportation to and from the place where the work of the employment is performed. Harris v. Jack O. Farrell, Inc., 31 N.C. App. 204, 229 S.E.2d 45 (1976).

Or Unless Injury Was Due to Risk Incident to Employment. — While recovery may be denied where an injury is sustained while the employee is going to or coming from work, such denial is not upon the ground that going and coming are circumstances not within the course of employment. To the contrary, such activity is within the course of employment if the time and place requisites are satisfied, and injuries sustained while engaged therein are compensable if the injury arose out of employment, i.e., that they were due to an employment-connected risk. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

But Injury on Employer's Premises May Be Compensable. — The moment when the employee begins his work is not necessarily the moment when he gets into the employment, because a reasonable margin must be allowed him to get to the place of work if he is on the premises of the employer or on some access to the premises which the employer has provided. Hunt v. State, 201 N.C. 707, 161 S.E. 203 (1931). See also Bryan v. T.A. Loving Co., 222 N.C. 724, 24 S.E.2d 751 (1943).

Injuries sustained by an employee while going to or from the work place on premises owned or controlled by the employer are generally deemed to have arisen out of and in the course of employment. Strickland v. King, 293 N.C. 731, 239 S.E.2d 243 (1977).

Employee injured while traveling to and from his employment on the employer's premises is covered by this Chapter. Chandler v. Nello L. Teer Co., 53 N.C. App. 766, 281 S.E.2d 718 (1981), aff'd, 305 N.C. 292, 287 S.E.2d 890 (1982).

The "coming and going" rule provides that injuries which occur while an employee travels to and from work are not compensable; however, the "premises" exception applies when an employee is injured while on the employer's premises. Jennings v. Backyard Burgers, 123 N.C. App. 129, 472 S.E.2d 205 (1996).

Employee who waited almost 30 minutes to get a ride home from another employee and who was injured when the other employee caused a vehicle accident in the employer's parking lot was covered by the North Carolina Workers' Compensation Act and the trial court properly dismissed a lawsuit which the injured employee filed against the employee who gave the injured employee a ride. Ragland v. Harris, 152 N.C. App. 132, 566 S.E.2d 827, 2002 N.C. App. LEXIS 894 (2002).

Provided No Unreasonable Delay Is Chargeable to Employee. — Where an employee sustains injury going to or from his place of work on employer's premises or premises controlled by employer, the injury is compensable, provided no unreasonable delay is chargeable to employee. Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

As an exception to the general rule, known as the "going and coming rule," that injuries sustained by the employee while going to or from work are not ordinarily compensable, the great weight of authority holds that injuries sustained by an employee while going to or from his place of work upon premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of employment within the act and are compensable, provided the employee's act involves no unreasonable delay. Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962); Maurer v. Salem Co., 266 N.C. 381, 146 S.E.2d 432 (1966); Gallimore v. Marilyn's Shoes, 30 N.C. App. 628, 228 S.E.2d 39 (1976), rev'd on other grounds, 292 N.C. 399, 233 S.E.2d 529 (1977).

Coming and Going Rule Has Exceptions. — The general rule barring compensability of injuries sustained while traveling to or from work is subject to several exceptions, including the traveling salesman exception, the contractual duty exception, the special errand exception, and the dual purpose exception. Dunn v. Marconi Communs., Inc., 161 N.C. App. 606, 589 S.E.2d 150, 2003 N.C. App. LEXIS 2260 (2003).

Where an employee worked as a health care aide and was involved in a car accident while driving from the employee's residence to the home of the employee's first patient for the day, the employee was entitled to workers' compensation benefits under an exception to the going and coming rule because the employee was acting within the course of employment at the time the injuries were sustained, since the employee was required to use the employee's private vehicle as part of the employee's employment and the employee was injured going to work. Hollin v. Johnston County Council on Aging, — N.C. App. —, 639 S.E.2d 88, 2007 N.C. App. LEXIS 76 (2007).

Parking Lot as Part of Premises. — It is usually held that an injury on a parking lot owned or maintained by the employer for his employees is an injury on the employer's premises. Maurer v. Salem Co., 266 N.C. 381, 146 S.E.2d 432 (1966); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Injuries sustained in automobile mishaps in company parking lots arise out of employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Employees Required to Furnish Own Vehicles. — Where an employee who is required to furnish their own vehicle as part of their employment is injured going to or coming from work, such injuries are covered by the Workers' Compensation Act. Hollin v. Johnston County Council on Aging, — N.C. App. —, 639 S.E.2d 88, 2007 N.C. App. LEXIS 76 (2007).

Attempt to Climb Locked Parking Lot Gate. — Employee's negligence in attempting to climb employer's locked parking lot gate after his shift ended so as to reach his ride did not defeat the applicability of the "premises exception" to the "coming and going rule"; since the full Commission was the ultimate fact finder, it did not have to make specific findings of fact when it modified hearing commissioner's findings. Arp v. Parkdale Mills, Inc., 150 N.C. App. 266, 563 S.E.2d 62, 2002 N.C. App. LEXIS 510 (2002).

Adjacent Premises Used as Means of Ingress and Egress. — Employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done; but it is clear that in some cases the rule extends to include adjacent premises used by the employee as a means of ingress and egress with the express or implied consent of the employer. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Route Chosen By Employer Not in Course of Employment. — Plaintiff's accidental injury, which resulted from a hazardous condition on property adjacent to his employer's premises, did not arise out of and in the course of employment although defendant employer instructed the employee to use that route for ingress and egress. Jennings v. Backyard Burgers, 123 N.C. App. 129, 472 S.E.2d 205 (1996).

Special Errand Exception to General Rule. — The special errand exception to the "coming and going" rule is no more than that — an exception to the general rule that accidents occurring while the employee is in transit to and from work are not compensable. Therefore, the special errand doctrine does not transform all employees covered by the Workers' Compensation Act into absolute insurers of the safety of employees called away on some special mission. Powers v. Lady' Funeral Home, 57 N.C. App. 25, 290 S.E.2d 720, rev'd on other grounds, 306 N.C. 728, 295 S.E.2d 473 (1982).

The "special errand" exception permits coverage of the employee from "portal to portal." Powers v. Lady's Funeral Home, 306 N.C. 728, 295 S.E.2d 473 (1982).

As to statement and application of "special errand rule," see Felton v. Hospital Guild, 57 N.C. App. 33, 291 S.E.2d 158, aff'd by divided S. Ct. as law of case but without precedential value, 307 N.C. 121, 296 S.E.2d 297 (1982).

The "special errand" exception provides that an injury is in the course of the employment if it occurs while the employee is engaged in a special duty or special errand for his employer. Schmoyer v. Church of Jesus Christ of Latter Day Saints, 81 N.C. App. 140, 343 S.E.2d 551, cert. denied, 318 N.C. 417, 349 S.E.2d 600 (1986).

Traveling Salesman Exception. — Where an employee worked as a health care aide and was involved in a car accident while driving from the employee's residence to the home of the employee's first patient for the day, the "traveling salesman" exception to the going and coming rule did not apply, because the employee had fixed work locations and fixed work hours, saw the same patients each week, and traveled to the same homes week after week. Hollin v. Johnston County Council on Aging, — N.C. App. —, 639 S.E.2d 88, 2007 N.C. App. LEXIS 76 (2007).

Same — Illustrative Case. — Where decedent was required, as a condition of his employment, to attend a four-week training seminar which was not offered at his regular place of employment, he was on a special errand to attend a training course at the direction of and for the benefit of his employer. Kirk v. State Dep't of Cor., 121 N.C. App. 129, 465 S.E.2d 301 (1995), review dismissed as improvidently granted, 344 N.C. 624, 476 S.E.2d 105 (1996).

Employee Held Not on Special Errand. — Evidence that church custodian, who was killed in an automobile accident late in the evening on the way from his parents' house to visit his fiancee, was planning to spend the night at the church following this visit so that despite an anticipated snowstorm he would be able to let a certain nonsupervisory volunteer into the church at 8:00 a.m. the next morning, when his work day ordinarily began, was not sufficient to establish that the custodian was on a special errand for his employer when he met his death. Schmoyer v. Church of Jesus Christ of Latter Day Saints, 81 N.C. App. 140, 343 S.E.2d 551, cert. denied, 318 N.C. 417, 349 S.E.2d 600 (1986).

The period of employment covers the working hours and such reasonable time as is required to pass to and from the employer's premises. Yates v. Hajoca Corp., 1 N.C. App. 553, 162 S.E.2d 119 (1968).

Injury While Returning to Jobsite at Direction of Foreman. — Where plaintiff's return to jobsite to pick up his final paycheck was at foreman's direction, even though foreman had earlier discharged plaintiff, the employment relationship was still in effect; however, plaintiff's injuries, sustained while he looked for foreman in a place other than where foreman had directed him to pick up the check, were not suffered in the course of employment. Byrd v. George W. Kane, Inc., 92 N.C. App. 490, 374 S.E.2d 480 (1988).

Accident While Driving Employer's Truck from Employee's Home to Place of Employment. — Where deceased was killed in a collision as he was driving a truck, owned and maintained by his employer, from his home to his place of employment, it was found that transportation to and from work was an incident of the employment, and that the accident arose out of and in the course of deceased's employment. Phifer v. Foremost Dairy, 200 N.C. 65, 156 S.E. 147 (1930).

Special Errand for Employer on Way to Work. — While on his way to work, plaintiff was injured in crossing the street to purchase supplies for defendant school. This was done at the request of the principal. It was held that plaintiff was employed in a special errand for his master. In such case employment begins from the time the employee leaves his home. Massey v. Board of Educ., 204 N.C. 193, 167 S.E. 695 (1933).

Contractual Duty Exception. — Where an employee worked as a health care aide and was involved in a car accident while driving from the employee's residence to the home of the employee's first patient for the day, the "contractual duty" exception to the going and coming rule did not apply, because, although the employee was reimbursed for travel as part of the job, the employee was not reimbursed for travel to the first patient's home in the morning and from the last patient's home to the employee's home in the afternoon. Hollin v. Johnston County Council on Aging, — N.C. App. —, 639 S.E.2d 88, 2007 N.C. App. LEXIS 76 (2007).

Injury to Police Officer on Call at All Times. — Recovery would be denied where a rural policeman on call at all times was killed in an automobile accident while driving his own car from his home to police headquarters to report for his regular working day. Davis v. Mecklenburg County, 214 N.C. 469, 199 S.E. 604 (1938).

Where the deceased was a motorcycle policeman with fixed hours of active patrol duty as well as a general obligation to make arrests at other hours when law violations came to his notice and to be "on call" at all times, his cycle was furnished by the city and he had the entire care of it, and he was privileged to keep it at home and did so and was riding home after regular hours when he was killed in a collision, the Commission properly found that his death was compensable. Smith v. City of Gastonia, 216 N.C. 517, 5 S.E.2d 540 (1939).

Policeman Killed While Returning to Work from Leave of Absence. — Where the evidence showed that a policeman was killed in an accident while returning to work from a leave of absence, the conclusion that he did not sustain injury by accident arising out of and in the course of his employment was sustained. McKenzie v. City of Gastonia, 222 N.C. 328, 22 S.E.2d 712 (1942).

Injury While Crossing Public Highway. — Where the evidence tended to show that plaintiff's intestate, a civilian guard of a construction company, stationed at a main gate of a marine base to direct traffic and parking about such gate and on the highway immediately adjoining, was at the time of the accident on his way to his place of employment to report for work and was killed, after alighting from a bus, on a public highway immediately in front of such main gate, as he attempted to cross the highway ahead of an oncoming car, an award was error, as deceased was not on the premises of his employer and his injury and death did not arise out of and in the course of his employment. Bryan v. T.A. Loving Co., 222 N.C. 724, 24 S.E.2d 751 (1943).

Injury During Lunch Hour. — Findings to the effect that during lunch hour the employees were free to go as they pleased, that deceased employee had stopped his work for the lunch period and, in attempting to board a truck moving within the premises of the employer, fell and was fatally injured, with further evidence that the employee had been given no order and had no duty connected either with the truck or its contents, and was acting according to his own will, was held insufficient to show affirmatively that the injury resulted from a hazard incident to the employment, and supported the ruling of the Industrial Commission that it did not arise out of the employment. Matthews v. Carolina Std. Corp., 232 N.C. 229, 60 S.E.2d 93 (1950).

An employee who was hit by a car while crossing highway to eat lunch on employer's parking lot did not sustain an injury arising out of and in the course of employment. Horn v. Sandhill Furn. Co., 245 N.C. 173, 95 S.E.2d 521 (1956).

Injury to Employee at Plant After Hours on Private Business. — Where claimant, a foreman, returned to the employer's plant after his regular working hours to attend to certain private business, but before entering upon such business he assisted with certain work of the employer, and then sat down on a wall to rest, whereupon he fell and was injured, it was held that the evidence was insufficient to sustain a finding that plaintiff's injury arose out of and in the course of his employment. Poteete v. North State Pyrophyllite Co., 240 N.C. 561, 82 S.E.2d 693 (1954).

Farm Employee Killed While Crossing Highway on Return from Barn to Home. — Where farm employee who lived on farm was killed while crossing highway when returning from barn to which he had gone to feed livestock to area of house in which he lived, the injury arose out of and in the course of his employment. Hardy v. Small, 246 N.C. 581, 99 S.E.2d 862 (1957).

Fall in Parking Lot. — Where the employer provided a parking lot on its premises next to its factory and permitted its employees to park their cars in the lot, an injury received by an employee in a fall while she was walking from her parked car on her way to the other part of the employer's premises where she actually worked was an injury arising out of and in the course of her employment within the purview of this section. Davis v. Devil Dog Mfg. Co., 249 N.C. 543, 107 S.E.2d 102 (1959).

Injury on Shopping Mall Parking Lot. — Salesperson for department store at mall shopping center who was injured after she had parked her automobile in an area in the mall parking lot designated for department store employees by the mall owners did not sustain an injury by an accident arising out of and in the course of her employment. Glassco v. Belk-Tyler Co., 69 N.C. App. 237, 316 S.E.2d 334 (1984).

Injuries on Employer's Private Road. — Injuries received by employees when their car went out of control as they were leaving work on a private road controlled and maintained by employer and leading from the area where the employees reported to work were held to have arisen out of and in the course of their employment. Robinson v. North Carolina State Hwy. Comm'n, 13 N.C. App. 208, 185 S.E.2d 333 (1971).

Injury After Leaving Premises. — Where accident occurred at a time after plaintiff had completed her regular work shift, had "clocked out" on the time clock provided by her employer for that purpose, and had left her employer's premises for the day and at a place which was not on her employer's premises and over which it had no control, the accident did not arise "in the course of" her employment. Taylor v. Albain Shirt Co., 28 N.C. App. 61, 220 S.E.2d 144 (1975), cert. denied, 289 N.C. 302, 222 S.E.2d 703 (1976).

Accident in Truck Operated by Fellow Employee. — Where the fatal accident occurred after the employees had completed their day's work at the job site, had punched out on the time clock, had left the place of their employment, and had started homeward in a truck owned and operated by a fellow employee whom they paid to transport them, the injury by accident did not arise out of and in the course of employment with defendant employer. Harris v. Jack O. Farrell, Inc., 31 N.C. App. 204, 229 S.E.2d 45 (1976).

Accident Returning from Meeting Where Going to and from Same Was Part of Duties. — Plaintiff's accident on a city street as she was returning home to write a report about a work-related meeting which she had just attended was an accident in the course of her employment where going to and from the meetings was a part of plaintiff's job duties for which she was paid the same as when actually in the office or at community meetings. Warren v. City of Wilmington, 43 N.C. App. 748, 259 S.E.2d 786 (1979).

Accident Returning from Meeting Held Not Part of Duties. — Although plaintiff's presence was required at a meeting after which his accident occurred, his travel from that meeting should not be included within the scope of his employment duties. Being required to drive one's car to a meeting is no different from being required to drive one's car to work. When plaintiff left the meeting he was not traveling to a destination required by his employer nor was he engaged in the furtherance of his employer's business. Wright v. Wake County Pub. Schs., 103 N.C. App. 282, 405 S.E.2d 228 (1991).

Fall in Loading Zone. — An injury to plaintiff grocery store employee when she slipped and fell on ice in a loading zone in front of defendant employer's store in a shopping center while she was walking to her work site after parking her car in the shopping center parking lot did not occur on her employer's premises and thus did not arise out of and in the course of her employment, where plaintiff failed to show that she was performing any duties for employer at the time of her injury or that she was exposed to any danger greater than that of the public generally. Barham v. Food World, Inc., 300 N.C. 329, 266 S.E.2d 676, rehearing denied, 300 N.C. 562, 270 S.E.2d 105 (1980).

Illustrative Cases. — An employee injured in an automobile accident while returning to work from his home was not entitled to any of those exceptions where he was on a personal errand at the time of his accident and the trip did not serve any business purpose. Dunn v. Marconi Communs., Inc., 161 N.C. App. 606, 589 S.E.2d 150, 2003 N.C. App. LEXIS 2260 (2003).

B. Where Employer Furnishes Transportation.

Employer would not expose himself to liability for workers' compensation purposes by gratuitously furnishing transportation for his employees. Travelers Ins. Co. v. Curry, 28 N.C. App. 286, 221 S.E.2d 75, cert. denied, 289 N.C. 615, 223 S.E.2d 396 (1976).

But Employer Who Furnishes Transportation as Incident to Contract of Employment May Be Liable. — While ordinarily an employer is not liable under this Chapter for an injury suffered by an employee while going to or returning from work, the employer may be held liable when he furnishes the means of transportation as an incident to the contract of employment. Smith v. City of Gastonia, 216 N.C. 517, 5 S.E.2d 540 (1939); Robertson v. Shepherd Constr. Co., 44 N.C. App. 335, 261 S.E.2d 16 (1979), cert. denied, 299 N.C. 545, 265 S.E.2d 405 (1980).

Injuries received by an employee while traveling to or from his place of employment are usually not covered by the act unless the employer furnishes the means of transportation as an incident of the contract of employment. Strickland v. King, 293 N.C. 731, 239 S.E.2d 243 (1977).

North Carolina has long held as compensable injuries sustained by employees while on the way to or returning from work where the employer provides the means of transportation. Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

Injuries sustained by an employee while being transported to or from work in a conveyance furnished by his employer pursuant to an express or implied term of the contract of employment are compensable. Enroughty v. Black Indus., Inc., 13 N.C. App. 400, 185 S.E.2d 597, cert. denied, 280 N.C. 721, 186 S.E.2d 923 (1972).

When the journey to or from work is made in the employer's conveyance, the journey is in the course of employment, the reason being that the risks of the employment continue throughout the journey. Battle v. Bryant Elec. Co., 15 N.C. App. 246, 189 S.E.2d 788, cert. denied, 281 N.C. 755, 191 S.E.2d 353 (1972).

As May Employer Who Makes Allowances to Cover Cost of Transportation. — Injuries sustained in an automobile accident by employees while on their way to or from work in an automobile owned by one of them arise out of and in the course of their employment when, under the terms of the employment and as an incident to the contract of employment, allowances are made by the employer to cover the cost of such transportation. Puett v. Bahnson Co., 231 N.C. 711, 58 S.E.2d 633 (1950). See also Phifer v. Foremost Dairy, 200 N.C. 65, 156 S.E. 147 (1930), where defendant provided deceased with a truck for use in defendant's business and in taking deceased to and from work; Edwards v. T.A. Loving Co., 203 N.C. 189, 165 S.E. 356 (1932), where deceased's contract of service provided for transportation by the employer.

An injury suffered by an employee while going to or from his work arises out of and in the course of employment when the employee, under the terms of the employment and, as an incident to the contract of employment, is paid an allowance to cover the cost of such transportation. Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

The test in such cases is whether the vehicle furnished by employer is one which the employees are required, or as a matter of right are permitted, to use by virtue of their contract, or whether it is furnished gratuitously for the mere accommodation of the workmen. Lassiter v. Carolina Tel. & Tel. Co., 215 N.C. 227, 1 S.E.2d 542 (1939), affirming denial of compensation where transportation was furnished gratuitously; Robertson v. Shepherd Constr. Co., 44 N.C. App. 335, 261 S.E.2d 16 (1979), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982). See also Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

Trips to and from Lunch. — The rule that traveling to and from work on a conveyance furnished by the employer is in the course of employment is applicable to trips to and from lunch. Enroughty v. Black Indus., Inc., 13 N.C. App. 400, 185 S.E.2d 597, cert. denied, 280 N.C. 721, 186 S.E.2d 923 (1972).

Transportation Furnished in Accordance with Custom. — Where employer hired two employees to ride on truck to help driver unload, and on the last trip the driver consented to let the employees off at the place on his route nearest their homes, in accordance with established custom, and one of the employees attempted to alight before the truck had completely stopped, contrary to express orders, and fell to his mortal injury, the evidence was sufficient to sustain the finding that the accident arose out of and in the course of the employment. Latham v. Southern Fish & Grocery Co., 208 N.C. 505, 181 S.E. 640 (1935).

Riding in Another Vehicle at Direction of Employer's Foreman. — The evidence tended to show that defendant's employees were required to check in at the office in the morning, were then transported to the job, and after completion of the day's work were transported back to the office where they received instructions as to the next day's work before checking out, their working time being computed from the time of checking in until the time of checking out, that on the date in question they were carried to the job in a truck, but that the president's car was sent to bring them back because of rain, that when deceased started to get in the car there were already six persons, including the driver, in the car, that the foreman said he could crowd in the car or ride in with another employee who was driving his own car, and that deceased then rode in with the other employee, and was fatally injured in an accident occurring after they had reached the city in which defendant's place of business was maintained and while they were on their way to defendant's office to check out. The evidence was sufficient to support the finding of the Industrial Commission that death resulted from an accident arising out of and in the course of the employment, the general rule of nonliability for an accident occurring while an employee is being transported to or from work in a conveyance of a third person over which the employer has no control not being applicable upon the evidence. Mion v. Atlantic Marble & Tile Co., 217 N.C. 743, 9 S.E.2d 501 (1940).

Abandoning Vehicle Furnished by Employer. — Where an employer was under obligation to transport its employees from the woods where they worked to a camp, and provided for that purpose a safety car attached to its railroad train, having forbidden its employees to use the more hazardous log train, and deceased was killed in attempting to get on the log train and thus return to camp, the employee was killed as result of injury by accident arising out of and in the course of his employment. Archie v. Greene Bros. Lumber Co., 222 N.C. 477, 23 S.E.2d 834 (1943).

Where making a trip to a farm to load poultry and a return trip to the place of business of the employer after the poultry was loaded constituted a substantial part of the services for which claimant was employed, the transfer of claimant from the truck of the employer to his own automobile in order that he might have it so that he could return home after he made his required report at the office of his employer did not constitute a distinct departure on a personal errand disassociated from his master's business, where claimant's home was located on the most direct route between the farm and the plant, and where when the collision occurred claimant was proceeding on this direct route to the place of business of his employer. Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962).

Abandonment of Employment. — Findings to the effect that the deceased employee was furnished a car for transportation to and from his work, that he quit work about 7:00 P.M., met a friend for dinner, took repeated drinks throughout the evening, made several trips, on one of which he drove approximately 100 miles per hour, in search of a girl to join the party, and some five hours thereafter started for home in the employer's car, and was killed in a wreck occurring on the direct route from the employer's place of business to the employee's home, held to show an abandonment of employment rather than a deviation from it, and therefore the accident did not arise in the course of the employment. Alford v. Quality Chevrolet Co., 246 N.C. 214, 97 S.E.2d 869 (1957).

Isolated Instance of Permission to Drive Company Truck Home. — Where deceased employee had permission to drive company truck home the day of the accident, the permission given the deceased on this single, isolated occasion would not make the operation of the pickup truck an incident of his contract of employment. Robertson v. Shepherd Constr. Co., 44 N.C. App. 335, 261 S.E.2d 16 (1979), cert. denied, 299 N.C. 545, 265 S.E.2d 405 (1980).

IX. INJURIES WHERE EMPLOYMENT ENTAILS TRAVELING.

Employees whose work entails travel away from the employer's premises are held to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown, in the majority of jurisdictions. Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962); Kiger v. Bahnson Serv. Co., 260 N.C. 760, 133 S.E.2d 702 (1963); Clark v. Burton Lines, 272 N.C. 433, 158 S.E.2d 569 (1968); Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969); Smith v. Central Transp., 51 N.C. App. 316, 276 S.E.2d 751 (1981); Chandler v. Nello L. Teer Co., 53 N.C. App. 766, 281 S.E.2d 718 (1981), aff'd, 305 N.C. 292, 287 S.E.2d 890 (1982).

When travel is contemplated as part of the work, the rule is that the employment includes not only the actual doing of the work, but also a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done, when the latter is expressly or impliedly included in the terms of the employment. Alford v. Quality Chevrolet Co., 246 N.C. 214, 97 S.E.2d 869 (1957); Yates v. Hajoca Corp., 1 N.C. App. 553, 162 S.E.2d 119 (1968).

As a general rule, accidents sustained while an employee is going to and from work are not within the course of the employment. However, where travel is contemplated as a part of the work, accident in travel is compensable. This exception is often referred to as the "traveling salesman's exception" to the going and coming rule. Ross v. Young Supply Co., 71 N.C. App. 532, 322 S.E.2d 648 (1984).

An employee whose work entails travel away from the employer's premises acts within the course of his employment continuously during the trip, unless there is proof of distinct or total departure on a personal errand. Hobgood v. Anchor Motor Freight, 68 N.C. App. 783, 316 S.E.2d 86 (1984).

Distinct and Total Departure Not Applicable. — Nurse's going to her employer's office on way to her patient's home in the same town as the office to drop off required time reports was not a distinct and total departure on a personal errand even if she deviated from the most direct route to the home. Munoz v. Caldwell Mem'l Hosp., 171 N.C. App. 386, 614 S.E.2d 448, 2005 N.C. App. LEXIS 1265 (2005).

Injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable. Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969); Smith v. Central Transp., 51 N.C. App. 316, 276 S.E.2d 751 (1981).

When a traveling man slips in the street or is struck by an automobile between his hotel and a restaurant, the injury has been held compensable, even though the accident occurred on a Sunday evening, or involved an extended trip occasioned by employee's wish to eat at a particular restaurant. Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

Necessary Business Trip Combining Simultaneous Private Purpose. — If the work of the employee creates the necessity for travel, such is in the course of his employment, even though he is serving at same time some purpose of his own. Bee v. Yates Aluminum Window Co., 46 N.C. App. 96, 264 S.E.2d 368 (1980).

Trip Made Primarily for Personal or Social Reasons. — Injuries received while on a trip being made primarily for personal or social reasons and not in performance of duty are not compensable, even if the employer is incidentally benefited by the trip. Ridout v. Rose's 5-10-25¢ Stores, 205 N.C. 423, 171 S.E. 642 (1933), in which deceased went with another to visit the other's girlfriend and while on the visit stopped to get certain goods for his employer.

Continuity Between Employment and Travel. — If it be conceded the course of employment included the travel home, then certainly there must be reasonable continuity between the employment and the travel. Alford v. Quality Chevrolet Co., 246 N.C. 214, 97 S.E.2d 869 (1957); Yates v. Hajoca Corp., 1 N.C. App. 553, 162 S.E.2d 119 (1968).

Traveling Salesman Exception. — Nurse, who was required to see only one patient per day, to be paid excess mileage, and to turn in time and mileage that day, had a compensable accident going to the hospital's office while going to her patient's home in the same town under the traveling salesman exception. Munoz v. Caldwell Mem'l Hosp., 171 N.C. App. 386, 614 S.E.2d 448, 2005 N.C. App. LEXIS 1265 (2005).

Because hospital's home health care nurse had multiple patients and work locations and did not have a fixed work location as in Hunt v. Tender Loving Care Home Care Agency, Inc., 153 N.C. App. 266, 569 S.E.2d 675 (2002), her accident was compensable under the traveling salesman exception. Munoz v. Caldwell Mem'l Hosp., 171 N.C. App. 386, 614 S.E.2d 448, 2005 N.C. App. LEXIS 1265 (2005).

Injury to Salesman on Weekend Trip. — Evidence that plaintiff, a traveling salesman, used his employer's car for a weekend trip and was injured in a wreck in returning was held to support the finding of the Industrial Commission that the accident did not arise out of and in the course of the employment, notwithstanding that the injured employee, at the destination of the trip, met and conversed with a representative of the employer, without appointment or direction of the employer, primarily in regard to a personal matter. Porter v. Noland Co., 215 N.C. 724, 2 S.E.2d 853 (1939).

Fishing Trip. — Injury to a Boy Scout executive by accident while on a fishing trip on the high seas while attending an executive's conference arose out of and in the course of his employment when the executive was directed to attend the conference with all expenses paid by Boy Scout council, and the council prepared an agenda of recreational projects, including deep sea fishing, and impliedly required each executive to select one of the projects as an aid to his advancement and better qualifications to carry on his work in scouting. Rice v. Uwharrie Council Boy Scouts of Am., 263 N.C. 204, 139 S.E.2d 223 (1964).

Contractual Duty Exception. — Nurse, who was required to see only one patient per day, to be paid excess mileage, and to turn in time and mileage that day, had a compensable accident going to the hospital's office while going to her patient's home in the same town under the contractual duty exception. Munoz v. Caldwell Mem'l Hosp., 171 N.C. App. 386, 614 S.E.2d 448, 2005 N.C. App. LEXIS 1265 (2005).

Choking on Food in Restaurant. — There was no causal relationship between decedent's employment and his choking on a piece of meat when his day's work was over and, business engagements scheduled for the morrow, he was having a leisurely evening meal at a public restaurant with an old friend whom the trip had enabled him to visit. Bartlett v. Duke Univ., 284 N.C. 230, 200 S.E.2d 193 (1973).

Employee Sent to Africa by Employer. — Where employer sent employees on a business trip to an isolated part of Africa and provided employees with sleeping, eating and recreational facilities within various company project areas, while they were within the project areas the employees were continuously in an employment situation and were protected by this Chapter. Chandler v. Nello L. Teer Co., 53 N.C. App. 766, 281 S.E.2d 718 (1981), aff'd, 305 N.C. 292, 287 S.E.2d 890 (1982).

Employee sent to Africa by employer to work on road project, who went on a personal detour to visit a nearby sugar plantation but was back within the confines of the road project when accident occurred, returning to his place of employment and the sleeping accommodations provided, was entitled to compensation under this Chapter. Chandler v. Nello L. Teer Co., 53 N.C. App. 766, 281 S.E.2d 718 (1981), aff'd, 305 N.C. 292, 287 S.E.2d 890 (1982).

X. ASSAULTS AND FIGHTS.

Assault as Accident When Unexpected. — Although an assault is an intentional act, it may be an accident within the meaning of the act when it is unexpected and without design on the part of the employee who suffers from it. Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972).

An assault is an "accident" within the meaning of the Workers' Compensation Act when from the point of view of the worker who suffers from it, it is unexpected and without design on his part, although intentionally caused by another. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949); Gallimore v. Marilyn's Shoes, 292 N.C. 399, 233 S.E.2d 529 (1977).

An unexpected assault may be considered as an accident despite its characterization as an intentional act. Daniels v. Swofford, 55 N.C. App. 555, 286 S.E.2d 582 (1982).

And When Arising Out of Work. — Where men are working together at the same work, disagreements may be expected to arise about the work, the manner of doing it, the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. When the disagreement arises out of the work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of employment. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

Where a worker is injured by a fellow employee because of a dispute about the manner of doing the work he is employed to do, the accident to the injured worker grows out of the employment and is compensable. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

North Carolina Industrial Commission properly concluded that a truck driver's injury and death following a road rage incident with another driver, in which the other driver ran over the decedent when the decedent exited his vehicle to confront the other driver, resulted from an injury by accident arising out of and in the course of his employment. Dodson v. Dubose Steel, Inc., 159 N.C. App. 1, 582 S.E.2d 389, 2003 N.C. App. LEXIS 1419 (2003).

The danger which causes the assault must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. Gallimore v. Marilyn's Shoes, 292 N.C. 399, 233 S.E.2d 529 (1977).

Where the assault upon the employee grows out of a motive foreign to the employment relationship, the necessary connection between the injury and the employment is not present and no compensation for the injury is proper. Gallimore v. Marilyn's Shoes, 292 N.C. 399, 233 S.E.2d 529 (1977).

Assault by Third Person. — The mere fact that injury is the result of the willful or criminal assault of a third person does not prevent the injury from being accidental. Gallimore v. Marilyn's Shoes, 30 N.C. App. 628, 228 S.E.2d 39 (1976), rev'd on other grounds, 292 N.C. 399, 233 S.E.2d 529 (1977).

Substantial evidence supported the award of total disability compensation, medical expenses, and psychological expenses under G.S. 97-2(6) to a hospital employee who was assaulted and injured by a man when she was going from her office to the morgue to retrieve records. D'Aquisto v. Mission St. Joseph's Health Sys., 171 N.C. App. 216, 614 S.E.2d 583, 2005 N.C. App. LEXIS 1269 (2005), rev'd on other grounds, review improvidently denied, in part, 360 N.C. 567, 633 S.E.2d 89 (2006).

Assault by Fellow Servant. — The mere fact that the injury is the result of a willful and criminal assault of a fellow servant does not of itself prevent the injury from being accidental. Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930).

If one employee assaults another solely from anger, hatred, revenge, or vindictiveness, not growing out of or as an incident to the employment, the injury is to be attributed to the voluntary act of the assailant, and not as an incident of the employment. But if the assault is incidental to some duty of the employment, the injuries suffered thereby may properly be said to arise out of the employment. Ashley v. F-W Chevrolet Co., 222 N.C. 25, 21 S.E.2d 834 (1942), wherein finding held to sustain award.

No Compensation Where Cause of Assault Is Personal. — When the moving cause of an assault upon an employee by a third person is personal, or the circumstances surrounding the assault furnish no basis for a reasonable inference that the nature of the employment created the risk of such an attack, the injury is not compensable. This is true even though the employee was engaged in the performance of his duties at the time, for even though the employment may have provided a convenient opportunity for the attack it was not the cause. Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972).

Injury is not compensable when it is inflicted in an assault upon an employee by an outsider as the result of a personal relationship between them, so that the attack was not created by and not reasonably related to the employment; to be compensable, the assault must have had such a connection with the employment that it can be found logically that the nature of the employment created the risk of the attack. Hemric v. Reed & Prince Mfg. Co., 54 N.C. App. 314, 283 S.E.2d 436 (1981), cert. denied, 304 N.C. 726, 288 S.E.2d 806 (1982).

Injuries which an employee suffered when the employee's ex-boyfriend entered the employee's workplace and shot the employee three times were not compensable under North Carolina's Workers' Compensation Act even though the employee's supervisor knew that the the ex-boyfriend had assaulted the employee and threatened to kill the employee and the supervisor might have prevented the incident by calling police. Dildy v. MBW Invs., Inc., 152 N.C. App. 65, 566 S.E.2d 759, 2002 N.C. App. LEXIS 875 (2002).

Killing as Result of Personal Enmity Alone. — In order for compensation to be recovered for the death of an employee under this act it is required that the injury causing death result from an accident arising out of and in the course of the employment, as a proximate cause, and where compensation is sought for the killing of one employee by another for purely personal and unrelated grounds, or when one was employed at night and the other by day, and the killing at night was a result of personal enmity alone, and these facts are found by the Commission and approved by the trial judge, the judgment denying the right of compensation will be affirmed on appeal. Harden v. Thomasville Furn. Co., 199 N.C. 733, 155 S.E. 728 (1930).

The risk of murder by a jealous spouse is not one which a rational mind would anticipate as an incident of the employment of both sexes in a business or industry. The possibility that an employee's spouse will become jealous of an associate, with or without cause, is a hazard common to the neighborhood; it is independent of the relation of master and servant and is not a risk arising out of the nature of the employment. Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972).

Employer's Knowledge of Threats Irrelevant. — Where an employee is injured in the course of employment by an outsider because of hate, jealousy, or revenge based on a personal relationship, the fact that the employer has knowledge of prior threats of death or bodily harm does not result in the injury's arising out of the employment; to allow compensation under such circumstances would have the practical effect of placing on the employer the duty of yielding to such threats of violence and terminating the employment of any worker so threatened, which would saddle the employer with a grossly unfair burden and the employee, in many cases, with an unjust job termination. Hemric v. Reed & Prince Mfg. Co., 54 N.C. App. 314, 283 S.E.2d 436 (1981), cert. denied, 304 N.C. 726, 288 S.E.2d 806 (1982).

Shooting by Assistant. — Where in a proceeding under this Act the evidence tended to show that the employee was a moulder in the employer's foundry, and that he struck his assistant with a shovel after the assistant had spoken words to him which he deemed insulting, whereupon the assistant left the employment and returned and shot the claimant while he was doing his work, causing permanent injury, the evidence was sufficient to bring the case within the intent and meaning of the terms "injury by accident arising out of and in the course of the employment." Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930).

Shooting of Night Watchman. — Even though one be engaged in duties involving peculiar risks, one may not recover for any injury not arising out of those risks. Harden v. Thomasville Furn. Co., 199 N.C. 733, 155 S.E. 728 (1930), where a night watchman was shot by a fellow employee because of a domestic affair.

Deceased was a night watchman. While in a small store on defendant's premises which was operated by a third person, he was shot by one who attempted to rob the store. It was held that the injury bore no relation to deceased's employment. Smith v. Newman Mach. Co., 206 N.C. 97, 172 S.E. 880 (1932).

Employee Shot by Hunter. — Plaintiff was shot in the eye by a hunter while he was working on his employer's truck. The injury did not result from a cause peculiar to the employment in which plaintiff was engaged. Whitley v. North Carolina State Hwy. Comm'n, 201 N.C. 539, 160 S.E. 827 (1931); Bain v. Travora Mfg. Co., 203 N.C. 466, 166 S.E. 301 (1932).

Murder by Robber. — Deceased was required to report at defendant's mill before the other employees. It was known that many hoboes slept near the boiler room where he worked. He was murdered by a robber while he was engaged in his duties and before any other employees reported for work. It was held that the injury arose out of the employment. Goodwin v. Bright, 202 N.C. 481, 163 S.E. 576 (1932). See also West v. East Coast Fertilizer Co., 201 N.C. 556, 160 S.E. 765 (1931), where deceased, a night watchman, was killed by a robber.

Assault upon Employee Collecting Accounts. — Where there was evidence that it was employee's duty to collect accounts of his employer for goods sold upon the installment plan and that the employee endeavored to collect an account from a debtor and was struck by another also owing an account to the employer, the injury resulting in death, the evidence was sufficient to sustain a finding by the Industrial Commission that the injury was the result of an accident arising out of and in the course of the employment, and such a finding of fact was conclusive and binding. Winberry v. Farley Stores, 204 N.C. 79, 167 S.E. 475 (1933).

Game Warden Killed by Person Against Whom He Testified in Criminal Action. — Where decedent, a game warden, was killed by a person against whom he had testified in a criminal action for violation of the game law, the court held that the injury did not arise out of and in the course of employment. Hollowell v. North Carolina Dep't of Conservation & Dev., 206 N.C. 206, 173 S.E. 603 (1934).

Fall Suffered While Running from Assailant. — A fellow employee, who was drunk at the time, ran plaintiff away from his work. Plaintiff returned, only to run again when he saw his assailant approaching. Plaintiff's foreman was present. In leaving the second time, plaintiff fell and broke his leg. The Commission's award of compensation was affirmed. The injury had its origin in plaintiff's employment. It was immaterial that it was unexpected. Wilson v. Boyd & Goforth, 207 N.C. 344, 177 S.E. 178 (1934).

Employee in Moving Vehicle Struck by Flying Object. — Where a deliveryman was driving a truck in the course of his employment and, while passing a group of boys playing baseball, a baseball struck the windshield and a piece of glass from the windshield struck him in the eye, resulting in serious injury, it was held that the injury resulted from an accident arising out of and in the course of the employment, within the meaning of this section. Perkins v. Sprott, 207 N.C. 462, 177 S.E. 404 (1934), distinguishing Whitley v. North Carolina State Hwy. Comm'n, 201 N.C. 539, 160 S.E. 827 (1931) and Bain v. Travora Mfg. Co., 203 N.C. 466, 166 S.E. 301 (1932), apparently on the ground that in those cases the plaintiff was struck by a bullet, whereas here, the glass and not the ball directly injured plaintiff.

Dispute over Matters Foreign to Employment. — Evidence tending to show that a night watchman employed to watch over one section of a highway under construction came over to a night watchman employed to watch over another section thereof, and engaged in an altercation relating to matters foreign to the employment, and that one of them killed the other as a result thereof, was sufficient to support the finding of the Industrial Commission that the deceased's death was not the result of an accident arising out of and in the course of the employment, and therefore such finding was conclusive on the courts. McNeill v. C.A. Ragland Constr. Co., 216 N.C. 744, 6 S.E.2d 491 (1940).

As to assault by foreman in discharging employee, see McCune v. Rhodes-Rhyne Mfg. Co., 217 N.C. 351, 8 S.E.2d 219 (1940).

Assault Arising from Dispute over Work. — Where the evidence disclosed that two employees had no personal contacts outside of the employment, and there was evidence that the dispute between them arose over the work they were performing for their common employer, the evidence was sufficient to sustain the finding by the Industrial Commission that an assault made by the one upon the other arose out of the employment. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

Where there was friction and enmity between two employees, growing out of criticism of the work of one of them by the other and complaint thereof to the employer, and the employee whose work was criticized assaulted his fellow worker from anger and revenge over such criticism, which resulted in the death of the one assaulted, such death occurred from an accident in the course of the employment. Hegler v. Cannon Mills Co., 224 N.C. 669, 31 S.E.2d 918 (1944).

Shooting of three employees by mentally disturbed coemployee while they were at work in locker plant arose out of and in the course of employment though shooting was "triggered" by a draft board incident, where shooter stated that reason for shooting was resentment of "domination" by coemployees. Zimmerman v. Elizabeth City Freezer Locker, 244 N.C. 628, 94 S.E.2d 813 (1956).

Shooting by Boyfriend of Coworker. — Injuries received by plaintiff at place of employment when the boyfriend of a coworker shot both plaintiff and coworker did not arise out of his employment, where the assault resulted from the personal relationship between the coworker and her boyfriend and was not created by or reasonably related to the employment, notwithstanding the fact that plaintiff was present in the office in which the shooting occurred because he had been instructed to keep a record of coworker's hours. Hemric v. Reed & Prince Mfg. Co., 54 N.C. App. 314, 283 S.E.2d 436 (1981), cert. denied, 304 N.C. 726, 288 S.E.2d 806 (1982).

XI. HORSEPLAY.

Horseplay as Risk Assumed by Employer. — The act contemplates the gathering together of workers of varying characteristics, and the risks and hazards of such close contact, including joking and pranks by the workers, are incidents to the business and grow out of it and are ordinary risks assumed by the employer under the act. Chambers v. Union Oil Co., 199 N.C. 28, 153 S.E. 594 (1930). See also Wilson v. Town of Mooresville, 222 N.C. 283, 22 S.E.2d 907 (1942).

Injuries resulting from horseplay initiated and participated in by a claimant have not been excluded from the Workers' Compensation Act by the decision of the State Supreme Court in Chambers v. Union Oil Co., 199 N.C. 28, 153 S.E. 594 (1930). Bare v. Wayne Poultry Co., 70 N.C. App. 88, 318 S.E.2d 534 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 484 (1985).

Where Injured Employee Did Not Participate in Horseplay He May Recover. — Where the injured employee does not participate in the sportive acts of his fellow employee, the injury is compensable. Chambers v. Union Oil Co., 199 N.C. 28, 153 S.E. 594 (1930), where claimant was accidentally shot by the discharge of a gun, which a fellow truck driver carried in his truck, while he was putting oil in his own truck, commented on in 9 N.C.L. Rev. 105 (1931).

If an employee is injured as a result of the horseplay of a fellow worker, the injured employee is not precluded from recovering his damages under this act if he did not participate therein. Chambers v. Union Oil Co., 199 N.C. 28, 153 S.E. 594 (1930).

Injuries occurring after the employee has ceased his horseplay and returned to work are compensable. Michaux v. Gate City Orange Crush Bottling Co., 205 N.C. 786, 172 S.E. 406 (1934), affirming award of compensation to deceased, who was killed in trying to catch his employer's truck, which had left him while he was wrestling with a stranger.

Thrill seeking which bears no conceivable relation to accomplishing the job for which the employee was hired moves the employee from the scope of his employment. Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (1982).

Back Injury Caused by Fellow Employee. — Plaintiff employee, who was injured when he told co-worker who was sitting on a box of cloth in employer's dyeing department that he was going to turn him over onto the floor, upon which co-employee got up and grabbed the front of plaintiff's belt and jerked him, causing an injury to plaintiff's back which eventually resulted in plaintiff having a disc removed from his back by surgery, sustained his injury by accident arising out of and in the course of his employment as a result of horseplay, and was entitled to compensation. McGraw v. Fieldcrest Mills, Inc., 84 N.C. App. 307, 352 S.E.2d 435 (1987).

Death by Drowning — Held Compensable. — The death of a 14-year-old employee of a sanitary district by drowning while he was attempting to wade across a reservoir to complete his work of cutting weeds on the side arose out of and in the course of his employment, although he had received general instructions at an earlier time not to go into the water, where the place at which he stepped into the water was shallow and the danger was not obvious, and decedent's actions were thus not so extreme as to break the causal connection between his employment and his death. Hensley v. Caswell Action Comm., Inc., 296 N.C. 527, 251 S.E.2d 399 (1979).

Same — Held Not Compensable. — The death of a 15-year-old laborer by drowning while swimming in a lake on his employer's premises during his lunch hour when the lifeguard was not on duty did not arise out of and in the course of his employment where all the evidence showed that deceased was acting in contravention of specific instructions from his employer and that he was engaged in an independent recreational activity totally unrelated to his work of cutting grass. Martin v. Bonclarken Ass'y, 296 N.C. 540, 251 S.E.2d 403 (1979).

XII. DEVIATION, DEPARTURE, AND ABANDONMENT.

Employee Need Not Be in Exact Spot Designated by Employer. — The Workers' Compensation Act must be liberally construed, and the term "out of the employment" will not preclude recovery for an accident occurring while an employee is not in the exact spot designated by the employer if the employee is at the place he is required to be in the performance of his duties. Howell v. Standard Ice & Fuel Co., 226 N.C. 730, 40 S.E.2d 197 (1946).

Performance of Forbidden Task. — Where an employee is employed solely for a particular job, such as operating a chain saw, and is positively forbidden to perform another job connected with the work, such as operating a tractor, and injury received while performing the forbidden task does not arise out of a hazard of the employment, and is not compensable. Taylor v. Dixon, 251 N.C. 304, 111 S.E.2d 181 (1959).

Violation of Orders. — Disobedience of a direct and specific order by a then present superior breaks the causal relation between the employment and the resulting injury. Conversely, when there is a rule or a prior order and the employee is faced with the choice of remaining idle in compliance with the rule or order or continuing to further his employer's business in contravention of it, no superior being present, the employer who would reap the benefits of the employee's acts if successfully completed should bear the burden of injury resulting from such acts. Under such circumstances, engaging in an activity which is outside the narrow confines of the employee's job description, but which is reasonably related to the accomplishment of the task for which the employee was hired, does not ordinarily constitute a departure from the scope of employment. Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (1982).

Emergency. — Deceased slept on employer's premises. On the night of the accident, some machinery had broken and deceased voluntarily went after a foreman who could fix it. No one had requested deceased to do this, although the evidence showed that he expected to receive pay for his time. He was killed by a passing car while on his way to get the foreman. It was held that the breakdown of machinery could not be classified as sufficient emergency to justify recovery. Davis v. North State Veneer Corp., 200 N.C. 263, 156 S.E. 859 (1931).

Salesman Going Out of His Way to Buy Cigars. — The injured employee was a salesman and collector who was furnished with a car and who had no fixed hours of employment. One evening, while on his way to make a business visit, he deviated less than a mile to buy some cigars, which he regarded as expedient to the purpose of his visit. While going from the drugstore, he was injured. Compensation award was affirmed; the accident arose out of and in the course of the employment. Parrish v. Armour & Co., 200 N.C. 654, 158 S.E. 188 (1931).

Attempt to Get a Job for a Friend. — Claimant was an employee in defendant's mill. Her work ceased at 11 o'clock one day, but she was not permitted to leave until 11:30. During this interval she was injured as she returned from downstairs to see about getting a friend a job. It was held that plaintiff's mission was "not such a departure from the employer's business . . . that it was not in the course of the employment." Bellamy v. Great Falls Mfg. Co., 200 N.C. 676, 158 S.E. 246 (1931).

Return to Employment after Deviation. — After working steadily for 15 hours, claimant stopped to eat and get a haircut. He then returned to his employer's truck. He was injured in taking the truck to defendant's place of business. It was held that the temporary deviation from the course of duty was not an abandonment. Furthermore, the accident occurred after the employee had resumed his work. Jackson v. Dairymen's Creamery, 202 N.C. 196, 162 S.E. 359 (1932).

Evidence that claimant was not sure that the mill in which he was employed would be operated on the day in question and that he rode to work with another employee, requesting his son to follow in his car to drive him home in case the mill was not operated, and that upon getting to work and ascertaining that the mill would be operated, he put his lunch in the room where he worked and went to a platform at the front of the mill to tell his son not to wait for him, and that he there slipped on ice and fell to his injury, was sufficient to support the finding that the injury resulted from an accident arising out of and in the course of his employment. Gordon v. Thomasville Chair Co., 205 N.C. 739, 172 S.E. 485 (1934).

Accidental Discharge of Gun. — Deceased, a delivery boy, went to employer's storeroom after groceries. He stopped by a private bedroom and was killed by the accidental discharge of a gun which he had found in the room. The evidence was held sufficient to support the Commission's finding that the accident did not arise out of and in the course of the employment. Smith v. S.E. Hauser & Co., 206 N.C. 562, 174 S.E. 455 (1934).

Acting at Request of Superior. — Recovery was denied where deceased was killed while attending a furniture market at the request of his superior. It was shown that the deceased was invited to attend, not for the purpose of learning anything helpful to his work, but to enable him to have a pleasure trip. Hilderbrand v. McDowell Furn. Co., 212 N.C. 100, 193 S.E. 294 (1937).

When plaintiff injured his arm in raising a window to obtain a bottle of milk which he had purchased from defendant's confectionery wagon and set aside to cool, recovery was allowed, the court saying that plaintiff's conduct did not constitute such a deviation as to deprive him of the benefits of the act. Pickard v. E.M. Holt Plaid Mills, 213 N.C. 28, 195 S.E. 28 (1938).

Drowning After Violation of Orders. — Recovery was denied where a painter dropped his brush in a river and in violation of the foreman's orders went in after it and was drowned. Morrow v. State Hwy. & Pub. Works Comm'n, 214 N.C. 835, 199 S.E. 265 (1938).

Fall After Resting on Plank. — The findings of fact of the Industrial Commission, supported by the evidence, were to the effect that deceased employee was a night watchman, that his duties were to make periodic inspection and to attend the furnaces and to get up steam, that on the night in question he procured his son to help him, that he instructed his son to do certain of his duties in the boiler room, that he placed a small box and plank on a walkway eight or nine feet high, with one end of the plank resting on the box, and lay down on the plank, that his son called him in time to make a periodic inspection some 30 minutes later, and that in getting up from his recumbent position, while his son was engaged in the performance of the employee's active duties in the boiler room, the employee fell from the walkway and was fatally injured. The facts did not compel the conclusion, as a matter of law, that at the time of injury the employee had not deviated from or abandoned his employment, and therefore the award of the Industrial Commission denying compensation was upheld. Stallcup v. Carolina Wood Turning Co., 217 N.C. 302, 7 S.E.2d 550 (1940).

Riding Conveyor. — Deceased was killed in rising from basement to ground floor on a mechanical crate conveyor. Steps were provided by the employer, and none of the employees rode the conveyor when the foreman was around. It was held that the denial of compensation was proper in that deceased stepped aside from the sphere of his employment in getting on the conveyor. Teague v. Atlantic Co., 213 N.C. 546, 196 S.E. 875 (1938).

The fact that deceased was not actually engaged in the performance of his duties as watchman at the time he was pushed over and injured unintentionally by a fellow employee in a hurry did not perforce defeat his claim for compensation under this Act, where both employees had checked in for work and were on the premises and where they had a right to be. Brown v. Carolina Aluminum Co., 224 N.C. 766, 32 S.E.2d 320 (1944).

Selection of More Hazardous Route. — The evidence tended to show that claimant, in the performance of his duty to go to a guard tower outside of a high wire fence, elected to climb over the fence rather than go around by the gate, which would require approximately 200 yards of travel, and was injured when he jumped from the top of the fence to avoid falling therefrom. It was held that the evidence sustained the award of compensation, and the contention that claimant climbed the fence for his own convenience rather than as a part of his duties was untenable, since the mere fact that an employee selected the more hazardous route in the performance of his duties does not defeat recovery. Hartley v. North Carolina Prison Dep't, 258 N.C. 287, 128 S.E.2d 598 (1962).

Injury On the Way to Move Truck. — Where plaintiff (mayor of town) set out on bike to move an improperly parked city truck, but first stopped at his place of business and consumed an alcoholic beverage, then resumed his errand and was subsequently injured in a bicycle accident, his injury arose out of and in the course of his employment. Creel v. Town of Dover, 126 N.C. App. 547, 486 S.E.2d 478 (1997).

Effect of Intoxication. — The relevant question in determining whether intoxication operates to bar benefits to a claimant under the Act is not whether the claimant was intoxicated at the time of the accident, but whether the claimant's intoxication was more probably than not a cause in fact of the accident. Creel v. Town of Dover, 126 N.C. App. 547, 486 S.E.2d 478 (1997).

XIII. AGGRAVATION OF EXISTING CONDITION OR INFIRMITY.

Injury Aggravating Preexisting Infirmity or Disease Is Compensable. — When an employee afflicted with a preexisting disease or infirmity suffers a personal injury by accident arising out of and in the course of his employment, and such injury materially accelerates or aggravates the preexisting disease or infirmity and thus proximately contributes to the death or disability of the employee, the injury is compensable even if it would not have caused death or disability to a normal person. Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951).

If the employee by reason of constitutional infirmities is predisposed to sustain injuries while engaged in labor, nevertheless the leniency and humanity of the law permit him to recover compensation if the physical aspects of the employment contribute in some reasonable degree to bring about or intensify the condition which renders him susceptible to such accident and consequent injury. Moore v. J.P. Stevens & Co., 47 N.C. App. 744, 269 S.E.2d 159, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980); Walston v. Burlington Indus., 49 N.C. App. 301, 271 S.E.2d 516 (1980), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982); Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981).

Employment Need Not Be Sole Causative Force. — In workers' compensation actions the rule of causation is that where the right to recover is based on injury by accident, the employment need not be the sole causative force to render an injury compensable. Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981); Kendrick v. City of Greensboro, 80 N.C. App. 183, 341 S.E.2d 122, cert. denied, 317 N.C. 335, 346 S.E.2d 500 (1986).

Where the accident and resultant injury arise out of both the idiopathic condition of the worker and hazards incident to the employment, the employer is liable. But not so where the idiopathic condition is the sole cause of the injury. Norris v. Kivettco, Inc., 58 N.C. App. 376, 293 S.E.2d 594 (1982).

Relative Contributions of Accident and Preexisting Condition Not Weighed. — An employer accepts an employee has he is, and if a compensable injury precipitates a latent physical condition, such as heart disease, cancer, back weakness, or the like, the entire disability is compensable; no attempt is made to weigh the relative contribution of the accident and the preexisting condition. Anderson v. A.M. Smyre Mfg. Co., 54 N.C. App. 337, 283 S.E.2d 433 (1981).

Aggravation of Heart Condition. — Findings to the effect that employee suffered an injury arising out of and in the course of the employment, which injury aggravated a preexisting heart condition and caused death, would support an award for compensation and burial expenses. Wyatt v. Sharp, 239 N.C. 655, 80 S.E.2d 762 (1954).

Evidence Held Insufficient to Show Death as Natural Result of Accident. — Deceased broke his leg from a fall on the job. He was then 65 and had arteriosclerosis, arthritis, and heart trouble. While laid up he suffered with a bladder ailment which two attending physicians thought was caused or aggravated by his inactivity in bed. Over seven months later he died from the heart ailment and arthritis, which a different attending physician thought possibly or even probably would have been aggravated by a bladder condition such as reported by the physicians who first looked after him but of which the witness had no knowledge. This physician thought the accident to have been only a remote cause of his death. It was held that the evidence was insufficient to support the Commission's finding that deceased died while totally disabled from the accident and as a natural result of it. Gilmore v. Hoke County Bd. of Educ., 222 N.C. 358, 23 S.E.2d 292 (1942).

Sufficient Evidence. — North Carolina Industrial Commission's finding that a workers' compensation claimant's shoulder injury, which occurred when a coworker grabbed her by her arm and spun her around at work, arose out of and in the course of her employment, pursuant to G.S. 97-2(6) and aggravated a pre-existing shoulder condition was supported by sufficient evidence. This finding supported the Commission's conclusion that the claimant's injury by accident exacerbated her pre-existing condition and, thus, entitled her to temporary total disability compensation. Davis v. Columbus County Schs., 175 N.C. App. 95, 622 S.E.2d 671, 2005 N.C. App. LEXIS 2709 (2005).

Injury Caused by Previous Compensable Injury. — Plaintiff's compensable spinal injury which caused permanent paralysis of his legs was a proximate cause of burns received by plaintiff on the lower portions of his body when a cigarette he had been smoking set the clothing on his bed on fire. Plaintiff suffered the burns because of a loss of feeling and sensitivity in the lower portions of his body as a result of the original compensable accident, and the act of leaving the cigarette where it could set fire to the bedclothing was insufficient to break the chain of causation between the original injury and the burns sustained. Starr v. Charlotte Paper Co., 8 N.C. App. 604, 175 S.E.2d 342 (1970).

Back Injury Following Previous Back Surgery. — Under the evidence the Commission could determine that plaintiff's work-related back injury and the surgery which followed contributed to his disability in a reasonable degree, regardless of the fact that he had two previous laminectomies, and that, as a result, plaintiff was entitled to compensation. Kendrick v. City of Greensboro, 80 N.C. App. 183, 341 S.E.2d 122, cert. denied, 317 N.C. 335, 346 S.E.2d 500 (1986).

Mere Speculation was Insufficient to Support Finding of Aggravation of Kyphotic Deformity. — Where employee sustained an injury to his back as a direct result of a specific traumatic incident arising out of and in the course of employment, the finding that the employee's kyphotic deformity was aggravated by the work-related injury was vacated because the testimony of a neurosurgeon that indicated the condition "likely" was aggravated, was insufficient to support such a finding as the opinion was mere speculation. Cannon v. Goodyear Tire & Rubber Co., 171 N.C. App. 254, 614 S.E.2d 440, 2005 N.C. App. LEXIS 1254 (2005).

Compensation for Entire Resulting Disability. — When a preexisting, nondisabling, non-job-related condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment or by an occupational disease so that disability results, then the employer must compensate the employee for the entire resulting disability, even though it would not have disabled a normal person to that extent. In such a case, where an injury has aggravated an existing condition and thus proximately caused the incapacity, the relative contributions of the accident and the preexisting condition will not be weighed. Wilder v. Barbour Boat Works, 84 N.C. App. 188, 352 S.E.2d 690 (1987).

While the case law interpreting the specific traumatic incident provision of G.S. 97-2(6) requires the plaintiff to prove an injury at a cognizable time, this does not compel the plaintiff to allege the specific hour or day of the injury; following a work-related injury, was not an intervening cause that precluded compensation for aggravation of the employee's work-related injury since the accident was not the fault of the employee. Cannon v. Goodyear Tire & Rubber Co., 171 N.C. App. 254, 614 S.E.2d 440, 2005 N.C. App. LEXIS 1254 (2005).

XIV. INJURY FROM DISEASE.

Section 97-52 et seq. Constitute Implied Amendment to This Section. — The Occupational Disease Act, G.S. 97-52 et seq., constitutes an implied amendment to this section. Under that act, specified occupational diseases are compensable. In adopting this amendment, the legislature was not making provision for compensation for injuries by accident as that term is ordinarily understood. Provision for that type of injury had already been made in the original act. It was considering those diseases the causative origin of which is occupational and designating those which are to be deemed within the new and extended definition of "injury by accident" which it was then providing. Henry v. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

But Compensation for Disease Resulting from Accident Is Not Precluded by § 97-52 et seq. — Section 97-52, providing that only the occupational diseases therein specified should be compensable, relates only to occupational diseases, which are those resulting from long and continued exposure to risks and conditions inherent and usual in the nature of the employment, and this section does not preclude compensation for a disease not inherent in or incident to the nature of the employment when it results from an accident arising out of and in the course of the employment. MacRae v. Unemployment Comp. Comm'n, 217 N.C. 769, 9 S.E.2d 595 (1940).

And the employer is responsible for any disease resulting naturally and unavoidably from an accident. Williams v. Thompson, 200 N.C. 463, 157 S.E. 430 (1931), where plaintiff injured his eye and later unavoidably contracted gonorrhea ophthalmia in the injured organ; Clark v. Carolina Cotton & Woolen Mills, 204 N.C. 529, 168 S.E. 816 (1933), in which evidence was sufficient to support the finding that plaintiff's fall resulted in myelitis. See also Anderson v. Century Data Sys., Inc., 71 N.C. App. 540, 322 S.E.2d 638 (1984). And see 10 N.C.L. Rev. 407 (1932).

Apportionment Between Incapacitating Disease and Other Factors Not Proper. — Where an industrial disease renders an employee actually incapacitated to earn any wages, the employer may not ask that a portion of the disability be charged to the employee's advanced age and poor learning on the grounds that if it were not for these factors he might still retain some earning capacity. Anderson v. A.M. Smyre Mfg. Co., 54 N.C. App. 337, 283 S.E.2d 433 (1981).

Ordinarily, heart disease is not an injury and death therefrom is not ordinarily compensable. West v. North Carolina Dep't of Conservation & Dev., 229 N.C. 232, 49 S.E.2d 398 (1948); Lewter v. Abercrombie Enters., Inc., 240 N.C. 399, 82 S.E.2d 410 (1954).

In heart cases the decisions require a showing that the exertion was in some way unusual or extraordinary. Lewter v. Abercrombie Enters., Inc., 240 N.C. 399, 82 S.E.2d 410 (1954).

Dilatation of the Heart Due to Unusual Exertion. — A policeman 56 years of age, who was in good health and without any physical defect or disease, arrested a young man, who, because of intoxication, violently and viciously resisted, and after the officer subdued him and transported him to the jail, the officer and another had to carry the prisoner up three flights of stairs because the elevator was out of order. The officer collapsed with acute dilatation of the heart due to the unusual exertion. This injury to the heart muscle was chronic and progressive and the policeman suffered a fatal heart attack some 10 months thereafter. It was held that the evidence warranted the conclusion that the injury to the heart resulted not from inherent weakness or disease but from an unusual and unexpected happening, and that therefore death resulted from an accident within the meaning of this section. Gabriel v. Town of Newton, 227 N.C. 314, 42 S.E.2d 96 (1947). See Lewter v. Abercrombie Enters., Inc., 240 N.C. 399, 82 S.E.2d 410 (1954).

Coronary Occlusion. — Evidence that plaintiff suffered a coronary occlusion while rolling a heavy rope net in the course of his employment, with medical expert testimony that the exercise could not be the cause of the condition, although the attack might have been accelerated or precipitated by the exertion, was insufficient to sustain a finding that the coronary occlusion and resulting myocardial infarction arose out of and in the course of the employment. Bellamy v. Morace Stevedoring Co., 258 N.C. 327, 128 S.E.2d 395 (1962).

Accident and Exposure as Contributing to Death from Acute Nephritis. — The evidence before the Industrial Commission tended to show that the deceased employee, for whose death compensation was sought, had been in exceptionally good health up to the time of the accident, that he fell from a platform, breaking his leg, and lay where he fell for about half an hour, exposed to the cool weather, that he was then discovered and carried into the office, where he had to wait some two hours for medical attention. There was expert testimony to the effect that the exposure was a contributing factor causing acute nephritis resulting in death, and that the accident and exposure accelerated the employee's death. It was held that the evidence was sufficient to support the finding of the Industrial Commission that the disease resulted naturally and unavoidably from the accident. Doggett v. South Atl. Whse. Co., 212 N.C. 599, 194 S.E. 111 (1937).

Hemorrhagic Pachymeningitis Resulting from Blow to Head. — Plaintiff, while about his employer's business, was struck on the back of the head by hides which he was jerking from hooks about 10 feet from the floor, and had to stop work for a very short time. As a result of the blow plaintiff contracted hemorrhagic pachymeningitis which caused his total disability. This was held to be an injury by accident, arising out of and in the course of his employment within this section. Eller v. Lawrence Leather Co., 222 N.C. 23, 21 S.E.2d 809 (1942), petition for rehearing allowed and judgment modified on other grounds, 222 N.C. 604, 24 S.E.2d 244 (1943).

Gonorrhea Ophthalmia Resulting from Accident. — Plaintiff, a truck driver, sustained an injury to his eye while cleaning a carburetor. The injury irritated his eye and resulted in ulcer. Seven days after the accident the plaintiff was treated by a doctor, who gave the plaintiff some lotion to use. He visited the doctor three times. Then gonorrhea ophthalmia showed up, which was on the thirteenth day after the accident. As a result of the infection the plaintiff lost one eye and suffered a partial loss of use in the other eye. Compensation was allowed. Williams v. Thompson, 200 N.C. 463, 157 S.E. 430 (1931). See 8 N.C.L. Rev. 421 (1930).

Contraction of Tuberculosis from Coworker. — Tuberculosis contracted from exposure to the cough of one actively infected who was seated in close proximity at work is not an occupational disease, but may be found to have resulted naturally and avoidably from an accident. MacRae v. Unemployment Comp. Comm'n, 217 N.C. 769, 9 S.E.2d 595 (1940). And see 10 N.C.L. Rev. 407 (1932).

Employee Contracting Pneumonia. — Where an employee got wet in washing certain machines, although furnished with special clothes, and while removing ashes, was in the sunshine and open air, and the sudden change in temperature caused him to contract pneumonia, from which he died, it was held that the death was not the result of an accidental injury. Slade v. Willis Hosiery Mills, 209 N.C. 823, 184 S.E. 844 (1936).

Asbestosis. — In an action brought at common law on the ground that, due to defendant's negligence over a period of months, plaintiff had contracted pulmonary asbestosis, the court held that since defendant was negligent, plaintiff's injury was not incidental to his employment and, furthermore, was not deprived of its accidental character by the mere fact of its requiring several months to develop. Accordingly, recovery was denied plaintiff in his suit at common law because the injury was declared to be covered by the act. McNeely v. Carolina Asbestos Co., 206 N.C. 568, 174 S.E. 509 (1934). See also Johnson v. Hughes & S. Dairies, Inc., 207 N.C. 544, 177 S.E. 632 (1935).

Where claimant worked in an asbestos plant for six or seven years, and a dust removing system was not installed until about a year before claimant's discharge, at which time a medical examination disclosed that he was suffering from asbestosis, the evidence showed that the injury was the result of an occupational disease not compensable under the act prior to its amendment by Laws 1935, c. 123. Swink v. Carolina Asbestos Co., 210 N.C. 303, 186 S.E. 258 (1936). See §§ 97-52 and 97-76.

Silicosis. — The clear intent of G.S. 97-61.6 to provide compensation for death occurring within 350 weeks from the date of last exposure to silicosis if the employee was at the time of death receiving compensation for disablement due to silicosis, even though the death does not result from silicosis, must be given effect, notwithstanding subdivisions (6) and (10) of this section and G.S. 97-52, since the specific provisions relating to silicosis, which were enacted because of the peculiar course of the disease, must be construed as an exception to the general tenor of the compensation act to provide compensation for death only if it results from an accident arising out of and in the course of the employment. Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

Phlebitis, Arthritis and Severe Body Pain Resulting from Primary Injury. — The complications of phlebitis, arthritis and severe body pain, whether the complications were considered subsequent injuries or diseases, were compensable under the act where they were the natural and unavoidable result of the primary injury to plaintiff's hip and upper leg. Roper v. J.P. Stevens & Co., 65 N.C. App. 69, 308 S.E.2d 485 (1983), cert. denied, 310 N.C. 309, 312 S.E.2d 652 (1984).

XV. HERNIA.

Editor's Note. — *The cases annotated under this analysis line were decided prior to the 1987 amendment to subdivision (18) of this section, which deleted paragraph c thereof, regarding accompaniment of the hernia with pain, and added the second sentence of paragraph d thereof.*

Subdivision (18) of this section is given a liberal construction, with primary consideration being given to compensation for the injured employee. McMahan v. Hickey's Supermarket, 24 N.C. App. 113, 210 S.E.2d 214 (1974).

Legislative Use of the Term. — The medical condition known as "hernia" is not specifically defined in either the Worker's Compensation Act or in the case law. Although the Court of Appeals has declined to define the term hernia, it has noted that the legislature's use of the term hernia in conjunction with the word rupture in the statute, "hernia or rupture," seems to indicate that something less than full extension through the organ wall is contemplated. Pernell v. Piedmont Circuits, 104 N.C. App. 289, 409 S.E.2d 618 (1991), cert. denied, 330 N.C. 613, 412 S.E.2d 87 (1992).

Failure to Prove Any Element of Subdivision (18) Nullifies Claim. — Failure to prove the existence of any one of the five elements of subdivision (18) of this section nullifies plaintiff's claim. Lutes v. Export Leaf Tobacco Co., 19 N.C. App. 380, 198 S.E.2d 746 (1973).

To recover compensation for a hernia, a plaintiff must prove the existence of each of the five elements of subdivision (18). The absence of any one of them will result in the denial of compensation. Long v. Morganton Dyeing & Finishing Co., 84 N.C. App. 81, 351 S.E.2d 767, rev'd on other grounds, 321 N.C. 82, 361 S.E.2d 575 (1987).

This section, in effect, defines what constitutes a causal connection for purposes of hernia injury, and when any one of the section's elements is not proven, a causal connection does not exist. This is true even if the Commission is otherwise convinced that the hernia was caused by an accident arising out of and in the course of employment. Long v. Morganton Dyeing & Finishing Co., 84 N.C. App. 81, 351 S.E.2d 767, rev'd on other grounds, 321 N.C. 82, 361 S.E.2d 575 (1987).

Hernia Must Result from Accident. — In every case it must definitely appear that the hernia resulted immediately from an accident. Ussery v. Erlanger Cotton Mills, 201 N.C. 688, 161 S.E. 307 (1931).

Unusual Conditions Required. — In cases involving back injury or hernia, the elements constituting accident are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences. Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963).

This section requires an interruption of the usual work routine or the introduction of some new circumstance not a part of the usual work routine before a compensable injury arises in a hernia case. Gray v. Durham Transf. & Storage, Inc., 10 N.C. App. 668, 179 S.E.2d 883 (1971).

A back injury or hernia suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way. Faires v. McDevitt & St. Co., 251 N.C. 194, 110 S.E.2d 898 (1959); Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963); Gray v. Durham Transf. & Storage, Inc., 10 N.C. App. 668, 179 S.E.2d 883 (1971); Southards v. Byrd Motor Lines, 11 N.C. App. 583, 181 S.E.2d 811 (1971); Beamon v. Stop & Shop Grocery, 27 N.C. App. 553, 219 S.E.2d 508 (1975); Curtis v. Carolina Mechanical Sys., 36 N.C. App. 621, 244 S.E.2d 690 (1978).

As to requirement of unusual circumstances or exertion, see Moore v. Engineering & Sales Co., 214 N.C. 424, 199 S.E. 605 (1938).

Onset of Pain. — The pain that prior to the 1987 amendment to this section had to accompany an injury resulting in a hernia to render the injury compensable under former paragraph (18)c did not have to occur simultaneously with the sustaining of the injury. Long v. Morgantown Dyeing & Finishing Co., 321 N.C. 82, 361 S.E.2d 575 (1987).

Hernia Not Discovered Until Some Days After Commencement of Pain. — It is sufficient for the Commission to find the facts required under this section and award compensation if the pain immediately followed the accident, even if the hernia was not discovered until diagnosis by a physician some days thereafter. Ussery v. Erlanger Cotton Mills, 201 N.C. 688, 161 S.E. 307 (1931).

Findings of Commission Binding on Appeal. — Where the Commission finds and concludes that there was no causal connection between "accident" and hernia, the findings of the Commission when supported by any competent evidence are binding on appeal. Lutes v. Export Leaf Tobacco Co., 19 N.C. App. 380, 198 S.E.2d 746 (1973).

Sudden Appearance of Lesion and Enlargement of Inguinal Ring. — Plaintiff was a plumbing foreman. He had been instructed to lay off his workmen and to finish a job with one other employee. In helping the other employee lift a heavy pipe, he felt a pain in his abdomen. He consulted a physician who found an enlargement of the left inguinal ring and a bulge but no protrusion. The doctor strapped plaintiff and gave him a truss. Eighteen days later an actual hernia was found. An award granting compensation for hernia was affirmed, the court saying that the accident consisted of the plaintiff's having to do unusual work and that the lesion and enlargement of the inguinal ring, from which the fully developed hernia naturally comes, did result immediately. Moore v. Engineering & Sales Co., 214 N.C. 424, 199 S.E. 605 (1938).

Evidence Held to Justify Finding Compensable Hernia. — Claimant's injury resulted from an accident within the contemplation of the act and the evidence justified the Industrial Commission in finding that hernia appeared "suddenly" within the meaning of this section. Moore v. Engineering & Sales Co., 214 N.C. 424, 199 S.E. 605 (1938).

Claimant, in delivering milk to a cafe, had to lift a box of chipped ice from the storage box. On this occasion he felt a sharp abdominal pain as he lifted and "he got sick," but after a short rest, he worked till noon, when he reported that he had strained his side and went home. Hernia appeared a few days later. The employer contended that the injury was not caused by accident but only by the doing of regular work in the regular way. It was held that the sudden and unexpected rupture was not a natural and probable consequence of the work, but an accidental injury and compensable. Smith v. Cabarrus Creamery Co., 217 N.C. 468, 8 S.E.2d 231 (1940).

Evidence held sufficient to sustain the finding of the Industrial Commission that the hernia was compensable under subdivision (18) of this section. Rice v. Thomasville Chair Co., 238

N.C. 121, 76 S.E.2d 311 (1953).

Evidence tending to show that the employee was a carpenter and customarily did the work of a carpenter, that in removing concrete forms carpenters usually "stripped" the forms and laborers lifted and removed them, that on the occasion in question other carpenters and helpers had been withdrawn from the job, that the lifting of the forms was usually and customarily done by two men, and that while the employee was attempting to lift one of the forms by himself, requiring extreme exertion and strain in a confined and difficult place of work, he felt a sharp pain which continued until he had received medical treatment for the hernia, was sufficient to support a finding of the Industrial Commission that the employee suffered an injury by accident arising out of and in the course of his employment, resulting in the hernia. Faires v. McDevitt & St. Co., 251 N.C. 194, 110 S.E.2d 898 (1959).

Evidence Held Not to Show Compensable Hernia. — Where the evidence showed that a hernia occurred while the employee was performing his work in the customary and usual manner, and there was no evidence of any unusual condition or any slipping or falling by the employee, there was no evidence to justify a finding that the hernia resulted from an accident, and an award of compensation would be reversed. Hensley v. Farmers Fed'n Coop., 246 N.C. 274, 98 S.E.2d 289 (1957); Holt v. Cannon Mills Co., 249 N.C. 215, 105 S.E.2d 614 (1958).

The mere fact that plaintiff was handling a different commodity than usual, without more, and that the weather was hot, were not enough to satisfy the requirement of an "interruption of the work routine and the introduction of unusual conditions likely to result in unpredicted consequences." Nor was the mere fact that plaintiff was in a hurry. Southards v. Byrd Motor Lines, 11 N.C. App. 583, 181 S.E.2d 811 (1971).

Speculative testimony of physicians before the North Carolina Industrial Commission was insufficient to support the conclusion that the employee's hernia injury was caused by his work related activity. Hodgin v. Hodgin, 159 N.C. App. 635, 583 S.E.2d 362, 2003 N.C. App. LEXIS 1490 (2003), cert. denied, 357 N.C. 578, 589 S.E.2d 126 (2003).

Industrial commission properly denied compensability pursuant to G.S. 97-2 for three hernias suffered after a worker left his employment; the subject hernias were not recurrences of two earlier compensable hernias, but instead were new non-work injuries. Bondurant v. Estes Express Lines, Inc., 167 N.C. App. 259, 606 S.E.2d 345, 2004 N.C. App. LEXIS 2184 (2004).

XVI. ILLUSTRATIVE CASES.

A. Falls.

A fall itself is usually regarded as a compensable accident. Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Hollar v. Montclair Furn. Co., 48 N.C. App. 489, 269 S.E.2d 667 (1980).

There is a clear line of distinction in fall cases, which holds that: (1) where the injury is clearly attributable to an idiopathic condition of the employee, with no other factors intervening or operating to cause or contribute to the injury, no award should be made; (2) where the injury is associated with any risk attributable to the employment, compensation should be allowed, even though the employee may have suffered from an idiopathic condition which precipitated or contributed to the injury. Hollar v. Montclair Furn. Co., 48 N.C. App. 489, 269 S.E.2d 667 (1980).

When Fall Constitutes Compensable Accident. — It has been held that a fall is an accident, and where it is not shown to have resulted from the employee's physical infirmity or from external force unconnected with the employment, it may be found by the Commission to arise out of the employment. No affirmative evidence as to what caused the fall is necessary to support the finding. Here the employee, reaching up to a rack in the course of her work, lost her balance and fell. Robbins v. Bossong Hosiery Mills, 220 N.C. 246, 17 S.E.2d 20 (1941), involving an employee who lost her balance and fell while reaching up to a rack in the course of her work, and distinguishing cases of heart failure, dizzy spells, etc.

The rule that compensation will be awarded in unexplained-fall cases is applied in North Carolina. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

The effects of a fall are compensable if the fall results from an idiopathic cause and the employment has placed the employee in a position which increases the dangerous effects of the fall. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

When Injury From Fall Is Not Compensable. — If a fall and the resultant injury arise solely from an idiopathic cause, or a cause independent of the employment, the injury is not compensable. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

The fall itself is the unusual, unforeseen occurrence which is the accident. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

Hence, Evidence of Unusual Occurrence Is Unnecessary. — To prove an accident in industrial injury cases, it is not essential that there be evidence of any unusual or untoward condition or occurrence causing a fall which produces injury. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

Slipping on Fruit. — Plaintiff got into his car to leave defendant's plant. A night watchman beckoned to him, and in getting out of the car to learn what the watchman wanted, plaintiff slipped on a fruit peeling. Recovery was denied, the court saying, "When an injury cannot fairly be traced to the employment as a contributing proximate cause or comes from a hazard to which the worker would have been equally exposed apart from the employment, or from a hazard common to others, it does not arise out of the employment." Lockey v. Cohen, Goldman & Co., 213 N.C. 356, 196 S.E. 342 (1938).

Circumstances Permitting Inference That Fall Arose Out of and in Course of Employment. — Employee was suffering from a disease which subjected him to fainting spells. While in the men's washroom he called to a person in an adjacent booth, "Please help me to the window, I am about to faint." The floor was of tile and very slick when wet. It was washed each morning. The employee was afterwards found on the roof of the adjacent building, directly beneath the open windows. The circumstances permit the inference that employee slipped and fell to his death. Rewis v. New York Life Ins. Co., 226 N.C. 325, 38 S.E.2d 97 (1946). See also DeVine v. Dave Steel Co., 227 N.C. 684, 44 S.E.2d 77 (1947), where the employee was subject to fainting spells, but it was not shown that the fatal fall resulted from such a spell.

Injuries sustained in a fall in which the employee's leg unexplainedly gave way were held to be attributable solely to the employee's idiopathic condition, and thus recovery was denied. Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963).

Injury Caused by Epileptic Seizure. — The evidence tended to show that plaintiff employee was subject to epileptic fits, that while driving the employer's truck in the course of his employment he felt a seizure approaching, stopped the truck on the side of the road, opened the door and lay down on the seat of the truck with his head on the seat opposite the steering wheel and his feet hanging out of the truck, that he immediately suffered an epileptic seizure causing him to lose consciousness, and that when he "came to" his body was on the outside of the truck and his hands on the steering wheel. The expert medical testimony was to the effect that the employee had suffered broken bones caused by the fall from the seat of the truck and that the fall resulted from the epileptic seizure. It was held that the evidence disclosed that the sole cause of the employee's moving from a position of safety to his injury was the epileptic seizure, and therefore the fall was independent of, unrelated to, and apart from the employment, and the evidence could not support a finding of the Industrial Commission that the injury resulted from an accident arising out of the employment. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951).

Injury in Public Street During Fatigue Break. — Claimant's injury by accident did not arise out of her employment where claimant left her employer's premises during a fatigue break and walked down a public street to where oil tanks for the use of defendant employer were being buried in the street and there stumbled over a cement block and fell in the street, injuring her hip and back. Smith v. Dacotah Cotton Mills, Inc., 31 N.C. App. 687, 230 S.E.2d 772 (1976).

Unexplained Injury Where Performance of Duties Was Only Active Force Involved. — Where the cause of plaintiff's fall was unknown, but the only active force involved was plaintiff's exertion in the performance of his duties, the court gave effect to the liberal intent of the law by finding the accident to have arisen out of plaintiff's employment. Slizewski v. Int'l Seafood, Inc., 46 N.C. App. 228, 264 S.E.2d 810 (1980).

Findings supported the conclusion that death was not accelerated or aggravated by the injury; there was ample evidence presented and findings made regarding the rupture of decedent's aneurysm prior to the collision, and although there was evidence that the windshield of the car in which decedent was traveling was broken, there was no evidence nor finding that the cause of the break was contact with decedent's head. Strickland v. Central Serv. Motor Co., 94 N.C. App. 79, 379 S.E.2d 645, cert. denied, 325 N.C. 276, 384 S.E.2d 530 (1989).

Conversion Hysteria. — The Commission's finding that accidental fall in which employee was involved did not cause plaintiff's subsequent paralysis, but that his condition represented "conversion hysteria" due to unresolved emotional conflicts was supported by the evidence, and the fact that employee's fall was a "precipitating" or "triggering" event for his conversion disorder did not, without more, establish causation. Brewington v. Rigsbee Auto Parts, 69 N.C. App. 168, 316 S.E.2d 336 (1984).

B. Storm and Weather-Related Injuries.

Where the employment subjects a worker to a special or particular hazard from the elements, such as excessive heat or cold, likely to produce sunstroke or freezing, death or disability resulting from such cause usually comes within the purview of the compensation acts. On the other hand, where the employee is not by reason of his work peculiarly exposed to injury by sunstroke or freezing, such injuries are not ordinarily compensable. The test is whether the employment subjects the worker to a greater hazard or risk than that to which he otherwise would be exposed. Fields v.

Tompkins-Johnston Plumbing Co., 224 N.C. 841, 32 S.E.2d 623 (1945).

Where a bus driver was compelled to change a tire on defendant's bus during very cold weather and he contracted pneumonia, the Commission's ruling denying recovery was affirmed. Carter v. Carolina Coach Co., 208 N.C. 849, 182 S.E. 493 (1935).

Tornado. — Claimant was in the plant of his employer when it was struck by a tornado and was injured as a result of the partial collapse of the building. It was held that the accident resulting in the injury did not arise out of the employment, there being no causal relation between the employment and the accident. Walker v. Wilkins, 212 N.C. 627, 194 S.E. 89 (1937); Marsh v. Bennett College for Women, 212 N.C. 662, 194 S.E. 303 (1937).

Death from Bite of Mad Dog. — Where intestate died of hydrophobia resulting from a dog bite received by him while engaged in his duties as attendant in a filling station, it was held that claimant was not entitled to compensation for the employee's death, since there was no causal connection between the employment and the bite of a dog running at large, and the accident was not from a risk incidental to the employment. Plemmons v. White's Serv., 213 N.C. 148, 195 S.E. 370 (1938).

Heat Exhaustion or Sunstroke. — Determination of the Industrial Commission that employee's death resulting from heat exhaustion or sunstroke was an injury which arose out of and in course of employment was supported by the evidence, where such evidence showed that the general outside temperature was 104° Fahrenheit, and employee's work required that he be in close proximity to melted lead which increased the temperature in the partly finished building where employee was working on day of his death. Fields v. Tompkins-Johnston Plumbing Co., 224 N.C. 841, 32 S.E.2d 623 (1945).

Lightning. — Where a carpenter, caught in a storm while working, went to a nearby house under construction by his employer to get out of the rain and, while standing near a window talking with his employer and wearing wet clothes, including a carpenter's nail apron with nails therein, was killed by lightning, all damage to the clothes and marks on the body being from the waist down, with the nail apron knocked off, a hole burned in it, and a majority of the nails in it fused, the evidence was sufficient to support the conclusion that the circumstances of the carpenter's employment peculiarly exposed him to the risk of injury from lightning greater than that of others in the community, and to sustain an award of compensation. Pope v. Goodson, 249 N.C. 690, 107 S.E.2d 524 (1959).

C. Street and Highway Accidents.

When Highway Accidents Are Compensable. — An injury caused by a highway accident is compensable if the employee at the time of the accident is acting in the course of his employment and in the performance of some duty incident thereto. Hardy v. Small, 246 N.C. 581, 99 S.E.2d 862 (1957), involving a farm employee killed while crossing highway on return from barn.

Injury Occurring on Highway Close to Employer's Premises. — North Carolina has allowed compensation where the injury occurred on the highway close to employer's premises and the employee was using the only means of ingress and egress to and from the work he was to perform, saying that the hazards of that route become the hazards of the employment. Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

Cemetery Keeper Crossing Street on Way to Funeral Home. — When as an incident of his employment as cemetery keeper and in the performance of a duty connected therewith, as shown by the established custom, the decedent crossed the street en route to a funeral home, the hazard of the journey could properly be regarded as within the scope of the Workers' Compensation Act. Hinkle v. City of Lexington, 239 N.C. 105, 79 S.E.2d 220 (1953).

Cemetery Caretaker Making Rounds of Funeral Homes. — Where a cemetery caretaker employed by the city, who had no telephone, regularly and daily made rounds of the funeral homes at night to determine what graves needed to be dug the next day, injury sustained by him when he was hit by an automobile while engaged in making these rounds was compensable. The employer was said to have consented to the making of the trip because of the established custom of the caretaker. Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

Off-Premises Accident Hours After Work. — Recovery would be denied for injury sustained in a highway accident, away from the premises, some five hours after the employee left work. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Teacher Killed in Accident at End of School Day. — In an action to recover death benefits for the death of a school teacher which occurred when she backed her car, at the end of the school day, into the path of a truck, evidence and findings that the deceased was required as part of her duties to visit students in their homes after school hours, and that she was also required from time to time to purchase incidental supplies at retail stores for use in her class, along with related evidence and findings, presented nothing more than a scenario of what the deceased might do on a given day, and was not sufficient to support a finding that the deceased was performing one of the duties of her employment at the time of the accident. Franklin v. Wilson County Bd. of Educ., 29 N.C. App. 491, 224 S.E.2d 657 (1976).

Injury on Employer-Owned Road. — Plaintiffs were not injured by accident arising out of and in the course of their employment when they were injured in a collision between two automobiles driven by fellow employees while they were leaving work on a two mile long private road maintained by the employer to provide ingress to and egress from the employer's plant where defendants, in driving plaintiffs home pursuant to a private arrangement, were not performing assigned duties for their employer; the accident occurred one and one-half miles from the employer's plant and parking lot on a road which was designed and constructed like a public highway; and the risks which the employees were exposed to on the private road were not materially different from those encountered on a public highway. Strickland v. King, 293 N.C. 731, 239 S.E.2d 243 (1977).

D. Miscellaneous Cases.

Editor's Note. *— Earlier cases dealing with back injuries should be read in light of the 1983 amendment to subdivision (6) of this section, which modified the definition of "injury" with respect to back injuries so as to cover "specific traumatic incidents." Caskie v. R.M. Butler & Co., 85 N.C. App. 266, 354 S.E.2d 242 (1987).*

Employee Drowned in Attempt to Extricate Car from Employer's Millrace. — Where deceased, whose duty it was to keep his employer's millrace clean, was drowned in an attempt to extricate a car and its occupants that had plunged into the water, there was sufficient evidence to support a finding that the accident arose out of and in the course of the employment. Southern v. Morehead Cotton Mills Co., 200 N.C. 165, 156 S.E. 861 (1931).

Inhaling Carbon Monoxide Gas. — Deceased died as a result of carbon monoxide gas inhaled by him during the course of one night. It was held that it was error for the Industrial Commission to refuse compensation on the grounds that death resulted from an occupational disease rather than an accident. Cabe v. Parker-Graham-Sexton, Inc., 202 N.C. 176, 162 S.E. 223 (1932).

Arrest Outside Scope of Employment of Jailer. — Deceased, who was employed by the sheriff as his deputy and by the county commissioners as jailer, met his death in attempting to arrest an individual who had just shot his own wife at a house two doors from the rear of the jail. The Commission was of the opinion that death resulted from accident arising out of and in the course of employment either as deputy sheriff or as jailer or as "deputy-sheriff jailer." The statute did not then treat deputies as employees of the county and the Supreme Court remanded the case for a finding specifically on whether the accident was in the course of deceased's employment as jailer. Gowens v. Alamance County, 214 N.C. 18, 197 S.E. 538 (1938). The Commission then found that question in the affirmative, but was later overruled on the ground that the attempted arrest was clearly "outside the scope of his employment as jailer".

Injury Produced by Inhaling Asbestos Dust. — The word "accident" within the meaning of this act should be construed in its wide and practical sense to give effect to the intent of the act, and an injury produced by inhaling asbestos dust for a period of five months is an accidental injury within the terms of this section, the test being not the amount of time taken to produce the injury but whether it was produced by unexpected and unforeseen, and therefore, accidental means. McNeeley v. Carolina Asbestos Co., 206 N.C. 568, 174 S.E. 509 (1934). As to compensation for occupational diseases, see §§ 97-52 to 97-76.

Infection After Getting Lime Dust in Eye. — Plaintiff, an employee at defendant's water company, got lime dust in his eye as he was dumping lime into a feeder. This had happened many times before, but this time his eye became infected. Recovery was allowed. Lover v. Town of Lumberton, 215 N.C. 28, 1 S.E.2d 121 (1939).

Loss of Sight Subsequent to Splashing of Fuel in Eye. — Employee who suffered a loss of sight in his left eye incident to a hemorrhagic central retinal vein occlusion subsequent to an accidental splashing of fuel in the eye could be awarded compensation if the Commission found that the burning and itching occasioned by the fuel-splashing caused employee, through a natural reflex, to vigorously rub his eyes and that the rubbing caused, aggravated, accelerated, or precipitated the hemorrhagic vein occlusion, even if the employee were to have a predisposition toward developing this condition. To deny compensation, the Commission would have to find and conclude that the vigorous rubbing did not significantly cause, aggravate, accelerate, or precipitate the occlusion. Jackson v. L.G. DeWitt Trucking Co., 82 N.C. App. 208, 346 S.E.2d 160 (1986).

Employee Mowing Lawn at Employer's Residence. — Where the claimant was employed to drive a delivery truck and to do janitorial work both in the employer's place of business and at the employer's home, and was injured while mowing the lawn at the employer's residence, the injury was not compensable and was not covered by a compensation insurance policy which provided coverage solely in connection with the employer's business having a definite location. Burnett v. Palmer-Lipe Paint Co., 216 N.C. 204, 4 S.E.2d 507 (1939).

Temporary Sickness and Blindness. — The Industrial Commission found, upon supporting evidence, that claimant became temporarily sick and blind while performing usual manual labor in the usual manner, that his condition improved and he went back to work and that shortly thereafter he again suffered a similar disability. The findings support the conclusion that the injury did not result from an accident arising out of and in the course of claimant's employment within the purview of this Chapter. Buchanan v. State Hwy. & Pub. Works Comm'n, 217 N.C. 173, 7 S.E.2d 382 (1940).

Infection Following Cut. — Where the claimant, while working in an upholstering plant, discovered that an upholstering tack had gone through his shoe and cut his toe, and subsequently infection set in, the Commission's finding that the injury arose out of and in the course of the employment was conclusive. Kearns v. Biltwell Chair & Furn. Co., 222 N.C. 438, 23 S.E.2d 310 (1942).

Rupture of Disc. — The evidence tended to show that employee lifted a plate weighing 40 or 50 pounds in the regular and usual course of his employment, and while handing it to the pressman with his body in a twisted position, felt a sharp pain. Expert testimony was introduced to the effect that the employee had ruptured an intervertebral disc and that the lifting of the weight in the manner described was sufficient to have produced the injury. Plaintiff employee admitted that on two different occasions, several years previously, when he arose from a sitting position he had a catch in his back. It was held that the evidence was sufficient to support the finding of the Industrial Commission that the injury resulted from an accident. Edwards v. Piedmont Publishing Co., 227 N.C. 184, 41 S.E.2d 592 (1947).

Evidence that while digging a ditch 12 inches wide by 14 inches deep, claimant came upon a rock some 24 inches long and 12 inches wide, weighing 50 to 100 pounds, that claimant dug around the rock, bent down to pick it up, and, as he twisted to heave it out of the ditch felt a catch in his back, together with expert testimony that the rupture of claimant's spinal disc was caused by the lifting episode and that lifting from such a twisted and cramped position multiplied the intensity of the stress upon the vertebrae, was sufficient to sustain the Commission's findings that the injury resulted from an accident arising out of and in the course of the employment. Keller v. Electric Wiring Co., 259 N.C. 222, 130 S.E.2d 342 (1963).

The evidence was sufficient to support the commission's conclusion that the ruptured disc suffered by the claimant was an injury by accident where the evidence showed that the claimant was not carrying out his usual and customary duties, and that the circumstances involved an interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences. Key v. Wagner Woodcraft, Inc., 33 N.C. App. 310, 235 S.E.2d 254 (1977).

The Industrial Commission properly determined that plaintiff suffered an injury by "accident" where the evidence supported findings by the commission that plaintiff, in the course of her duties as a knitter, was pulling a rod out of a roll of cloth; this activity was a part of plaintiff's regular and customary job; on this occasion, the withdrawal of the rod was more difficult than usual because the roll of cloth was "extra tight"; and the extraordinary effort plaintiff exerted in her attempt to withdraw the rod injured her back, causing a ruptured intervertebral disc. Porter v. Shelby Knit, Inc., 46 N.C. App. 22, 264 S.E.2d 360 (1980).

The Industrial Commission erred in awarding plaintiff compensation for a herniated intervertebral disc in the absence of expert medical testimony tending to establish a causal relationship between plaintiff's work-related accident and the injury for which compensation was sought. Click v. Pilot Freight Carriers, Inc., 300 N.C. 164, 265 S.E.2d 389 (1980).

Highway Patrolman Using Airplane to Search for Escaped Convict. — Two highway patrolmen were killed while in an airplane searching for an escaped convict. The award of the commissioner granting compensation was reversed by the full Commission, and reinstated on appeal to the superior court. The Supreme Court affirmed the award. The case turned on the question of the authority of the patrolmen to attempt to apprehend the fugitive. The court found such authority, and held that the use of an airplane was not a novel or unusual method of carrying out such a purpose. Galloway v. Department of Motor Vehicles, 231 N.C. 447, 57 S.E.2d 799 (1950).

Death from Coronary Occlusion After Making Arrest. — A game warden arrested several men, one of whom offered slight resistance. Later that day, the warden died of a coronary occlusion. It was held that mere resistance of arrest by one who is being taken into custody by an officer does not constitute an accident; it may be considered as one of his duties. Also, heart disease is not an occupational disease. West v. North Carolina Dep't of Conservation & Dev., 229 N.C. 232, 49 S.E.2d 398 (1948), distinguishing Gabriel v. Town of Newton, 227 N.C. 314, 42 S.E.2d 96 (1947). See Lewter v. Abercrombie Enters., Inc., 240 N.C. 399, 82 S.E.2d 410 (1954).

Electric Shock. — The record disclosed competent evidence sufficient to support the

Industrial Commission in finding that death was caused by electric shock by accident arising out of and in the course of employment. Blalock v. City of Durham, 244 N.C. 208, 92 S.E.2d 758 (1956).

Injury Sustained While Taking Medical Test. — An injury sustained by an employee while taking a medical test or examination, which test or examination was required by law in order for the employee to continue to hold her job, did not constitute an accident arising out of and in the course of her employment within the meaning of this section. King v. Arthur, 245 N.C. 599, 96 S.E.2d 846 (1957).

Death of Policeman Held Compensable. Andrews v. Town of Princeville, 245 N.C. 669, 97 S.E.2d 110 (1957).

Lifting of 175 Pound Cabinet. — Evidence that claimant received an injury while attempting, alone, to elevate and hold a 175 pound cabinet in place while another worker secured it to the wall, and that three men were usually assigned to the installation of such cabinets on the construction job, was sufficient to sustain a finding that claimant suffered a compensable injury by accident arising out of and in the course of his employment. Davis v. Summitt, 259 N.C. 57, 129 S.E.2d 588 (1963).

Death from Coronary Thrombosis. — Where the evidence does not disclose that the employee was doing work essentially different from that which had been customarily performed by him over the years, his death as a result of a coronary thrombosis is not the result of an accident within the meaning of the act. Ferrell v. Montgomery & Aldridge Sales Co., 262 N.C. 76, 136 S.E.2d 227 (1964).

Seed Processor Bush Hogging for Employer on Saturday. — Plaintiff, who worked on Saturdays by choice and with the agreement of his employer, and whose primary duties involved processing soybeans, oats and barley through the gin, but who, on the Saturday of his accident, when the gin was not in operation, was instructed by his employer to "bush hog" in the area around the gin and in a field leased by his employer, which job was related to his employer's business, sustained an injury by accident which arose out of and in the course of his employment. Murray v. Biggerstaff, 81 N.C. App. 377, 344 S.E.2d 550, cert. denied, 318 N.C. 696, 350 S.E.2d 858 (1986).

Injury to Minister Moving from Parsonage. — Where claimant, who was employed as a minister by defendant church and was furnished a parsonage as part of his remuneration, agreed for the benefit of the church to move out of the parsonage two weeks before the termination of his employment in order that repairs might be made, and while he was moving his stove from the parsonage he suffered a back injury, the injury could not be traced to his employment as minister, since the evidence plainly showed that his injury arose out of the performance of an act personal to himself and his family. Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

Back Injury. — Evidence tending to show that an employee, while engaged in moving cases of soup in the ordinary manner and free from confining or otherwise exceptional conditions and surroundings, suffered a back injury which was accentuated by a congenital condition, was insufficient to support a finding that the injury resulted from an accident within the purview of the act. Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967).

There was no accident when a painter moved from a squatting position to a standing position and experienced pain in his lower back. Hewett v. Constructor's Supply Co., 29 N.C. App. 395, 224 S.E.2d 297, cert. denied, 290 N.C. 550, 226 S.E.2d 510 (1976).

Plaintiff's cleaning of an oil breather cap from a co-employee's car during his lunch period was a reasonable activity and the risk inherent in such activity was a risk of the employment giving rise to compensation because of injury sustained in cleaning the cap. Watkins v. City of Wilmington, 28 N.C. App. 553, 221 S.E.2d 910, aff'd, 290 N.C. 276, 225 S.E.2d 577 (1976).

Injuries to Trucker Preparing Truck for Job. — Injuries to an owner-operator of a truck leased to an Interstate Commerce Commission franchise holder arose out of and in the course of employment where the plaintiff accepted the offer of a job driving from Greensboro to San Francisco, a part of the duties of the employment was to present the tractor-trailer in condition to make the trip, and plaintiff was injured while preparing the truck. Thompson v. Refrigerated Transp. Co., 32 N.C. App. 693, 236 S.E.2d 312 (1977).

Injuries to Truck Driver on Route. — Findings of commission that heart attack suffered by truck driver while driving his route was not the result of an accident or occupational disease caused by stress, equipment, and long hours upheld. Dye v. Shippers Freight Lines, 118 N.C. App. 280, 454 S.E.2d 845 (1995).

Nurse Turning Obese Patient. — Plaintiff's injury suffered during the course of her employment was not the result of an accident within the meaning of subdivision (6) of this section where the injury occurred while plaintiff nurse was turning an unconscious, obese patient, where turning patients was part of plaintiff's job, and where there was no evidence that the hospital room and its condition were any different than those in which plaintiff was used to working and where the patient, although obese, did not present an exceptional condition to plaintiff. Artis v. North Carolina

Baptist Hosps., 44 N.C. App. 64, 259 S.E.2d 789 (1979).

Heart Attack After Chasing Suspect. — Where it was clear from the evidence that acute myocardial infarction suffered by plaintiff deputy sheriff occurred suddenly and immediately after the foot chase of a suspect, and that it was the overexertion experienced during the foot chase that caused the injury to his heart, it was not necessary for plaintiff to show that the overexertion which was the cause of his injury occurred while he was engaged in some unusual activity, since it was the extent and nature of the exertion that classified the resulting injury to the plaintiff's heart as an injury by accident within the meaning of this section. King v. Forsyth County, 45 N.C. App. 467, 263 S.E.2d 283, cert. denied, 300 N.C. 374, 267 S.E.2d 676 (1980).

Rupture of Aneurysm. — Under the evidence, the Industrial Commission properly determined that the death of a traveling mechanic from the rupture of a congenital aneurysm in the left carotid artery did not result from an accident arising out of and in the course of his employment. King v. Exxon Co., 46 N.C. App. 750, 266 S.E.2d 37 (1980).

Subarachnoid Hemorrhage. — Where the evidence indicated that decedent died from a subarachnoid hemorrhage, which is not a compensable cause, the presumption of compensability was not applicable and the Commission did not err by not applying it. Gilbert v. Entenmann's, Inc., 113 N.C. App. 619, 440 S.E.2d 115 (1994).

Filling in for Absent Employee. — Evidence was sufficient to support a finding by the Industrial Commission that there was no interruption of plaintiff's work routine or the introduction of some new circumstance not a part of the usual work routine, the fact that plaintiff was filling in for absent employees and therefor engaged in a greater volume of lifting than was her ordinarily assigned task not rendering her performance at the time of the injury other than a part of the usual work routine. Dyer v. Mack Foster Poultry & Livestock, Inc., 50 N.C. App. 291, 273 S.E.2d 321 (1981).

Lifting Object Heavier Than Usual. — Where plaintiff's work routine, the lifting of lighter crates, was interrupted by introduction of a crate heavier than expected and heavier than usual, the Commission was warranted in concluding as a matter of law that plaintiff suffered an injury "by accident." Gladson v. Piedmont Stores/Scotties Disct. Drug Store, 57 N.C. App. 579, 292 S.E.2d 18, cert. denied, 306 N.C. 556, 294 S.E.2d 370 (1982).

Injury During Regularly Scheduled Rest Break. — Plaintiff's injury arose out of and in the course of his employment, that is, had its origin in an employment-connected risk as opposed to one common to the public at large, where he was locked inside the plant yard which was enclosed with a high chain link fence with a large crowd of fellow employees as was customary during a regularly scheduled rest break, the railroad track over which he tripped and injured his knee was an integral part of the equipment of the plant, and it ran directly through the area in which he took his relaxation breaks, and permission from the plant supervisor was necessary in order for an employee to leave the plant premises during these scheduled rest breaks. Williams v. Hydro Print, Inc., 65 N.C. App. 1, 308 S.E.2d 478 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 297 (1984).

Injury Incident to New Job. — Employee who ruptured a tendon as he was twisting and jerking hose off a mandrel incident to a new job in the curved hose department of employer, to which he had been assigned when, to avoid being laid off, he exercised his contractual right to displace another employee in a different department with less union seniority, and who had spent two days observing the new job and two days and a few hours doing the new job, was entitled to compensation for an injury arising by accident. Gunter v. Dayco Corp., 317 N.C. 670, 346 S.E.2d 395 (1986).

Unexplained Death. — Where the undisputed evidence indicated that decedent died while acting in the scope of his employment, and no evidence indicated that he died other than by accident, under these circumstances decedent's widow may rely on a presumption that decedent's death occurred via a work related cause, thereby making the death compensable even though the cause of death was unknown. Pickrell v. Motor Convoy, Inc., 322 N.C. 363, 368 S.E.2d 582 (1988).

Claimant, mother of a 34-year-old cablevision lineman who was found dead at the base of a utility pole by two co-workers, was not entitled to benefits, where the examining pathologist attributed the probable cause of her son's death to marked atherosclerotic coronary artery disease, although he noted that the possibility of a low voltage injury could not be completely excluded, and she was not entitled to a presumption that, upon an unexplained death, there was an inference the death arose out of the employment and was compensable, nor to a presumption that close cases should be decided to the employee's benefit. Gilbert v. B & S Contractors, 81 N.C. App. 110, 343 S.E.2d 609 (1986).

Heart Attack After Tugging on Tarp. — Commission properly concluded that a tractor-trailer driver's heart attack was not the result of an accident arising out of and in the course of employment, where the driver's frustration and physical exertion in tugging on a tarp was not the precipitating cause of the heart attack. Cody v. Snider Lumber Co., 328 N.C. 67, 399 S.E.2d 104 (1991).

For additional cases in which compensation was not awarded, see Plyler v. Charlotte Country Club, 214 N.C. 453, 199 S.E. 622 (1938); Thornton v. J.A. Richardson Co., 258 N.C. 207, 128 S.E.2d 256 (1962); Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

XVII. DISABILITY.

To obtain an award of compensation an employee must establish that his injury caused him disability, unless it is included in the schedule of injuries made compensable by G.S. 97-31 without regard to loss of wage-earning power. Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951).

To support a conclusion of disability, the Commission must find: (1) That the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment and (3) that the plaintiff's incapacity to earn was caused by his injury. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986); Gregory v. Sadie Cotton Mills, Inc., 90 N.C. App. 433, 368 S.E.2d 650, cert. denied, 322 N.C. 835, 371 S.E.2d 277 (1988).

To establish disability a claimant must prove: (1) he was incapable of earning the same wages in the same employment, (2) he was incapable of earning the same wages in any other employment, and (3) his incapacity to earn was caused by the injury. Arrington v. Texfi Indus., 123 N.C. App. 476, 473 S.E.2d 403 (1996).

Disability is the event of being incapacitated from the performance of normal labor. Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975), rev'd on other grounds, 289 N.C. 254, 221 S.E.2d 335 (1976).

But disability is more than mere physical injury and is markedly different from technical or functional disability. Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975), rev'd on other grounds, 289 N.C. 254, 221 S.E.2d 335 (1976).

Ability to Carry Out "Normal Life Functions" Not Determinative. — Physicians' estimates of plaintiff's disability, which referred only to the degree of loss of use of her nervous system and to the impairment of her ability to carry out "total life functions," were insufficient to support the commission's finding that plaintiff was entitled to compensation for permanent partial disability or loss of use of her back and not to benefits for total incapacity to work, since a person may be wholly incapable of working and earning wages even though her ability to carry out normal life functions has not been wholly destroyed and even though she has not lost 100 percent use of her nervous system. Little v. Anson County Schools Food Serv., 295 N.C. 527, 246 S.E.2d 743 (1978).

A claimant's post-injury earning capacity is the determinative factor in assessing disability. Tyndall v. Walter Kidde Co., 102 N.C. App. 726, 403 S.E.2d 548, cert. denied, 329 N.C. 505, 407 S.E.2d 553 (1991).

Ability to Work For Others After Injury. — Football player was properly awarded 299 weeks of workers' compensation benefits as the North Carolina Industrial Commission's finding that the football player made another team, but was released from the other team because of limitations from his injury with the employer, was supported by competent evidence. Swift v. Richardson Sports, Ltd., 173 N.C. App. 134, 620 S.E.2d 533, 2005 N.C. App. LEXIS 1898 (2005).

Under the act, disability refers not to physical infirmity but to a diminished capacity to earn money. Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951); Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965); Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967); Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967); Morgan v. Thomasville Furn. Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968); Snead v. Sandhurst Mills, Inc., 8 N.C. App. 447, 174 S.E.2d 699 (1970); Willis v. Reidsville Drapery Plant, 29 N.C. App. 386, 224 S.E.2d 287 (1976); Little v. Anson County Schools Food Serv., 33 N.C. App. 742, 236 S.E.2d 801 (1977), rev'd on other grounds, 295 N.C. 527, 246 S.E.2d 743 (1978); Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979); Lucas v. Burlington Indus., 57 N.C. App. 366, 291 S.E.2d 360 (1982); Priddy v. Cone Mills Corp., 58 N.C. App. 720, 294 S.E.2d 743 (1982); Fleming v. K-Mart Corp., 67 N.C. App. 669, 313 S.E.2d 890 (1984), aff'd, 312 N.C. 538, 324 S.E.2d 214 (1985); Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985); Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

Disability is defined in terms of a diminution in earning power. Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975), rev'd on other grounds, 289 N.C. 254, 221 S.E.2d 335 (1976).

As used in the Workers' Compensation Act, "disability" specifically relates to incapacity to earn wages. Fleming v. K-Mart Corp., 67 N.C. App. 669, 313 S.E.2d 890 (1984), aff'd, 312 N.C. 538, 324 S.E.2d 214 (1985).

"Disability" under this Chapter means an impairment in the employee's wage-earning capacity because of injury, not merely a physical impairment. Hendrix v. Linn-Corriher Corp., 78 N.C. App. 373, 337 S.E.2d 106 (1985), aff'd in part and rev'd in part, 317 N.C. 179, 345 S.E.2d 374 (1986).

Fact that claimant may be capable of doing sedentary work does not establish that she is not disabled. Disability under the Workers' Compensation Act is not to be equated with physical infirmity. Other factors tending to show the unemployability of the worker, such as age, education and experience, may be considered. McCubbins v. Fieldcrest Mills, Inc., 79 N.C. App. 409, 339 S.E.2d 497, cert. denied, 316 N.C. 732, 345 S.E.2d 389 (1986).

An occupationally injured or diseased worker who is employable at wages equal to those earned before the injury or disease was incurred is not disabled. Bridges v. Linn-Corriher Corp., 90 N.C. App. 397, 368 S.E.2d 388, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

In order to receive disability compensation under the Worker's Compensation Act, the mere fact of an on the job injury is not sufficient; the injury must have impaired the worker's earning capacity. Brown v. S & N Communications, Inc., 124 N.C. App. 320, 477 S.E.2d 197 (1996).

Award Not Based on Capacity to Earn Is Erroneous. — An award of compensation based upon a finding as to the amount the claimant had earned since the date on which total permanent disability had ceased, rather than upon his capacity or ability to earn, is erroneous. Hill v. DuBose, 237 N.C. 501, 75 S.E.2d 401 (1953).

The test for disability is whether and to what extent earning capacity is impaired, not the fact or extent of physical impairment. Robinson v. J.P. Stevens & Co., 57 N.C. App. 619, 292 S.E.2d 144 (1982); Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986).

Entitlement to compensation under this Chapter is rooted in and must be measured by plaintiff's capacity or incapacity to earn wages. Mills v. J.P. Stevens & Co., 53 N.C. App. 341, 280 S.E.2d 802, cert. denied, 304 N.C. 196, 285 S.E.2d 100 (1981).

Loss of Earning Power Is Criterion. — The disability of an employee is to be measured by his capacity or incapacity to earn the wages he was receiving at the time of the injury. Loss of earning capacity is the criterion. If there is no loss of earning capacity, there is no disability within the meaning of the act. Dail v. Kellex Corp., 233 N.C. 446, 64 S.E.2d 438 (1951); Peoples v. Cone Mills Corp., 69 N.C. App. 263, 317 S.E.2d 120, modified on other grounds, 316 N.C. 426, 342 S.E.2d 798 (1986), modified on other grounds, 316 N.C. 426, 342 S.E.2d 798 (1986).

Loss of earning capacity is the criterion. Compensation must be based upon loss of wage-earning power rather than the amount actually received. It was intended by this section to provide compensation only for loss of earning capacity. Hill v. DuBose, 234 N.C. 446, 67 S.E.2d 371 (1951); Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

The Commission's finding of fact that "due to plaintiff's accepted compensable carpal tunnel syndrome superimposed on fibromyalgia, [she] is unable to earn wages" was not supported by competent evidence; although evidence a plaintiff suffers from pain as a result of her compensable injury may be competent evidence to support a conclusion the plaintiff is disabled, the evidence must show that pain renders the plaintiff incapable of work in any employment. Demery v. Perdue Farms, Inc., 143 N.C. App. 259, 545 S.E.2d 485, 2001 N.C. App. LEXIS 266 (2001), aff'd, 354 N.C. 355, 554 S.E.2d 337 (2001).

Disability is measured by the capacity or incapacity of employee to earn the wages he was receiving at the time of the injury, by the same or any other employment. And the fact that the same wages are paid by the employer because of long service does not alter the rule. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943); Dail v. Kellex Corp., 233 N.C. 446, 64 S.E.2d 438 (1951); Hill v. DuBose, 234 N.C. 446, 67 S.E.2d 371 (1951).

Statement in Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943), which is noted above, that there is no disability if the employee is receiving the same wages in the same or other employment is correct only so long as the employment reflects the employee's ability to earn wages in the competitive market. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

The term "disability," as used in the Workers' Compensation Act, means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of injury. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971); Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975), rev'd on other grounds, 289 N.C. 254, 221 S.E.2d 355 (1976); Porter v. Shelby Knit, Inc., 46 N.C. App. 22, 264 S.E.2d 360 (1980).

In order for the Commission to award disability compensation, the plaintiff must prove and the Commission must find: (1) That he was incapable of earning the same wages he had earned before his injury in the same employment, (2) that he was incapable of earning the same wages he had earned before his injury in any other employment, and (3) that his incapacity was caused by his injury or occupational disease. Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986); Taylor v. Margaret R. Pardee Mem. Hosp., 83 N.C. App. 385, 350 S.E.2d 148 (1986), cert. denied, 319 N.C. 410, 354 S.E.2d 729 (1987).

Under the Workers' Compensation Act, disability is defined by a diminished capacity to earn wages, not by physical infirmity; however, the fact that an employee is capable of performing employment tendered by the employer is not, as a matter of law, an indication of plaintiff's ability to earn wages. Saums v. Raleigh Community Hosp., 346 N.C. 760, 487 S.E.2d 746 (1997).

In order to prove disability the burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions. i.e. age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury. Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 425 S.E.2d 454 (1993).

And Not by Employer's Willingness to Pay. — Capacity to earn the same wages, and not the particular employer's policy or willingness to pay wages for an undetermined time, is the test of disability. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

The Workers' Compensation Act does not permit an employer to avoid its duty to pay compensation by offering an injured employee employment which the employee under normally prevailing market conditions could find nowhere else and which the employer could terminate at will or for reasons beyond its control. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

When a person has been offered, but has not accepted, employment after an accident, and the proffered employment does not accurately reflect the person's ability to compete with others for wages, it cannot be considered evidence of earning capacity. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

Supply room position offered to employee by employer, which was so modified because of employee's medical condition that the position would not be offered in the competitive job market, could not be considered as evidence of employee's ability to earn wages. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

But there is no "disability" if the employee is receiving the same wages in the same or any other employment. The fact that "in the same" employment he is not required to perform all the physical work theretofore required of him can make no difference. Even so, if this is not "the same employment," then it clearly comes within the term "other employment." To remove the employment from one classification necessarily shifts it to the other. Furthermore, there is no language used in this section or in any other part of the statute which even suggests that "other employment" must be with a different employer. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

Receipt of Same Wages After Injury Creates Rebuttable Presumption. — Receipt of the same wages after injury should create no stronger presumption that disability has ended than the presumption which arises on an employee's returning to work. In both instances a rebuttable presumption of fact arises. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

If an award is made by the Industrial Commission, payable during disability, there is a presumption that disability lasts until the employee returns to work, and likewise a presumption that disability ends when the employee returns to work at wages equal to those he was receiving at the time his injury occurred. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

But Is Not Conclusive Proof That No "Disability" Exists. — The amount of wages received by the employee after his injury should be strong evidence of his capacity or incapacity to earn wages, but receipt of wages in the amount received before the injury cannot be conclusive proof that no "disability" exists. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Disability Not Presumed Where Payments Not Shown to be Payable During Disability. — Presumption that disability continued until plaintiff returned to work did not apply, where parties stipulated plaintiff sustained injury arising out of and in the course of her employment, and parties stipulated Form 21 and Form 26 agreements were approved in which defendant admitted plaintiff was paid for compensation "for temporary total disability for a period not specifically identified in the record", but the record did not include the forms or reveal whether payments made by defendant were payable during disability. Hoyle v. Carolina Associated Mills, 122 N.C. App. 462, 470 S.E.2d 357 (1996).

Employer Given Benefit of Any Wages Earned After Injury. — Subdivision (9) of this section is drawn so as to give the employer the benefit of wages which plaintiff, after his injury, is able to earn from any other source. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

How Disability Measured for Second Compensable Injury. — While, in the ordinary case, "disability" can be measured in terms of percentage, in those cases where the claimant has a preexisting "disability" to the same part of the body which is affected by a subsequent compensable injury, "disability" must be measured in terms of capacity to earn wages. Ridenhour v. Fisher Transp. Corp., 50 N.C. App. 126, 272 S.E.2d 889 (1980).

It is insufficient for claimant to show that he has obtained no other employment since his retirement. He must prove that he is unable to earn wages in other employment. Hundley v. Fieldcrest Mills, 58 N.C. App. 184, 292 S.E.2d 766 (1982).

The Workers' Compensation Act does not ensure an employee any particular employment; subdivision (9) of this section speaks of incapacity to earn wages "in the same or any other employment." Lucas v. Burlington Indus., 57 N.C. App. 366, 291 S.E.2d 360 (1982).

Capacity of Particular Employee Must Be Considered. — In determining disability, the Commission is not allowed to consider whether the average employee with plaintiff's injury is capable of working and earning wages. The question is whether this particular employee has such a capacity. Lucas v. Burlington Indus., 57 N.C. App. 366, 291 S.E.2d 360 (1982).

Where an employee's efforts to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

The Commission must decide the disability issue based on the particular characteristics of the individual employee. This necessitates a consideration of the employee's age, work experience, training, education and any other factors which might affect his ability to earn wages. Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986).

Employee failed to meet her burden of showing a continuing disability for workers' compensation purposes where: (1) the employee's doctor released her to return to work, with few restrictions other than a limitation on prolonged standing; (2) although the employee's condition prevented her from dance instruction, the employee's physical limitations were not so restrictive as to render the employee incapable of performing well in alternate employment; and (3) the employer's expert testified that with the employee's level of education and transferable skills, she would be able to find comparable employment at a commensurate wage. Gilberto v. Wake Forest Univ., 152 N.C. App. 112, 566 S.E.2d 788, 2002 N.C. App. LEXIS 864 (2002).

Before it can be determined that a plaintiff is employable and can earn wages, it must be established, not merely that jobs are available or that the average job seeker can get one, but that plaintiff can obtain a job taking into account his specific limitations. Bridges v. Linn-Corriher Corp., 90 N.C. App. 397, 368 S.E.2d 388, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Individual, intellectual and vocational considerations may be taken into account on the issue of disability. Calloway v. Mills, 78 N.C. App. 702, 338 S.E.2d 548 (1986).

Preexisting Conditions. — If preexisting conditions such as an employee's age, education and work experience are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the incapacity which he or she suffers, and not for the degree of disability which would be suffered by someone with superior education or work experience or who is younger or in better health. Little v. Anson County Schools Food Serv., 295 N.C. 527, 246 S.E.2d 743 (1978).

Plaintiff may prove his wage-earning impairment by evidence of preexisting conditions such as his age, education and work experience which are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person. Hundley v. Fieldcrest Mills, 58 N.C. App. 184, 292 S.E.2d 766 (1982).

Total and Partial Disability Compared. — If plaintiff is unable to work and earn any wages, he is totally disabled. If he is able to work and earn some wages, but less than he was receiving at the time of his injury, he is partially disabled. Robinson v. J.P. Stevens & Co., 57 N.C. App. 619, 292 S.E.2d 144 (1982).

Definition Not Applicable to Cases of Asbestosis or Silicosis. — The definition of "disability" contained in this section is not applicable to cases of disablement from asbestosis or silicosis. "Disability" resulting from asbestosis or silicosis means the event of becoming actually incapacitated from performing normal labor in the last occupation in which remuneratively employed. Thus, one actually incapacitated by asbestosis or silicosis is entitled to compensation under G.S. 97-29 even though he may be earning the same or greater wages in a different employment. Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952). See §§ 97-54, 97-55.

Definition Read into § 97-38. — The definition of the word "disability" as it is defined in subdivision (9) of this section must be read into G.S. 97-38 in lieu of the word "disability" therein. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

The determination of whether a disability exists is a conclusion of law, which must be based upon findings of fact supported by competent evidence. Hilliard v. Apex Cabinet Co., 305 N.C. 593, 290 S.E.2d 682 (1982); Hundley v. Fieldcrest Mills, 58 N.C. App. 184, 292 S.E.2d 766 (1982); Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Findings Required to Support Conclusion of Disability. — In order to support a conclusion of disability, the Industrial Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this incapacity to earn was caused by plaintiff's injury. Hilliard v. Apex Cabinet Co., 305 N.C. 593, 290 S.E.2d 682 (1982); Hundley v. Fieldcrest Mills, 58 N.C. App. 184, 292 S.E.2d 766 (1982); Priddy v. Cone Mills Corp., 58 N.C. App. 720, 294 S.E.2d 743 (1982); Peoples v. Cone Mills Corp., 69 N.C. App. 263, 317 S.E.2d 120, modified on other grounds, 316 N.C. 426, 342 S.E.2d 798 (1986); Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985); Hendrix v. Linn-Corriher Corp., 78 N.C. App. 373, 337 S.E.2d 106 (1985), aff'd in part and rev'd in part, 317 N.C. 179, 345 S.E.2d 374 (1986).

Findings Held Inadequate to Establish Disability. — Although pain can be part of a finding of disability, the term "disability" in the context of workers' compensation is defined as the incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; since the burden remained on the employee to prove his disability, the commission was obligated to make specific findings as to the existence and extent of any disability, and since evidence was presented that the employee was still able to perform some jobs, the commission's findings were inadequate to establish that the employee was disabled because of pain. Johnson v. Southern Tire Sales & Serv., 358 N.C. 701, 599 S.E.2d 508, 2004 N.C. LEXIS 915 (2004).

Where the industrial commission found that a worker was unable to work in any capacity due to carpal tunnel syndrome, but the transcripts revealed no medical evidence that supported a finding that the worker was incapable of work in any employment, the commission erred in finding that the worker proved that she was temporarily totally disabled. Teras v. AT&T, 174 N.C. App. 735, 622 S.E.2d 145, 2005 N.C. App. LEXIS 2591 (2005), aff'd, — N.C. —, 634 S.E.2d 888 (2006).

Inability to Earn Wages Earned Before Injury Must Be Shown. — Before the plaintiff may receive compensation, he must show that he is not capable of earning the same wages he had earned before his injury. Merely showing that plaintiff is not earning the same wages after his injury than before is insufficient. Hendrix v. Linn-Corriher Corp., 78 N.C. App. 373, 337 S.E.2d 106 (1985), aff'd in part and rev'd in part, 317 N.C. 179, 345 S.E.2d 374 (1986).

Employee Able to Do Other Work Not Entitled to Compensation. — Where the uncontradicted medical testimony indicated that plaintiff, a 46 year old man with an eighth grade education who was unable to read a newspaper or spell, suffered from a mild case of employment-related chronic obstructive lung disease, with a 20 to 30 percent lung impairment, but that plaintiff was capable of work involving a clean environment, moderate activity and anything requiring manual dexterity, plaintiff was not entitled to compensation under this Chapter. Hendrix v. Linn-Corriher Corp., 78 N.C. App. 373, 337 S.E.2d 106 (1985), aff'd in part and rev'd in part, 317 N.C. 179, 345 S.E.2d 374 (1986).

When Search for Work Need Not Be Shown. — While in order to prove disability, an injured employee must prove that he is unable to work and not merely that he unsuccessfully sought work, the converse is not true. In order to prove disability, the employee need not prove that he unsuccessfully sought employment if the employee proves that he is unable to obtain employment. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

Claimant Unable to Earn Wages in Any Job for Which Qualified Is Totally, Not Partially, Disabled. — The Commission erred as a matter of law by awarding claimant compensation for partial disability when it found as fact that plaintiff was incapable of earning wages in any employment for which plaintiff was qualified. Based on the Commission's findings, plaintiff was totally disabled within the meaning of G.S. 97-29. Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

Where a plaintiff, due to an occupational disease, is fully incapacitated to earn wages at employment which is the only work he is qualified to do by reason of such factors as age and education, he is totally incapacitated. Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

Uncontroverted evidence established that plaintiff, whom the court found to be 59 years old and to have a third-grade education, was totally disabled, where although the impairment rating of his left leg was only 45%, the evidence showed plaintiff to be totally and permanently unable to earn the wages he was receiving at the time of his injury. Wilder v. Barbour Boat Works, 84 N.C. App. 188, 352 S.E.2d 690 (1987).

Employee exposed to toxic chemicals in the course of his employment spray-painting automobiles showed his disability, under G.S. 97-2(9), was permanent and total because he had a seventh grade education, his nervous system was permanently damaged, and he was unemployable due to his severe loss of cognitive function and his inability to sustain concentration and attention necessary for working a normal eight-hour day. Matthews v. City of Raleigh, 160 N.C. App. 597, 586 S.E.2d 829, 2003 N.C. App. LEXIS 1928 (2003).

Receipt of Higher Wages for Unsatisfactory Work. — It was not error for the Commission to conclude that employee was permanently partially disabled even though the evidence showed that he had worked in the packing room at a wage higher than he had ever before earned after his impairing lung disease was diagnosed, where the Commission found without exception that he performed unsatisfactorily at this job in the packing department, and where the evidence demonstrated that although he was capable of performing less skilled jobs at the mill, which he did for more than 30 years, he had difficulty in a position requiring greater skills. Calloway v. Mills, 78 N.C. App. 702, 338 S.E.2d 548 (1986).

In determining the extent to which an occupational disease affects an employee's wage-earning ability in another position, the line of inquiry must center on that particular individual's earning capacity and not that of a different individual. Thomas v. Hanes Printables, 91 N.C. App. 45, 370 S.E.2d 419 (1988).

Although the practice of comparing earnings before and after an injury is not the proper method to exhibit diminished earning capacity, it is a valid factor which deserves consideration. Thomas v. Hanes Printables, 91 N.C. App. 45, 370 S.E.2d 419 (1988).

Wages received by claimant after his injury are strong but not conclusive evidence of his ability to earn for purposes of determining whether he is disabled within the meaning of subdivision (9) of this section. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Inability to Earn Same Wages Due to Occupational Disease and Not Merely Lack of Skill. — While it was correct that plaintiff's inability to earn the same wages as in her former employment was not due to a physical incapacity per se, the transfer of positions which resulted in a diminished earning capacity was necessitated by a compensable injury; therefore, plaintiff's inability to earn the same wages in other jobs was due to her occupational disease and not merely to her lack of skill in the job as the Industrial Commission found, and the commission's conclusion of law that plaintiff was not entitled to benefits for partial disability because she was capable of earning the same wages she earned before contracting the occupational disease, was not supported by the findings of fact. Thomas v. Hanes Printables, 91 N.C. App. 45, 370 S.E.2d 419 (1988).

Evidence that plaintiff held "temporary" jobs was not sufficient to rebut the presumption of disability created by the Industrial Commission-approved Form 21 agreement. Davis v. Embree-Reed, Inc., 135 N.C. App. 80, 519 S.E.2d 763, 1999 N.C. App. LEXIS 923 (1999), cert. denied, 351 N.C. 102, 541 S.E.2d 143 (1999).

Evidence Supported Determination of Total and Permanent Disability to Employee's Legs. — The evidence was sufficient to support the Industrial Commission's determination that plaintiff was totally and permanently disabled by reason of extensive burns sustained on both legs when he set fire to his trousers while using an electric welder's torch. Martin v. Bahnson Serv. Co., 17 N.C. App. 359, 194 S.E.2d 223, cert. denied, 283 N.C. 257, 195 S.E.2d 690 (1973).

Skin Condition Caused by Sensitivity to Chemicals Used in Work Held Not a Disability. — A hair stylist was not entitled to disability compensation payments where her skin condition, caused by her sensitivity to chemicals used in her work, had completely cleared up within one month of her terminating her employment. While it might be true that her skin disease could recur if she returned to her previous job, there was no evidence of any continuing disability as a result of a disease contracted in the course of employment. She was not entitled to compensation for her susceptibility to the skin disease. Sebastian v. Mona Watkins Hair Styling, 40 N.C. App. 30, 251 S.E.2d 872, cert. denied, 297 N.C. 301, 254 S.E.2d 921 (1979).

Award Limited to Loss of Use of Back Held Insufficient. — Where physicians indicated that an injury to the plaintiff's spinal cord resulted in weakness in all of her extremities and numbness or loss of sensation throughout her body, and the doctors further testified that she suffered diminished mobility and had difficulty with position sense and with recognition of things in her hands when objects were placed in her hands, the Commission could not limit the plaintiff to an award under G.S. 97-31(23) for loss of use of the back. Little v. Anson County Schools Food Serv., 295 N.C. 527, 246 S.E.2d 743 (1978).

Disability Is Presumed to Continue Until Employee Returns to Work. — Once the disability is proven, there is a presumption that it continues until the employee returns to work at wages equal to those he was receiving at the time his injury occurred. Watson v. Winston-Salem Transit Auth., 92 N.C. App. 473, 374 S.E.2d 483 (1988).

Plaintiff's Temporary Total Disability Was Presumed to Continue Until She Returned to Work. — Where plaintiff was "ready, willing, and able" to return to work, but her employer declined to honor plaintiff's request to return due to her injuries, there was a presumption that plaintiff's temporary total disability continued until she returned to work, and Commission's finding of maximum medical improvement was not the equivalent of the end of plaintiff's disability; therefore, on remand plaintiff was entitled to a determination of the extent of her disability for the period of time she was not allowed to work. Watson v. Winston-Salem Transit Auth., 92 N.C. App. 473, 374 S.E.2d 483 (1988).

Evidence of Disability Held Sufficient. — Evidence that an employee (1) reported an injury to her supervisor, (2) was advised by a doctor not to continue working because of a disease contracted while working, (3) was terminated because her injury rendered her unable to perform the requisite job duties, and (4) was unable to procure suitable alternative employment at the same wages for the same hours despite reasonable efforts, supported the Industrial Commission's finding that she was disabled as defined in G.S. 92-2(9). Cialino v. Wal-Mart Stores, 156 N.C. App. 463, 577 S.E.2d 345, 2003 N.C. App. LEXIS 203 (2003).

North Carolina Industrial Commission did not err in finding that an employee was disabled as defined by G.S. 97-2 as a result of her falls in the workplace where the employee produced some medical evidence that she was physically incapable of work due to her workplace falls and, thus, there was some medical evidence supporting the Commission's finding. Aboagwa v. Raleigh Lions Clinic for the Blind, Inc., 167 N.C. App. 554, 607 S.E.2d 1, 2004 N.C. App. LEXIS 2317 (2004).

Employee was disabled as a result of a right knee injury incurred when she fell on a degreaser at the employee's restaurant; the evidence showed that the employee experienced pain and swelling even after a knee replacement, that ultimately caused total disability. Taylor v. Carolina Rest. Group, Inc., 170 N.C. App. 532, 613 S.E.2d 510, 2005 N.C. App. LEXIS 1079 (2005).

North Carolina Industrial Commission did not err by finding that an employee proved that a work-related accident was the cause of her disability under G.S. 97-2(9) because expert testimony was adequate to establish the claim; the expert ruled out other causes of the employee's fibromyalgia; furthermore, the doctor's medical excuse was sufficient to establish the extent of the disability as well. Singletary v. N.C. Baptist Hosp., 174 N.C. App. 147, 619 S.E.2d 888, 2005 N.C. App. LEXIS 2303 (2005).

Evidence supported the industrial commission's finding that a workers' compensation claimant was temporarily disabled under G.S. 97-2(9) as of June 1, 2002, as: (1) an employer did not dispute that the claimant was totally disabled due to the claimant's compensable accident as of June 17, 2002, the date the claimant was first examined by an orthopedic doctor, who found a torn medial meniscus, and wrote the claimant out of work; and (2) the claimant's testimony permitted an inference that the claimant's condition as of June 1, 2002, was physically the same as on June 17, 2002. Britt v. Gator Wood, Inc., — N.C. App. —, 648 S.E.2d 917, 2007 N.C. App. LEXIS 1950 (2007).

Evidence of Temporary Total Disability Held Sufficient. — The Court upheld the Commission's finding that the plaintiff had suffered a specific traumatic injury and its consequent award of temporary total disability compensation where the defendants failed to meet their burden of establishing that "suitable jobs [we]re available to plaintiff." Webb v. Power Circuit, Inc., 141 N.C. App. 507, 540 S.E.2d 790, 2000 N.C. App. LEXIS 1303 (2000), cert denied, 353 N.C. 398, 548 S.E.2d 159 (2001).

Though employee's medical evidence was insufficient to show his temporary total disability, he proved such disability through evidence that, while capable of some work, he was, after reasonable efforts, unsuccessful in his effort to obtain employment. Bridwell v. Golden Corral Steak House, 149 N.C. App. 338, 561 S.E.2d 298, 2002 N.C. App. LEXIS 186 (2002), cert. denied, 355 N.C. 747, 565 S.W.3d 193 (2002).

Award of temporary total disability benefits to an employee who fell while working as a hair stylist at her employer's salon was upheld on appeal because medical testimony established to a reasonable degree of medical certainty that a causal connection existed between employee's degenerative neck condition and the work-related injury, which prohibited her from working. Barbour v. Regis Corp., 167 N.C. App. 449, 606 S.E.2d 119, 2004 N.C. App. LEXIS 2336 (2004).

Employee's Earning Capacity Negated His Proof of Temporary Total Disability. — The Commission's finding that plaintiff employee failed to sustain his burden of proving temporary total disability was supported by competent evidence which showed that the plaintiff earned income from three private businesses throughout the time he received temporary disability payments from defendants. Sims v. Charmes/Arby's Roast Beef, 142 N.C. App. 154, 542 S.E.2d 277, 2001 N.C. App. LEXIS 46 (2001), cert. denied, 353 N.C. 729, 550 S.E.2d 782 (2001).

Evidence That Claimant No Longer Disabled. — Evidence that claimant was released by his doctor to return to work and that he worked as a self-employed painter and then as a truck driver, earning more than he had while employed with defendant, was sufficient to support the conclusion that he was no longer entitled to temporary total disability payments. Snead v. Carolina Pre-Cast Concrete, Inc., 129 N.C. App. 331, 499 S.E.2d 470 (1998), cert. denied, 348 N.C. 501, 510 S.E.2d 656 (1998).

North Carolina Industrial Commission did not err by finding that an employee failed to prove that her disability under G.S. 97-2(9) extended past a medical leave granted by a doctor where no other evidence was provided; there was no presumption of continuing disability since there was no previous opinion or settlement agreement. Singletary v. N.C. Baptist Hosp., 174 N.C. App. 147, 619 S.E.2d 888, 2005 N.C. App. LEXIS 2303 (2005).

Evidence that an employee had been released to sedentary work with some restrictions, and the lack of evidence of the extent to which she was unable to work after that time, supported the North Carolina Industrial Commission's finding that her period of disability had ended. Frost v. Salter Path Fire & Rescue, 176 N.C. App. 482, 628 S.E.2d 22, 2006 N.C. App. LEXIS 539 (2006), rev'd on other grounds, review improvidently allowed, 361 N.C. 181, 639 S.E.2d 429 (2007).

Effect of Retirement. — Because disability measures an employee's present ability to earn wages, and is unrelated to a decision to withdraw from the labor force by retirement, the Commission may not deny disability benefits because the claimant retired, where there is evidence of diminished earning capacity caused by an occupational disease. Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986).

Evidence of Employee's Inability to Earn Wages Held Sufficient. — Testimony of two doctors and a vocational rehabilitation counselor was amply competent to support the Commission's finding that employee had no capacity to earn wages in either the same or any other employment up to the date of a hearing before a deputy commissioner. Kennedy v. Duke Univ. Medical Center, 101 N.C. App. 24, 398 S.E.2d 677 (1990).

Industrial commission could properly determine that a workers' compensation claimant's reduced wages were a manifestation of the claimant's disability under G.S. 97-2(9) and that this diminished earning capacity entitled the claimant to temporary partial disability benefits, as the claimant presented evidence that the claimant obtained other employment at lower wages than the claimant had previously earned, as well as evidence showing agreement among all the doctors that the claimant had permanent restrictions on the type of work the claimant could perform; the burden shifted to the employer to show that the claimant could obtain a higher-paying job, and the employer did not do so. Britt v. Gator Wood, Inc., — N.C. App. —, 648 S.E.2d 917, 2007 N.C. App. LEXIS 1950 (2007).

Evidence of Partial Disability Held Sufficient. — Evidence held sufficient to support the finding that plaintiff was partially incapable of engaging in gainful employment by byssinosis and chronic obstructive lung disease as a result of 29 years of smoking and exposure to cotton dust and that his occupational disease, combined with his age, limited education and work experience, limited his ability to earn wages. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Claimant Must Show Disability Work-Related. — Where evidence supported the Industrial Commission's finding that plaintiff failed to establish his present disability was caused by a work-related injury, the commission's decision would not be disturbed on appeal and plaintiff was entitled to compensation only for his temporary total disability. Lettley v. Trash Removal Serv., 91 N.C. App. 625, 372 S.E.2d 747 (1988).

Plaintiff did not meet her burden of showing she sustained a disability as a consequence of her injury where there was competent evidence in the record to show that plaintiff was released to return to work without restrictions four days after her injury , and that she was capable of earning her regular wages and performing her regular duties. Fuller v. Motel 6, 136 N.C. App. 727, 526 S.E.2d 480, 2000 N.C. App. LEXIS 150 (2000).

Plaintiff Carried Initial Burden of Showing That She Was Disabled. — Where the record indicated that plaintiff began to receive temporary total disability payments in May 1984, the payments continued until November 1984, on November 21, 1984 her treating physician reported that she could return to work "as her comfort permits," there was no "light" work available for plaintiff nor would her employer allow her to return to work to perform her old duties, and though not in the record, the briefs indicated and the opinion and award make reference to the fact that plaintiff had signed a statement in which it was recited that she had reached maximum medical improvement on November 22, 1984, plaintiff carried her initial burden of showing she was disabled. Watson v. Winston-Salem Transit Auth., 92 N.C. App. 473, 374 S.E.2d 483 (1988).

Presumption of Disability Created. — In a general sense, it is true an injured employee has the burden of showing he is incapable of earning the same wages he previously earned, either in the same or any other employment; however, upon execution of a Form 21 agreement, and subsequent approval by the Commission, the employee enjoys a presumption of disability. King v. Yeargin Constr. Co., 124 N.C. App. 396, 476 S.E.2d 898 (1996).

The approval of a Form 21 by the Industrial

Commission relieves the employee of his initial burden of proving a disability; further, once an agreement is approved, the employee receives the benefit of the presumption that he is totally disabled. Brown v. S & N Communications, Inc., 124 N.C. App. 320, 477 S.E.2d 197 (1996).

Constructive Refusal to Accept Suitable Employment. — For misconduct that causes a claimant to be discharged from employment to amount to "constructive refusal" to accept suitable employment that renders him ineligible for worker's compensation, the misconduct need not occur during working hours or at the workplace, and it need not amount to a crime, but it must have been conduct for which a nondisabled employee ordinarily would have been terminated. Williams v. Pee Dee Elec. Membership Corp., 130 N.C. App. 298, 502 S.E.2d 645 (1998).

Failure to Make Required Findings Concerning Earning Capacity. — Industrial commission erred in determining a worker's permanent partial disability rating pursuant to G.S. 97-31; disability was defined by a diminished capacity to earn wages, not by physical infirmity alone, G.S. 97-2(9), and the commission failed to make required findings pursuant to G.S. 97-30 on whether the job offered to the worker by her employer accurately reflected her ability to earn wages. Baker v. Sam's Club, 161 N.C. App. 712, 589 S.E.2d 387, 2003 N.C. App. LEXIS 2255 (2003).

Evidence of Incapacity to Earn Wages Held Sufficient. — Where defendant failed to come forward with rebuttal evidence, the Industrial Commission did not err in finding that the medical evidence, plaintiff's complaints of chronic leg and back pain related during each visit to her physicians, and plaintiff's continuing pain treatment and doctor visits as of the hearing date provided competent evidence supporting a determination that plaintiff was incapable of earning the same wages from defendant or another employer as a result of lumbosacral strain. Barber v. Going West Transp., Inc., 134 N.C. App. 428, 517 S.E.2d 914 (1999).

Award of Disability Benefits Appropriate Remedy. — Where the full Commission found that defendants had not presented convincing evidence that defendant-store had offered or obtained employment for plaintiff consistent with her limitations, and where plaintiff met the burden of showing injury to her wage earning capacity, the full Commission was correct in finding that the disability continued, and ongoing award of disability benefits was the appropriate remedy. Simmons v. Kroger Co., 117 N.C. App. 440, 451 S.E.2d 12 (1994).

Plaintiff, after having shown credible evidence of diligent efforts to find employment, was entitled to receive compensation benefits where his inability to earn the same wages was caused in part by unavailability of area jobs consistent with his physical limitations. Fletcher v. Dana Corp., 119 N.C. App. 491, 459 S.E.2d 31 (1995), cert. denied, 342 N.C. 191, 463 S.E.2d 235 (1995).

Where the Industrial Commission weighed the evidence and determined the credibility of the witnesses before it and made findings of fact as to its award of temporary disability to an employee who had fallen at his workplace, this satisfied the fact-finding of G.S. 97-85; the finding that the employee had suffered a back injury within G.S. 97-2(6) was presumed to be correct on appeal, pursuant to N.C. R. App. P. 10(b) where the employer did not preserve that issue for review by separately contesting each particular finding of fact. Johnson v. Herbie's Place, 157 N.C. App. 168, 579 S.E.2d 110, 2003 N.C. App. LEXIS 640 (2003), cert. denied, 357 N.C. 460, 585 S.E.2d 760 (2003).

XVIII. BURDEN OF PROOF AND EVIDENCE.

Burden of Proof Is on Claimant. — The person claiming the benefit of compensation has the burden of showing that the injury complained of resulted from an accident arising out of and in the course of the employment. Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964); Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976); Franklin v. Wilson County Bd. of Educ., 29 N.C. App. 491, 224 S.E.2d 657 (1976); Smith v. Dacotah Cotton Mills, Inc., 31 N.C. App. 687, 230 S.E.2d 772 (1976).

One who seeks to avail himself of the act must come within its terms and must be held to prove that he is in a class embraced in the act. Hayes v. Board of Trustees, 224 N.C. 11, 29 S.E.2d 137 (1944); Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965).

Claimant in a proceeding under the Workers' Compensation Act has the burden of proving that his claim is compensable under the act. Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950). See also Davis v. Raleigh Rental Center, 58 N.C. App. 113, 292 S.E.2d 763 (1982).

The burden of proving each and every element of compensability is upon the plaintiff. Harvey v. Raleigh Police Dep't, 96 N.C. App. 28, 384 S.E.2d 549, cert. denied, 326 N.C. 706, 388 S.E.2d 454 (1989).

Claimant Has Burden of Proving Employer-Employee Relationship. — In order to bring himself within the coverage of the Workers' Compensation Act, the claimant has the burden of proving that the employer-employee relationship existed. Lloyd v. Jenkins

Context Co., 46 N.C. App. 817, 266 S.E.2d 35 (1980); Durham v. McLamb, 59 N.C. App. 165, 296 S.E.2d 3 (1982); Doud v. K & G Janitorial Servs., 69 N.C. App. 205, 316 S.E.2d 664, cert. denied, 312 N.C. 492, 322 S.E.2d 492 (1984).

Burden of Proving Disability. — In workers' compensation cases, a claimant ordinarily has the burden of proving both the existence of his disability and its degree. Hilliard v. Apex Cabinet Co., 305 N.C. 593, 290 S.E.2d 682 (1982); Hundley v. Fieldcrest Mills, 58 N.C. App. 184, 292 S.E.2d 766 (1982); Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986); Taylor v. Margaret R. Pardee Mem. Hosp., 83 N.C. App. 385, 350 S.E.2d 148 (1986), cert. denied, 319 N.C. 410, 354 S.E.2d 729 (1987).

In order to receive disability compensation, the burden is on the claimant to prove that his illness has impaired his capacity to work and the extent of this impairment. Priddy v. Cone Mills Corp., 58 N.C. App. 720, 294 S.E.2d 743 (1982).

The burden of proof of showing a disability is on the plaintiff. Donnell v. Cone Mills Corp., 60 N.C. App. 338, 299 S.E.2d 436, cert. denied, 308 N.C. 190, 302 S.E.2d 243 (1983).

Employee to Establish Disability Before Employer Can Be Required to Prove the Availability of Suitable Employment. — The Industrial Commission erred in placing the initial burden on the defendants/employers to prove the availability of suitable employment at pre-injury wages without first requiring plaintiff/injured illegal alien employee to establish the existence and extent of his disability. Before defendants could be required to prove the availability of suitable employment, plaintiff had to first come forward with evidence to show that his earning capacity was diminished as a result of his on-the-job injury. Olivares-Juarez v. Showell Farms, 138 N.C. App. 663, 532 S.E.2d 198, 2000 N.C. App. LEXIS 785 (2000).

Evidence of Effort to Find Other Employment. — An injured employee seeking an award of total disability under this section who is unemployed, medically able to work, and possesses no preexisting limitations which would render him unemployable, must produce evidence of reasonable effort to find other employment. Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 425 S.E.2d 454 (1993).

Claimant Must Show Disability Work-Related. — Where evidence supported the Industrial Commission's finding that plaintiff failed to establish his present disability was caused by a work-related injury, the Commission's decision would not be disturbed on appeal and plaintiff was entitled to compensation only for his temporary total disability. Lettley v. Trash Removal Serv., 91 N.C. App. 625, 372 S.E.2d 747 (1988).

Whether an employee is disabled is a question of law which must be based on findings of fact supported by competent evidence. Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986).

Plaintiff Carried Initial Burden of Showing That She Was Disabled. — Where the record indicated that plaintiff began to receive temporary total disability payments in May 1984, the payments continued until November 1984, on November 21, 1984 her treating physician reported that she could return to work "as her comfort permits," there was no "light" work available for plaintiff nor would her employer allow her to return to work to perform her old duties, and though not in the record, the briefs indicated and the opinion and award make reference to the fact that plaintiff had signed a statement in which it was recited that she had reached maximum medical improvement on November 22, 1984, plaintiff carried her initial burden of showing she was disabled. Watson v. Winston-Salem Transit Auth., 92 N.C. App. 473, 374 S.E.2d 483 (1988).

Burden of Proof that Claimant Unsuited for Employment Due to Characteristics Peculiar to Him. — The burden of proof rests upon the claimant to prove the existence of his disability and its extent, and relevant to these issues is evidence that the claimant may be unsuited for particular employment due to characteristics peculiar to him. Tyndall v. Walter Kidde Co., 102 N.C. App. 726, 403 S.E.2d 548, cert. denied, 329 N.C. 505, 407 S.E.2d 553 (1991).

Including Inability to Earn Pre-Injury Wages. — Industrial Commission misapplied the law by erroneously placing the initial burden on defendant to prove plaintiff's capacity to earn pre-injury wages in other employment before plaintiff had met her burden of proof regarding pre-injury wages, in support of a showing of "disability" under this section, as laid out in Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). Coppley v. PPG Indus., Inc., 133 N.C. App. 631, 516 S.E.2d 184 (1999).

In the compensation cases holding medical testimony unnecessary to make a prima facie case of causation, the distinguishing features are an uncomplicated situation, the immediate appearance of symptoms, the prompt reporting of the occurrence by the worker to his supervisor and consultation with a physician, and the fact that the plaintiff was theretofore in good health and free from any disability of the kind involved. A further relevant factor is the absence of expert testimony that the alleged precipitating event could not have been the cause of the injury. Slizewski v. International Seafood, Inc., 46 N.C. App. 228, 264 S.E.2d 810 (1980).

Hearsay. — It must not only appear by competent evidence that the injury was received in the course of the employment, but also that it arose out of the employment as well. Hearsay evidence is not competent to establish either fact. Plyler v. Charlotte Country Club, 214 N.C. 453, 199 S.E. 622 (1938).

Where no objection is made before the hearing commissioner to the introduction of hearsay evidence, the objection must be treated as waived and the evidence may be considered. The principle on which hearsay evidence is excluded by rules of evidence relates to its competency, not to its relevancy. Maley v. Thomasville Furn. Co., 214 N.C. 589, 200 S.E. 438 (1938).

The Commission is the sole judge of the credibility and weight to be given the testimony; it may accept or reject all of the testimony of a witness, or it may accept a part and reject a part. Blalock v. Roberts Co., 12 N.C. App. 499, 183 S.E.2d 827 (1971).

The Commission has the duty and authority to resolve conflicts in the testimony of a witness or witnesses. Blalock v. Roberts Co., 12 N.C. App. 499, 183 S.E.2d 827 (1971).

Commission's Factual Determinations Binding Upon Court. — Whether a plaintiff was injured by accident and had a reasonable excuse for not giving the employer timely notice were factual issues that depended entirely upon her credibility. Since the Commission found, as its prerogative as fact finder permitted, that plaintiff's testimony was not credible, that determination was binding upon the Court of Appeals. Elliot v. A.O. Smith Corp., 103 N.C. App. 523, 405 S.E.2d 799 (1991).

Sufficiency of Evidence Is Question of Law. — The question whether the evidence is sufficient to support the findings is one of law to be determined by the courts. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

Proof That Employee Was at Place of Employment Doing Usual Work Is Insufficient. — It must be kept in mind that while an accident arising out of an employment usually occurs in the course of it, it does not necessarily or invariably do so. Nor does an accident which occurs in the course of an employment necessarily or inevitably arise out of it. Therefore proof that an employee was at his place of employment and was doing his usual work at the time of the injury, without more, is insufficient to support an award of compensation. Sweatt v. Rutherford County Bd. of Educ., 237 N.C. 653, 75 S.E.2d 738 (1953).

But Evidence Explaining Exact Cause of Accident Need Not Be Offered. — It is not necessary for a plaintiff to offer evidence explaining the exact cause of the accident. Battle v. Bryant Elec. Co., 15 N.C. App. 246, 189 S.E.2d 788, cert. denied, 281 N.C. 755, 191 S.E.2d 353 (1972).

Award Where Cause of Injury Not Explained. — Where an employee, while about his work, suffers an injury in the ordinary course of employment, the cause of which is not explained, but which is a natural and probable result of a risk thereof, and the Commission finds from the evidence that the injury arose out of the employment, an award will be sustained. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951); Poteete v. North State Pyrophyllite Co., 240 N.C. 561, 82 S.E.2d 693 (1954); Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

When an accident occurs in the course of employment, and there is no affirmative evidence that arose from a cause independent of the employment, an award will be sustained. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

Insufficient Evidence of Earning Capacity. — There was no competent evidence to support the Commission's findings that plaintiff was capable of earning $12.00 per hour, that other suitable jobs for which plaintiff was qualified were available, that any other positions for which plaintiff was qualified would pay $12.00 per hour, that plaintiff would be able to secure such a position, and that plaintiff's ability to obtain a temporary position paying $12.00 per hour meant that plaintiff, when permanently employed, would receive $12.00 per hour. Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994).

Plaintiff met his burden of proving present earning capacity where he produced evidence that he had obtained employment as a driver at a wage less than that earned as a brick mason prior to the injury. Bond v. Foster Masonry, Inc., 139 N.C. App. 123, 532 S.E.2d 583, 2000 N.C. App. LEXIS 803 (2000).

Presumption of Continuing Disability. — The employer may not rebut the presumption of continuing disability by showing that the employee is capable of earning pre-injury wages in a temporary position or by creating a position within the employer's own company that is not ordinarily in the competitive job market, because such positions do not accurately reflect the employee's capacity to earn wages. Stamey v. North Carolina Self-Insurance Guar. Ass'n, 131 N.C. App. 662, 507 S.E.2d 596 (1998).

The employer failed to rebut the presumption of continuing disability with medical evidence or with evidence that the claimant was capable of obtaining a suitable job in the competitive marketplace, where the claimant temporarily and unsuccessfully returned to work, the modified roller picker position offered to claimant was temporary, there was no evidence that this position was a real position that existed in the marketplace and was not "made" work, and the only medical evidence supported the claimant's claims of shoulder pain. Stamey v. North Carolina Self-Insurance Guar. Ass'n, 131 N.C. App. 662, 507 S.E.2d 596 (1998).

Presumption of Reduction in Earning Capacity Rebutted. — Where claimant presented no evidence contesting the availability of other jobs or her suitability for those jobs and furthermore presented no evidence that she sought employment at any of these places, employer offered sufficient evidence to rebut the presumption that claimant sustained a reduction in her earning capacity. Tyndall v. Walter Kidde Co., 102 N.C. App. 726, 403 S.E.2d 548, cert. denied, 329 N.C. 505, 407 S.E.2d 553 (1991).

Termination of Benefits. — Absent waiver, in order to terminate an employee's benefits after execution of a Form 21 agreement, the employer must request a hearing at which it bears the burden of showing the employee is no longer disabled. King v. Yeargin Constr. Co., 124 N.C. App. 396, 476 S.E.2d 898 (1996).

An employer may rebut the continuing presumption of total disability either by showing the employee's capacity to earn the same wages as before the injury or by showing the employee's capacity to earn lesser wages than before the injury. Brown v. S & N Communications, Inc., 124 N.C. App. 320, 477 S.E.2d 197 (1996).

Medical Treatment. — The claimant's medical care constituted "medical treatment" under subdivision (19) of this section, even though the employer contended that the claimant was not referred to some of his doctors by specialists, where the employee was referred to a specialist by his family doctor, and each subsequent visit to a physician was on the basis of a valid medical referral. Sanders v. Broyhill Furn. Indus., 131 N.C. App. 383, 507 S.E.2d 568 (1998).

Pursuant to G.S. 97-2(18) and 97-25, an employee was entitled to payment of medical expenses for treatment to relieve substantial and continual back pain arising from an accident where she fell and injured her back in the course of her employment, where the record reflected that she had obtained authorization from the Industrial Commission for such future treatment; however, there was no indication in the record of the necessary authorization in order to allow reimbursement for past medical treatments, and accordingly, an award rendered for that was vacated and further consideration had to be made on the issue of whether the proper authorization was obtained prior to such treatment or within a reasonable time thereafter. Whitfield v. Lab. Corp., 158 N.C. App. 341, 581 S.E.2d 778, 2003 N.C. App. LEXIS 1192 (2003).

Remand to Show Continued Disability. — Where Commission's determination that defendant who suffered back injury was credible was not supported by sufficient evidence, and there was competent evidence regarding business ownership and management by defendant, case would be remanded for plaintiff to show that he continued to be disabled. Deese v. Champion Int'l Corp, 133 N.C. App. 278, 515 S.E.2d 239 (1999), cet. granted, 350 N.C. 828 (1999).

Claimant Not Entitled to Presumption of Ongoing Disability. — Workers' compensation claimant was not entitled to a presumption of ongoing disability for purposes of the claimant's total disability claim under G.S. 97-2(9) as: (1) the claimant had not filed an executed Form 21 or Form 26, and there had not been a prior disability award from the industrial commission; and (2) an orthopedic doctor released the claimant to work without restrictions a year earlier. Britt v. Gator Wood, Inc., — N.C. App. —, 648 S.E.2d 917, 2007 N.C. App. LEXIS 1950 (2007).

XIX. COMPENSATION.

"Compensation," means money relief afforded according to a scale established and for the persons designated in this Chapter. Ivey v. North Carolina Prison Dep't, 252 N.C. 615, 114 S.E.2d 812 (1960); Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

And Involves More Than Burial Expenses. — The definition of compensation in this section includes burial expenses, but it takes the whole to constitute compensation and not one of its parts. Compensation for wrongful death involves more than the burial of the body. Ivey v. North Carolina Prison Dep't, 252 N.C. 615, 114 S.E.2d 812 (1960).

Types of Compensation. — The Workers' Compensation Act provides primarily for four types of compensation to be paid to employees covered by the act. They are: (1) Compensation for disability, dependent as to amount upon whether the injury produces a permanent total, a permanent partial, a total temporary or a partial temporary incapacity; (2) Compensation in stipulated amounts for loss of some part of the body such as a finger or toe, a leg or arm; (3) Compensation for death; and (4) Compensation for bodily disfigurement. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

Presumption of Compensability When Employee Dies within Scope of Employment and Cause Is Unknown. — The Court of Appeals erred in holding that a presumption of compensability does not apply when an employee dies within the course and scope of employment and the cause of death is unknown. Pickrell v. Motor Convoy, Inc., 322 N.C. 363, 368 S.E.2d 582 (1988).

Where claimant is entitled to rely on the presumption of compensability, the defendant must come forward with some evidence that death occurred as a result of a noncompensable cause; otherwise, the claimant prevails. In the presence of evidence that death was not compensable, the presumption disappears. In that event, the Industrial Commission should find the facts based on all the evidence adduced, taking into account its credibility, and drawing such reasonable inferences from the credible evidence as may be permissible, the burden of persuasion remaining with the claimant. Pickrell v. Motor Convoy, Inc., 322 N.C. 363, 368 S.E.2d 582 (1988).

Plaintiff was entitled to rely on a presumption of compensability, where the undisputed evidence indicated that plaintiff's decedent died while acting within the course and scope of his employment, and no evidence indicated decedent died other than by accident. Pickrell v. Motor Convoy, Inc., 322 N.C. 363, 368 S.E.2d 582 (1988).

Payment of medical or hospital expenses constitutes no part of compensation to an employee or his dependents under the provisions of the act. Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948). See Thompson v. Virginia & C.S.R.R., 216 N.C. 554, 6 S.E.2d 38 (1939); Morris v. Laughlin Chevrolet Co., 217 N.C. 428, 8 S.E.2d 484 (1940).

Compensation must be based upon the loss of wage earning power rather than the amount actually received. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Calculation Based on Wages at Time of Diagnosis. — Plaintiff who was diagnosed with silicosis was entitled to compensation calculated based on his average weekly wage at the time he was diagnosed, not at the time of his last exposure or at the time he was "removed from the industry". Moore v. Standard Mineral Co., 122 N.C. App. 375, 469 S.E.2d 594 (1996).

A finding of maximum medical improvement is not the equivalent of a finding that the employee is able to earn the same wage earned prior to injury; the maximum medical improvement finding is solely the prerequisite to determination of the amount of any permanent disability for purposes of G.S. 97-31. Watson v. Winston-Salem Transit Auth., 92 N.C. App. 473, 374 S.E.2d 483 (1988).

Claimant Entitled to Benefits For Expenses Arising Out of Cesarean Section. — Workers' Compensation claimant was entitled to benefits for expenses arising out of cesarean section surgery in light of evidence that claimant's weakened back, which necessitated the surgery, was solely the result of an initial compensable injury; claimant's pregnancy was not an independent intervening cause attributable to claimant's own intentional conduct even though the pregnancy occurred subsequent to the compensable injury. English v. J.P. Stevens & Co., 98 N.C. App. 466, 391 S.E.2d 499 (1990).

A permanently and totally disabled employee is entitled to receive compensation under § 97-29. This is true even though no single injury of claimant resulted in total and permanent disability, so long as the combined effect of all of the injuries caused permanent and total disability. Fleming v. K-Mart Corp., 312 N.C. 538, 324 S.E.2d 214 (1985).

Partially Disabled Employee Held Entitled to Difference Between Wage Paid by Employer and Wage Received Thereafter. — Where the evidence tended to show that plaintiff was permanently partially disabled by reason of occupational disease and that after failing to obtain employment in the cotton textile industry in which he had been employed for 29 years, the plaintiff made an earnest and highly commendable search for other employment, and was able to obtain a permanent job with a restaurant at the minimum wage but was released from that employment only because business conditions resulted in the restaurant going out of business, the Commission was required to enter an award setting the plaintiff's compensation at two-thirds of the difference between his average wage of $196.91 a week while working for the defendant and the minimum wage of $134.00 a week which he received thereafter, an award of $41.94 per week, not to exceed 300 weeks. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Offsetting Sickness and Disability Plan Payments Against Compensation. — Since the wage payments under employee Sickness and Disability Plan belonged to claimant, using them to offset employer's obligations to pay her compensation for other weeks is not authorized by G.S. 97-42 and would be confiscatory if it was. But though the wage payments were hers, offsetting them against compensation awarded her for the same weeks is authorized for two reasons: First, no compensation is due claimant for the weeks that her wages were paid because disability under the Workers' Compensation Act is based upon decreased earnings, and she had sustained no wage loss; and second, the claimant cannot collect workers' compensation for the weeks that her wages were paid because of the policy against employees receiving duplicating payments at the employers' expense. Evans v. AT & T Technologies, 103 N.C. App. 45, 404 S.E.2d 183, rev'd, 332 N.C. 78, 418 S.E.2d 503 (1992).

Determination of Compensation for Former Employee Diagnosed with Asbestosis. — Since the North Carolina General Assembly has made no specific provision for determining compensation pursuant to G.S. 97-64 when a former employee is diagnosed with asbestosis some time after his removal from the employment, the only statutory provision which was in fairness to be used was the "final method," contained in the second full paragraph of G.S. 97-2(5). Abernathy v. Sandoz Chemicals/Clariant Corp., 151 N.C. App. 252, 565 S.E.2d 218, 2002 N.C. App. LEXIS 724 (2002), cert. denied, 356 N.C. 432, 572 S.E.2d 421 (2002).

XX. CHILD, GRANDCHILD, ETC.

Effect of Subdivision (12) on § 97-40. — The doctrine of pari materia does not apply and the provisions of G.S. 97-40 should not be construed with the provisions of subdivision (12) of this section. Stevenson v. City of Durham, 281 N.C. 300, 188 S.E.2d 281 (1972).

The imposition of the restrictions of dependency and age contained in subdivision (12) of this section upon G.S. 97-40 would result in a narrow and technical interpretation of the act. Stevenson v. City of Durham, 281 N.C. 300, 188 S.E.2d 281 (1972).

The dependency which this statute recognizes as the basis of the right of the child to compensation grows out of the relationship, which in itself imposes upon the father the duty to support the child, and confers upon the child the right to support by its father. The status of the child, social or legal, is immaterial. Lippard v. Southeastern Express Co., 207 N.C. 507, 177 S.E. 801 (1935); Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968).

Illegitimate Child. — Subdivision (12) of this section recognizes a distinction between actual and legal dependency. A legal dependence is sufficient, and the law fixes that type of responsibility on the father of an illegitimate child. Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968).

The philosophy of the common law, which denied an illegitimate child any rights, legal or social, as against its father, and imposed no duty upon the father with respect to the child, is discarded by this statute. Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968).

When an illegitimate child qualifies as a child, this status, for compensation purposes, continues until the child becomes 18 years of age or unless she marries before reaching that age. Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968).

To qualify for survivor's benefits under the act, an illegitimate child must be acknowledged in sufficient fashion by the father. Tucker v. City of Clinton, 120 N.C. App. 776, 463 S.E.2d 806 (1995).

Posthumous Illegitimate Child. — Deceased supported a housekeeper who bore him a posthumous illegitimate child. The Supreme Court reversed the Commission's opinion that the child was not a dependent. Lippard v. Southeastern Express Co., 207 N.C. 507, 177 S.E. 801 (1935).

How Child Acknowledged. — The word "acknowledged," referring to illegitimate children under this section, is not a term of art requiring a formal declaration before an authorized official; in regard to paternity actions, the term "acknowledgment" generally has been held to mean the recognition of a parental relation, either by written agreement, verbal declarations or statements, by the life, acts, and conduct of the parties, or any other satisfactory evidence that the relation was recognized and admitted. Carpenter v. Hawley, 53 N.C. App. 715, 281 S.E.2d 783, cert. denied and appeal dismissed, 304 N.C. 587, 289 S.E.2d 564 (1981).

The wholly dependent provision of subdivision (12) applies only in case of married children. It does not apply to acknowledged illegitimate children or other children who are unmarried and who are under 18. Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968).

Married children must be "wholly" dependent. Winstead v. Derreberry, 73 N.C. App. 35, 326 S.E.2d 66 (1985).

Stepchildren. — Stepchildren must be substantially dependent upon the deceased employee. This result is derived from the wording of the various dependency tests employed by the act. Winstead v. Derreberry, 73 N.C. App. 35, 326 S.E.2d 66 (1985).

The substantial dependency standard is a question of fact to be determined under the facts of each case, the burden of proof being on the stepchild under the evidentiary standards normally employed in workers' compensation cases. The factors to be considered are the actual amount and consistency of the support derived by the stepchild from (1) the deceased stepparent, (2) the natural parent married to the stepparent, (3) the estranged natural parent, whether such support is voluntary or required by law, (4) the income of the stepchild, and (5) any other funds regularly received for the support of the stepchild. Winstead v. Derreberry, 73 N.C. App. 35, 326 S.E.2d 66 (1985).

Person over 18 Not Considered a Child. — Subdivision (12) of this section defines a person over 18 at the time of his father's death as not a child. Stevenson v. City of Durham, 12 N.C. App. 632, 184 S.E.2d 411 (1971), rev'd on other grounds, 281 N.C. 300, 188 S.E.2d 281 (1972).

Legal Adoption Incomplete. — Where adoption proceedings had begun but were not finalized, the minor plaintiff was not a child legally adopted prior to the injury of the employee. Lennon v. Cumberland County, 119 N.C. App. 319, 458 S.E.2d 240 (1995).

XXI. WIDOW AND WIDOWER.

Presumption of Dependency. — By statute, a widow is conclusively presumed to be wholly dependent for support upon the deceased employee, and shall receive benefits under the Workers' Compensation Act. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

To qualify as the "widow" under the act, the surviving wife must have been living with husband at time of death; if not, it must have been for justifiable cause or by reason of his desertion at such time. Jones v. Service Roofing & Sheet Metal Co., 63 N.C. App. 772, 306 S.E.2d 460 (1983).

By using the word "or" before the second of the three listed methods in which a person can qualify as a widow under G.S. 97-39, the General Assembly intended that a wife can qualify as a widow if she is actually dependent on decedent whether or not living with him, and in method three, she qualifies if she is living apart for justifiable cause or desertion, whether or not dependent; accordingly, where evidence in the record before the Industrial Commission showed that a widow was dependent on the deceased employee for support, that she was a responsible person and was competent with money, she should have been found to be his widow under G.S. 97-2(14) and granted benefits. Goodrich v. R.L. Dresser, Inc., 161 N.C. App. 394, 588 S.E.2d 511, 2003 N.C. App. LEXIS 2204 (2003).

"Justifiable Cause" for Living Separate and Apart. — A husband and wife are not living separate and apart for "justifiable cause" if they are living separate and apart as a result of a mutual agreement evidenced by a legally executed separation agreement. Bass v. Mooresville Mills, 11 N.C. App. 631, 182 S.E.2d 246 (1971); Sloop v. Williams Exxon Serv., 24 N.C. App. 129, 210 S.E.2d 111 (1974).

If a separation agreement is in full force and effect at the time of the employee's death, the employee and his wife are, as a matter of law, living separate and apart by mutual consent, which is not "justifiable cause" within the meaning of this section. Bass v. Mooresville Mills, 11 N.C. App. 631, 182 S.E.2d 246 (1971).

While "justifiable cause" is usually equated to some form of marital misconduct, it would also seem to be applicable where the separation is not intended by the parties to be permanent, the temporary living apart being merely for reasons of convenience. Bass v. Mooresville Mills, 11 N.C. App. 631, 182 S.E.2d 246 (1971).

There is authority in other jurisdictions to the effect that "justifiable cause," as that term is employed in statutory provisions similar to subdivision (14) of this section, may not be interpreted as applicable to separations by mutual consent. Bass v. Mooresville Mills, 11 N.C. App. 631, 182 S.E.2d 246 (1971); Sloop v. Williams Exxon Serv., 24 N.C. App. 129, 210 S.E.2d 111 (1974).

There is no specific formula for the definition of "justifiable cause" under the statute. A court must consider the complexity and history of the particular relationship in order to determine whether the marital partners were separated for justifiable cause in the months before the death of a recipient of benefits. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

Adultery. — A wife's adulterous affair did not bar her from qualifying as her husband's widow under subdivision (14) of this section and G.S. 97-39. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

It is not within the authority of courts to create an exception to subdivision (14) of this section and G.S. 97-39 based upon adultery by a spouse. To find that the legislature intended such an exception, it must be apparent in the statute. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

Surrender of Right to Support. — There is no reason why a separated wife who has surrendered all right to look to the husband for support while he is living should, upon his death, receive benefits that are intended to replace in part the support which the husband was providing, or should have been providing. Bass v. Mooresville Mills, 11 N.C. App. 631, 182 S.E.2d 246 (1971); Sloop v. Williams Exxon Serv., 24 N.C. App. 129, 210 S.E.2d 111 (1974).

Right to Compensation if Living Apart for Mutual Convenience. — If the living apart of the husband and wife is merely for the mutual convenience or the joint advantage of the parties and the obligation of the husband to support her is recognized, the right of the wife to compensation exists as though they were living together. Bass v. Mooresville Mills, 11 N.C. App. 631, 182 S.E.2d 246 (1971).

A second or subsequent marriage is presumed legal until the contrary is proven, and the burden of the issue is upon a plaintiff who attempts to establish a property right which is dependent upon the invalidity of such a marriage. The plaintiff cannot recover because of the failure of defendant to carry the burden. Kearney v. Thomas, 225 N.C. 156, 33 S.E.2d 871 (1945); Ivory v. Greer Bros., 45 N.C. App. 455, 263 S.E.2d 290 (1980).

Whether Presumption of Subsequent Marriage's Validity Is Overcome Is Question of Fact. — The question of whether the first wife of a deceased employee had overcome the presumption of the validity of a subsequent marriage was a question of fact for the commission. Ivory v. Greer Bros., 45 N.C. App. 455, 263 S.E.2d 290 (1980).

Divorce and Remarriage in Another State. — On the conflict of laws question where there has been a divorce and remarriage in another state, and a subsequent controversy develops as to which is the "widow," see Rice v. Rice, 336 U.S. 674, 69 S. Ct. 751, 93 L. Ed. 957 (1949). And see 28 N.C.L. Rev. 265 (1950).

OPINIONS OF ATTORNEY GENERAL

As to the right of a city policeman injured outside the corporate limits while chasing a motorist to compensation under the act, see opinion of Attorney General to Mr. Everette L. Doffermyre, Dunn City Attorney, 40 N.C.A.G. 181 (1969).

"Employee" Does Not Include Person on Suspended Sentence Who Is Not a Prisoner. — See opinion of Attorney General to Honorable Gilbert H. Burnett, 41 N.C.A.G. 398 (1971).

§ 97-3. Presumption that all employers and employees have come under provisions of Article.

From and after January 1, 1975, every employer and employee, as hereinbefore defined and except as herein stated, shall be presumed to have accepted the provisions of this Article respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of his employment and shall be bound thereby. (1929, c. 120, s. 4; 1973, c. 1291, s. 1.)

Cross References. — As to exceptions from provisions of article, see G.S. 97-13.

Legal Periodicals. — For comment on injury by accident in workers' compensation, see 59 N.C.L. Rev. 175 (1980).

For a survey of 1996 developments in the law regarding prisoner rights, see 75 N.C.L. Rev. 2428 (1997).

CASE NOTES

Presumption of Acceptance of Act. — Under the Workers' Compensation Act, every employer and employee, except as therein stated, is presumed to have accepted the provisions of the act and to pay and accept compensation for personal injury or death as therein set forth. Pilley v. Greenville Cotton Mills, 201 N.C. 426, 160 S.E. 479 (1931); Miller v. Roberts, 212 N.C. 126, 193 S.E. 286 (1937). See also Lee v. American Enka Corp., 212 N.C. 455, 193 S.E. 809 (1937).

Presumption Prevents Court from Exercising Jurisdiction. — A claim in which the plaintiff/employee alleges only that he sustained injuries due to defendant/employer's negligence while he was performing duties within the course and scope of his employment is within the exclusive jurisdiction of the Industrial Commission and cannot be heard by the court without further evidence that the employer refuses to accept the provisions of this Act. Reece v. Forga, 138 N.C. App. 703, 531 S.E.2d 881, 2000 N.C. App. LEXIS 790 (2000).

An allegation that the employee had not accepted the provisions of the act is immaterial, for the reason that this section provides in substance that every employer and employee coming within the purview of the act is presumed to have accepted the provisions thereof. Hanks v. Southern Pub. Util. Co., 204 N.C. 155, 167 S.E. 560 (1933).

But Allegation That Employers Were Not Operating Under Act Was Not Demurrable. — The plaintiff instituted a common-law action, alleging that the defendants were not operating under the Workers' Compensation Act. It was held that a demurrer to plaintiff's complaint should have been overruled because the above allegation laid the foundation for proof to rebut the presumption of acceptance of the act. Calahan v. Roberts, 208 N.C. 768, 182 S.E. 657 (1935).

And it was not necessary to allege facts showing defendant's nonacceptance of the act. Cooke v. Gillis, 218 N.C. 726, 12 S.E.2d 250 (1940).

When Presumption Not Operative. — Where the evidence does not show that the employer has regularly in service the requisite number of employees in the same business within this State, the presumption under this section is not operative. Dependents of Thompson v. Johnson Funeral Home, 205 N.C. 801, 172 S.E. 500 (1924).

Rebuttal of Presumption. — Notwithstanding the presumption contained in this section, there are provisions in the act whereby employers, as well as employees, may except themselves from the operation thereof, and the presumption of acceptance may be rebutted by proof of nonacceptance. Calahan v. Roberts, 208 N.C. 768, 182 S.E. 657 (1935).

Action Against Third Party. — In the absence of evidence that the employee or the employer had given notice of nonacceptance of the act, it must be presumed that both employee and employer are bound by the provisions of the act. However, where an employee was injured by the negligence of a third-party tort-feasor and filed no claim for compensation against the employer but instead instituted a common-law action against the third party, it was held that since the employee filed no claim against his employer under the act, he waived his rights thereunder and could proceed directly against the third party, and the provisions of the act provided no defense against such suit to the third party. Ward v. Bowles, 228 N.C. 273, 45 S.E.2d 354 (1947).

An infant employee is bound by the terms of the North Carolina Workers' Compensation Act regardless of his age. Lineberry v. Mebane, 219 N.C. 257, 13 S.E.2d 429 (1941).

In general, doctrines of waiver and estoppel do not apply in workers' compensation cases and they may not be invoked to defeat rights granted or to avoid burdens imposed thereunder. Ashe v. Barnes, 255 N.C. 310, 121 S.E.2d 549 (1961).

Ordinarily, the parties may not by agreement or conduct extend the provisions of this Chapter, but continued and definite recognition of the relationship of employer and employee, based on knowledge of the work performed, and acceptance of the benefits of that status, may work an estoppel after loss. Pearson v. Newt Pearson, Inc., 222 N.C. 69, 21 S.E.2d 879 (1942).

Applied in McNeely v. Carolina Asbestos Co., 206 N.C. 568, 174 S.E. 509 (1934); Arp v. Wood & Co., 207 N.C. 41, 175 S.E. 719 (1934); Lee v. American Enka Corp., 212 N.C. 455, 193 S.E. 809 (1937); Tscheiller v. National Weaving Co., 214 N.C. 449, 199 S.E. 623 (1938); McNair v. Ward, 240 N.C. 330, 82 S.E.2d 85 (1954); Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969); Fulcher v. Willard's Cab Co., 132 N.C. App. 74, 511 S.E.2d 9 (1999).

Cited in Murphy v. American Enka Corp., 213 N.C. 218, 195 S.E. 536 (1938); Odum v. National Oil Co., 213 N.C. 478, 196 S.E. 823 (1938); McCune v. Rhodes-Rhyne Mfg. Co., 217 N.C. 351, 8 S.E.2d 219 (1940); Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); Bame v. Palmer Stone Works, 232 N.C. 267, 59 S.E.2d 812 (1950); Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951); Laughridge v. South Mt. Pulpwood Co., 266 N.C. 769, 147 S.E.2d 213 (1966); Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979); Wiggins v. Rufus Tart Trucking Co., 63 N.C. App. 542, 305 S.E.2d 749 (1983); Poythress v. Libbey-Owens Ford Co., 67 N.C. App. 720, 313 S.E.2d 893 (1984); Buser v. Southern Food Serv., 73 F. Supp. 2d 556 (M.D.N.C. 1999).

§ 97-4: Repealed by Session Laws 1973, c. 1291, s. 2.

§ 97-5. Presumption as to contract of service.

Every contract of service between any employer and employee covered by this Article, written or implied, now in operation or made or implied prior to July 1, 1929, shall, after that date, be presumed to continue, subject to the provisions of this Article; and every such contract made subsequent to that date shall be presumed to have been made subject to the provisions of this Article. (1929, c. 120, s. 6; 1973, c. 1291, s. 3.)

CASE NOTES

Cited in Hogan v. Cone Mills Corp., 94 N.C. App. 640, 381 S.E.2d 151 (1989).

§ 97-6. No special contract can relieve an employer of obligations.

No contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer in whole or in part, of any obligation created by this Article, except as herein otherwise expressly provided. (1929, c. 120, s. 7.)

Cross References. — As to settlements between employee and employer, see G.S. 97-17 and notes thereunder.

Legal Periodicals. — For survey of 1978 administrative law, see 57 N.C. L. Rev. 831 (1979).

For note discussing the nonexistence of a private right of action for retaliatory discharge resulting from pursuit of workers' compensation benefits, see 15 Wake Forest L. Rev. 139 (1979).

For note on workers' compensation and retaliatory discharge, see 58 N.C. L. Rev. 629 (1980).

CASE NOTES

An employer is not permitted to escape his liability or obligations under this Article through the use of a special contract or agreement if the elements required for coverage of the injured individual would otherwise exist. Hoffman v. Ryder Truck Lines, 306 N.C. 502, 293 S.E.2d 807 (1982).

This section invalidated attempt by an Arkansas trucking company/employer to relieve itself of responsibility under the North Carolina Workers' Compensation Act and to limit employee's right to compensation in any state other than Arkansas. Perkins v. Arkansas Trucking Servs., Inc., 134 N.C. App. 490, 518 S.E.2d 36 (1999). But see Perkins v. Arkansas Trucking Servs., 351 N.C. 634, 528 S.E.2d 902, 2000 N.C. LEXIS 356 (2000).

North Carolina Industrial Commission, pursuant to G.S. 97-91, had jurisdiction over an employee's claim after the employee's employer sold the division for which the employee worked to a buyer that went bankrupt, and the sales agreement between the employer and the buyer, pursuant to G.S. 97-6, did not invalidate this jurisdiction by its terms for the transfer of liabilities. Goodson v. P.H. Glatfelter Co., 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

North Carolina Workers' Compensation Act, G.S. 97-1 et seq., prohibited contractual modification of the workers' compensation statutory provisions to permit dollar-for-dollar credit to an award for payments made by an employer. Smith v. Richardson Sports Ltd., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 908 (May 3, 2005).

Employer May Not Escape Liability or Obligations Because of Payment From Union. — North Carolina Industrial Commission did not abuse its discretion by awarding a time credit of one week rather than a dollar-for-dollar credit for payments made to a former professional football player by his employer and its insurance carrier after the player was injured in the next to last game of the season because the player returned to professional football for one week in the next season and exhibited earning capacity comparable to his average weekly wage. Further, dollar-for-dollar credits were precluded by North Carolina law as a payment that the player received for the last game of the season that he missed was made by the player's union under the terms of a collective bargaining agreement, and the agreement could not relieve the employer, in whole or in part, from its obligation to pay the player workers' compensation. Swift v. Richardson Sports, Inc., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 725 (Apr. 5, 2005).

Contract Between Two Employers That One Shall Carry Compensation Insurance. — Where two employers make a contract that one of them should carry compensation insurance on employees, the other is not relieved of liability under the act. Roth v. McCord, 232 N.C. 678, 62 S.E.2d 64 (1950).

Liability to Employee Suffering from Preexisting Infirmity. — An employee who becomes disabled as the result of an accident while at work is not to be deprived of benefits because of any preexisting infirmity. And this liability of the employer cannot be waived or released or diminished by any agreement of the employee. NLRB v. Cranston Print Works Co., 258 F.2d 206 (4th Cir. 1958).

Delegation of Authority. — A corporation, having been given a franchise for the operation of motor trucks on the highway as a carrier of goods in interstate commerce, cannot evade its responsibility by delegating its authority to others. Watkins v. Murrow, 253 N.C. 652, 118 S.E.2d 5 (1961).

Leases. — An employer may not, by leasing the truck of one not authorized to transport goods in interstate commerce and causing its operation under its own franchise and license plates for interstate transportation, avoid legal responsibility therefor. Watkins v. Murrow, 253 N.C. 652, 118 S.E.2d 5 (1961).

Employer May Make Provisions for Injured Employee Beyond Workers' Compensation Benefits. — There is nothing in the act that prohibits an employer from making special provisions for an injured employee beyond those benefits which the employee is entitled to receive under the provisions of the act. Ashe v. Barnes, 255 N.C. 310, 121 S.E.2d 549 (1961).

But He May Not Substitute Accident Insurance Policy for Such Benefits. — There is no provision in the law which authorizes an employer subject to the act to substitute an accident policy in lieu of compensation and other benefits required by the act. Ashe v.

Barnes, 255 N.C. 310, 121 S.E.2d 549 (1961).

Employer May Not Provide Substitute Benefits. — This section proscribes a plan permitting a rejection of benefits. The language of the statute is unequivocal; employers may not provide benefits in lieu of paying workers' compensation. Estes v. North Carolina State Univ., 89 N.C. App. 55, 365 S.E.2d 160 (1988).

Nor May Employee Elect Substitute Benefits. — The act contains no exception for cases where the employee, pursuant to a choice provided by the employer, elects to receive other benefits in lieu of workers' compensation benefits. Estes v. North Carolina State Univ., 89 N.C. App. 55, 365 S.E.2d 160 (1988).

State May Not Substitute Accumulated Sick and Vacation Leave for Workers' Compensation. — This section and G.S. 97-7 prohibit the State from paying accumulated sick and vacation leave as a substitute for workers' compensation. Estes v. North Carolina State Univ., 89 N.C. App. 55, 365 S.E.2d 160 (1988).

Employee Accepting Policy Does Not Exempt Himself from Compensation Act. — Where an employee elected to accept the insurance policy provided for him by his employer, he did not elect thereby to exempt himself from the provisions of the act. Ashe v. Barnes, 255 N.C. 310, 121 S.E.2d 549 (1961).

Nor Is He Estopped to Claim Compensation by Accepting Benefits Under Policy. — Where an employee accepted benefits under an insurance policy, he did not thereby estop himself from claiming under the provisions of the Workers' Compensation Act. Ashe v. Barnes, 255 N.C. 310, 121 S.E.2d 549 (1961).

Employer was not entitled to use accumulated sick and vacation leave to offset its obligations as determined by the Industrial Commission. Under this section and G.S. 97-7, employers, including the State, are prohibited from providing benefits in lieu of paying workers' compensation. Estes v. North Carolina State Univ., 102 N.C. App. 52, 401 S.E.2d 384 (1991).

Employer May Not Skirt Jurisdiction. — Plaintiff's principal place of employment was within North Carolina. Plaintiff was assigned to operate a tractor-trailer in an area consisting of twelve to thirteen southern states but no state, standing alone, had the same degree of significant contacts to plaintiff's employment as North Carolina. Furthermore, the "Policies, Procedures and Agreement" form signed by plaintiff upon being hired was an invalid attempt to limit plaintiff's rights to those enumerated under Arkansas workers' compensation law as well as a violation of this section. Perkins v. Arkansas Trucking Servs., 351 N.C. 634, 528 S.E.2d 902, 2000 N.C. LEXIS 356 (2000).

Applied in Brown v. Bottoms Truck Lines, 227 N.C. 299, 42 S.E.2d 71 (1947).

Quoted in Smith v. Richardson Sports Ltd. Partners, 168 N.C. App. 410, 608 S.E.2d 342, 2005 N.C. App. LEXIS 348 (2005).

Cited in Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); Jocie Motor Lines v. Johnson, 231 N.C. 367, 57 S.E.2d 388 (1950); Laughridge v. South Mt. Pulpwood Co., 266 N.C. 769, 147 S.E.2d 213 (1966); Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979); Sides v. Duke Hosp., 74 N.C. App. 331, 328 S.E.2d 818 (1985); Hogan v. Cone Mills Corp., 94 N.C. App. 640, 381 S.E.2d 151 (1989); Tellado v. Ti-Caro Corp., 119 N.C. App. 529, 459 S.E.2d 27 (1995).

§ **97-6.1:** Repealed by 1991 (Regular Session, 1992), c. 1021, s. 4.

Cross References. — For present provisions regarding retaliatory employment discrimination, see G.S. 95-240 et seq.

§ 97-7. State or subdivision and employees thereof.

Neither the State nor any municipal corporation within the State, nor any political subdivision thereof, nor any employee of the State or of any such corporation or subdivision, shall have the right to reject the provisions of this Article relative to payment and acceptance of compensation, and G.S. 97-100(c) does not apply to them: Provided, that all such corporations or subdivisions are hereby authorized to self-insure or purchase insurance to secure its liability under this Article and to include thereunder the liability of such subordinate governmental agencies as the county board of health, the school board, and other political and quasi-political subdivisions supported in whole or in part by the municipal corporation or political subdivision of the State. Each municipality is authorized to make appropriations for these purposes and to fund them by levy of property taxes pursuant to G.S. 153A-149 and G.S. 160A-209 and by the allocation of other revenues whose use is not otherwise restricted by law. (1929, c. 120, s. 8; 1931, c. 274, s. 1; 1945, c. 766; 1957, c. 1396, s. 1; 1961, c. 1200; 1973, c. 803, s. 34; c. 1291, s. 4; 2006-105, s. 1.10.)

Local Modification. — City of Raleigh: 1955, c. 1184.

Cross References. — As to tort claims against state agencies, see G.S. 143-291 et seq.

Editor's Note. — Session Laws 2006-105, s. 4, is a severability clause.

Effect of Amendments. — Session Laws 2006-105, s. 1.10, effective July 13, 2006, substituted "G.S. 97-100(c) does" for "the provisions of G.S. 97-100(j) shall" in the first sentence.

CASE NOTES

State May Not Provide Substitute Benefits. — While the state, like any other employer, may provide additional benefits to its injured workers, it may not substitute those benefits for workers' compensation. Estes v. North Carolina State Univ., 89 N.C. App. 55, 365 S.E.2d 160 (1988).

Such as Accumulated Sick and Vacation Leave. — This section and G.S. 97-6 prohibit the state from paying accumulated sick and vacation leave as a substitute for workers' compensation. Estes v. North Carolina State Univ., 89 N.C. App. 55, 365 S.E.2d 160 (1988).

Employer was not entitled to use accumulated sick and vacation leave to offset its obligations as determined by the Industrial Commission. Under G.S. 97-6 and this section, employers, including the State, are prohibited from providing benefits in lieu of paying workers' compensation. Estes v. North Carolina State Univ., 102 N.C. App. 52, 401 S.E.2d 384 (1991).

Extinguishment of County's Subrogation Lien. — Trial court did not abuse its discretion in extinguishing a county's subrogation lien against a deputy sheriff regarding a settlement that he received following an injury in the course of his employment because, based upon the fact that the county government was subject to the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., and its provisions regarding payment and compensation under the Act, there was specific statutory authority authorizing the deputy sheriff to seek a determination under G.S. 97-10.2(j) of the county's authority to file a lien against his settlement proceeds. Helsius v. Robertson, 174 N.C. App. 507, 621 S.E.2d 263, 2005 N.C. App. LEXIS 2469 (2005), appeal dismissed, review denied, 360 N.C. 363, 629 S.E.2d 851, recons. denied, 360 N.C. 533, 633 S.E.2d 815 (2006).

The death of highway patrolmen in a plane crash while attempting to locate and arrest a person accused of a crime of violence was held compensable under the act, since the patrolmen had authority to make the arrest and did not exceed their authority in using an airplane in their attempted discharge of their duties. Galloway v. Department of Motor Vehicles, 231 N.C. 447, 57 S.E.2d 799 (1950).

Applied in Perdue v. State Bd. of Equalization, 205 N.C. 730, 172 S.E. 396 (1934); Barnhardt v. City of Concord, 213 N.C. 364, 196 S.E. 310 (1938); Rape v. Town of Huntersville, 214 N.C. 505, 199 S.E. 736 (1938); Stanley v. Brown, 261 N.C. 243, 134 S.E.2d 321 (1964).

Cited in Wilmington Shipyard, Inc. v. North Carolina State Hwy. Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

§ 97-8. Prior injuries and deaths unaffected.

The provisions of this Article shall not apply to injuries or deaths, nor to accidents which occurred prior to July 1, 1929. (1929, c. 120, s. 9.)

CASE NOTES

Applied in Hafleigh & Co. v. Crossingham, 206 N.C. 333, 173 S.E. 619 (1934).

§ 97-9. Employer to secure payment of compensation.

Every employer subject to the compensation provisions of this Article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee for personal injury or death by accident to the extent and in the manner herein specified. (1929, c. 120, s. 10; 1973, c. 1291, s. 5.)

Cross References. — As to exclusion of other rights and remedies against employer, see G.S. 97-10.1.

Legal Periodicals. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For note, "Pleasant v. Johnson: The North Carolina Supreme Court Enters the Twilight Zone — Is a Co-employee Liable in Tort for Willful, Reckless, and Wanton Conduct?," see 64 N.C.L. Rev. 688 (1986).

For note, "North Carolina's Expansion of the Definition of 'Intentional' in Exceptions to the Exclusivity of Workers' Compensation: Is Legislative Action 'Substantially Certain' to Follow? — Woodson v. Rowland," see 27 Wake Forest L. Rev. 797 (1992).

For comment, "From Andrews to Woodson and Beyond: The Development of the Intentional Tort Exception to the Exclusive Remedy Provision—Rescuing North Carolina Workers from Treacherous Waters," see 20 N.C. Cent. L.J. 164 (1992).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For article, "The Substantial Certainty Exception to Workers' Compensation," see 17 Campbell L. Rev. 413 (1995).

For a survey of 1996 developments in the law regarding prisoner rights, see 75 N.C.L. Rev. 2428 (1997).

CASE NOTES

Editor's Note. — *For additional cases relating to rights and remedies against employer, see the case notes under G.S. 97-10.1.*

This section manifests the legislative intent that the liability of the employer is to be limited to the compensation payable by him on account of the injury or death of his employee. Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953).

When certain specified conditions are complied with, this section limits the liability of an employer for personal injury or death by accident of his employees as provided in the Workers' Compensation Act. Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

Act Provides Sole Remedy Against Employer and Those Conducting His Business. — Under the act, where an employee's injury or death is compensable, the sole remedy against the employer and "those conducting his business" is that provided by its terms. Weaver v. Bennett, 259 N.C. 16, 129 S.E.2d 610 (1963).

Act Provides Exclusive Remedy. — Defendant principal contractor was plaintiff's statutory employer and the workers' compensation benefits available to plaintiff through defendant's workers' compensation carrier constituted plaintiff's exclusive remedy against defendant for plaintiff's injuries. Rich v. R.L. Casey, Inc., 118 N.C. App. 156, 454 S.E.2d 666 (1995).

Employers' motion for summary judgment was granted because the administratrix's wrongful death action was barred by the North Carolina's Workers' Compensation Act, G.S. 97-1, et seq., since: (1) the shooting occurred at the deceased's place of employment, and (2) regardless of whether the deceased was the intended victim, the shooting arose out of the deceased's employment because the gunman intended to shoot a co-worker. Champion v. PPG Indus., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 9034 (W.D.N.C. Apr. 2, 2004).

Where a former employee filed claims of negligent infliction of emotional distress against her former employers, alleging that she suffered from post-traumatic stress disorder as a result of verbal abuse and humiliation she experienced at work, claims based on conduct other than sexual harassment were barred by the Workers' Compensation Act because the alleged emotional injuries arose from and were in the course of employment and the Act barred negligence actions against employers for injuries caused by conduct other than sexual harassment. Boggess v. Roper, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 63057 (W.D.N.C. Sept. 1, 2006).

Civil Action Allowed for Employer's Misconduct Substantially Certain to Cause Injury or Death. — When an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer as well as a claim for workers' compensation as such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Workers' Compensation Act. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Effect of Release Agreement on Employee's Remedies. — Once a plaintiff signs a release agreement to settle a workers' compensation claim that plaintiff is not automatically precluded from recovering pursuant to Woodson v. Rowland, 329 N.C. 33, 407 S.E.2d 222 (1991), and does not automatically admit the injury was solely accidental to the exclusion of a claim against an employer for tortious conduct. Owens v. W.K. Deal Printing, Inc., 113 N.C. App. 324, 438 S.E.2d 440 (1994), rev'd on other grounds, 339 N.C. 603, 453 S.E.2d 160 (1995).

Election Between Remedies Not Required. — A claimant may, but is not required to, elect between a civil remedy and a remedy under the Workers' Compensation Act but, in any event, is entitled to but one recovery. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Woodson v. Rowland Applies Retroactively. — The Supreme Court's decision in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), which is annotated above, applies retroactively, even though the Woodson court was silent on whether its decision was to operate retroactively. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Evidence Insufficient for Exception to Apply. — Where there was no evidence that defendant was aware, prior to employee's death, of a high probability that his equipment would fail, plaintiff failed to forecast evidence sufficient to create a genuine issue of material fact regarding defendant's liability under the Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), exception to the exclusivity provisions of the Worker's Compensation Act. Mickles v. Duke Power Co., 342 N.C. 103, 463 S.E.2d 206 (1995).

Employer was not liable for intentional misconduct, where the cart that caused the employee's injury had been used for many years previously without causing an injury, and there was no evidence that alleged defects in the cart violated state or federal workplace safety regulations or industry safety standards, or that the employer was aware of and refused to implement relevant safety measures. Wiggins v. Pelikan, Inc., 132 N.C. App. 752, 513 S.E.2d 829 (1999).

Employees could not state a claim against the employer under the exception to the exclusivity provisions of the North Carolina Workers' Compensation Act because the employees could not show that the employer intentionally engaged in conduct that it knew was substantially certain to cause serious injury or death to the employees since the hazards due to toxic mold were not "obvious" to the employer, the employer did not violate any safety regulations, the allegations failed to show that the employer recognized the immediate hazards of its conduct and consciously elected to forgo critical safety precautions or that the employer disregarded all safety measures. Allen v. IBM, 308 F. Supp. 2d 638, 2004 U.S. Dist. LEXIS 3850 (M.D.N.C. 2004).

Even if a forklift driver was not trained to sound a horn when entering or exiting defendant employer's plant, there was no evidence injury or death was substantially certain to occur as the forklift had been operated in a similar manner for a number of years with no similar accident. Thus, the elements of Woodson v. Rowland were not present, and the wrongful death action filed by deceased worker's representative under the North Carolina Wrongful Death Act, G.S. 28A-18-1 through G.S. 28A-18-8, was precluded by G.S. 97-9 and G.S. 97-10.1, of the North Carolina Workers' Compensation Act. Southern v. Metromont Materials, L.L.C., 331 F. Supp. 2d 386, 2004 U.S. Dist. LEXIS 6958 (W.D.N.C. 2004).

Woodson v. Rowland Elements Existed. — The allegations of misconduct, particularly the directing of the plaintiffs to work on a billboard after notice of its dangerous condition, were sufficient to support a reasonable inference that each of the four elements of a claim existed under Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991). Pastva v. Naegele Outdoor Adv., 121 N.C. App. 656, 468 S.E.2d 491 (1996).

Action Under Woodson v. Rowland. — In order for a plaintiff to maintain an action based on Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), plaintiff must establish that employer knew its conduct was substantially certain to cause serious injury or death to the employee. Rose v. Isenhour Brick & Tile Co., 344 N.C. 153, 472 S.E.2d 774 (1996).

Where employee failed to forecast evidence demonstrating that employer knew its conduct in failing to provide safety training, safety manuals, and violating industry standards by having inexperienced workers in close proximity to cranes was substantially certain to result in serious injury or death, summary judgment was properly granted for employer. Tinch v. Video Indus. Servs., Inc., 129 N.C. App. 69, 497 S.E.2d 295 (1998).

Meaning of "Substantial Certainty" of the Consequences of Misconduct. — When deciding whether an employer acted with "substantial certainty" of the consequences of its conduct, factors to consider may include: whether the risk existed in the workplace for a long time without causing substantial injury; whether the risk was created by a defective instrumentality with a high probability of causing the harm; whether there was evidence the employer, prior to the accident, attempted to remedy the risk that caused the harm; whether the employer's conduct that created the risk violated state or federal work safety regulations; whether the employer created a risk by failing to adhere to an industry practice, even though there was no violation of a state or federal safety regulation; and whether the employer offered safety training in the context of the risk causing the harm. Wiggins v. Pelikan, Inc., 132 N.C. App. 752, 513 S.E.2d 829 (1999).

Employer, as a matter of law, did not know that workplace "risks" were substantially certain to cause death or serious injury to deceased employee in a wrongful death action brought by a deceased employee's estate where the employer may have known of the risky procedures, but this knowledge alone did not demonstrate a genuine issue of material fact that the employer knew that these risks were substantially certain to cause death or serious injury and incur liability under the Woodson exception to the North Carolina Workers' Compensation Act., G.S. 97-9 and G.S. 97-10.1. Specifically, the employer could not have known that there was a substantial certainty that the deceased would wear a loose coat, slip where he did, have his coat get caught in the machine in the exact place where it did, and be crushed before someone could turn off the machine. Richmond v. Indalex Inc., 308 F. Supp. 2d 648, 2004 U.S. Dist. LEXIS 3851 (M.D.N.C. 2004).

Although a violation of state and federal regulations. — is an important factor in determining whether the employer's conduct can be found to have been substantially certain to cause injury or death, such violation, without more, is insufficient evidence of the employer's state of mind to make out a case of liability for intentional misconduct. Wiggins v. Pelikan, Inc., 132 N.C. App. 752, 513 S.E.2d 829 (1999).

Co-employee Civil Liability. — The Workers' Compensation Act does not bar an employee from suing a co-employee for injuries caused by willful, wanton, and reckless negligence. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Meaning of "Those Conducting His Business". — The phrase, "those conducting his business," which appears in this section, should be given a liberal construction. One must be deemed to be conducting his employer's business, within the meaning of this section, whenever he, himself, is acting within the course of his employment, as that term is used in the act. It is not necessary, in order to bring an employee within the protection of this statute, to show that his act was such as would have been imputed to the employer at common law. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

The phrase "those conducting his business" includes fellow employees. Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

Superiors of an injured employee are within the immunity of this section when their orders, upon which alleged liability is predicated, are given in the conduct of the employer's business, and such supervisory employees are improperly made additional parties defendant upon the motion of the original defendant in an action by the personal representative of a deceased employee against the third-person tortfeasor. Essick v. City of Lexington, 232 N.C. 200, 60 S.E.2d 106 (1950).

As Are Fellow Employees. — By reading this section in conjunction with G.S. 97-10.1, fellow employees are excluded from common-law liability. Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

A rationale supporting coemployee immunity is that immunity from common-law suit for ordinary negligence is part of that which an employee receives for forfeiting his own right to bring a negligence action. Furthermore, since negligence connotes unconscious inadvertence, allowing injured workers to sue coemployees would not reduce injuries caused by ordinary negligence. The same cannot be said in cases involving intentional torts. Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985).

Employee Is Deprived of Certain Common-Law Rights. — The Workers' Compensation Act provides compensation for an employee who sustains an injury by accident arising out of and in the course of his employment without regard to whether his injury was caused by negligence attributable to the employer, but the act also deprives the employee of certain rights which he had at common law. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

This section prevents an employee from suing a negligent fellow employee. Strickland v. King, 32 N.C. App. 222, 231 S.E.2d 193, rev'd on other grounds, 293 N.C. 731, 239 S.E.2d 243 (1977).

This section relieves an employee from liability for negligence resulting in injury to a fellow employee when the employees and employer are subject to the act and the injury arises out of and in the course of the employment. Stanley v. Brown, 261 N.C. 243, 134 S.E.2d 321 (1964).

Where the employer maintains insurance coverage, as specified in this section, an employee who is subject to the provisions of the act and who sustains an injury arising out of and in the course of his or her own employment cannot maintain an action at common law against another employee whose negligence, while conducting the employer's business, was the proximate cause of the injury. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

An officer or agent of a corporation who is acting within the scope of his authority for and on behalf of the corporation, and whose acts are such as to render the corporation liable therefor, is among those conducting the business of the corporation, within the purview of this section, and is entitled to the immunity it gives. Warner v. Leder, 234 N.C. 727, 69 S.E.2d 6 (1951), overruled to extent it barred action for willful, wanton, and reckless negligence in Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985), overruled on other grounds,, commented on in 30 N.C.L. Rev. 474 (1952).

The protection of this section against suit by an injured employee extends to officers of the corporate employer whose acts are such as to render the corporate employer liable therefor. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Protection Does Not Extend to Independent Contractors. — The protection of this section against suit by an injured employee does not extend to independent contractors performing work pursuant to their contracts with the employer of the injured person. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Nor to Physician Treating Employees Sent to Him by Plant Manager. — Where a physician is carrying on an independent practice of medicine or surgery, he is not "conducting the business" of an industrial corporation merely because the manager of the plant sends to him, for examination and treatment, those who, from time to time, sustain injuries in the plant. Under these circumstances, this section does not deprive the employee of his common-law right to sue a physician or surgeon who, in the course of such examination or treatment, is negligent and thereby aggravates the original injury. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Lending Employee May Relieve Employer of Liability for His Negligence. — An employer may lend or otherwise furnish his employee to another person so as to be relieved from liability for an injury caused by the negligence of the employee in performing work for the other person. It is equally true that an employer may, for a consideration or otherwise, direct his employee to go upon the premises of another and there perform work, to be designated by such other person, without severing the employment relation between the general employer and the employee. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Test Is Right to Control Manner of Doing Work. — The crucial test in determining whether a servant furnished by one person to another becomes the employee of the person to whom he is loaned is whether he passes under the latter's right of control with regard not only to the work to be done but also as to the manner of performing it. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Original Employment Is Presumed to Continue. — Where one is engaged in the business of renting out trucks, automobiles, cranes, or any other machine, and furnishes a driver or operator as part of the hiring, there is a factual presumption that the operator remains in the employ of his original master, and unless that presumption is overcome by evidence that the borrowing employer in fact assumes control of the employee's manner of performing the work, the servant remains in the service of his original employer. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Joint employment occurs when a single employee, under contracts with two employers, simultaneously performs the work of both under the control of both. In such a case, both employers are liable for workers' compensation. Leggette v. J.D. McCotter, Inc., 265 N.C. 617, 144 S.E.2d 849 (1965).

The operator of equipment may be held the employee of both the general employer and the special employer with regard to liability under the act when the general employer leases the equipment to a special employer who directs the work being performed and who has the power of terminating the employment at the work site but no power to terminate the general overall employment. Leggette v. J.D. McCotter, Inc., 265 N.C. 617, 144 S.E.2d 849 (1965), upholding the finding of the Industrial Commission that at the time of the injury the operator was in the dual employment of both the general and special employers, and that the award for compensation should be split between them and their insurance carriers.

One may be the servant or agent of another and acting within the course of his employment so as to make such employer or principal liable, under the doctrine of respondeat superior, for injuries proximately caused by his negligence, and at the same time be also in the course of his employment by another employer within the meaning of the act. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

Intentional assault by an employer removes the employer from his common-law immunity; in such a case, the employee must choose between suing his employer at common law or accepting compensation. Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

Where the employer is guilty of a felonious or willful assault on an employee he cannot relegate him to the compensation act for recovery. Daniels v. Swofford, 55 N.C. App. 555, 286 S.E.2d 582 (1982).

A coemployee is liable for willful, wanton and reckless negligence. Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985).

The Workers' Compensation Act does not provide the exclusive remedy where an employee is injured in the course of his employment by the willful, wanton and reckless conduct of a coemployee. An employee may bring an action against the coemployee for injuries received as a result of such conduct. Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985).

And assaultive behavior removes a coemployee from his immunity to common-law actions. Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

While the Workers' Compensation Act precludes plaintiff from asserting a cause of action against corporate employer for alleged assault of a supervisory employee, the act does not preclude her from pursuing recovery from the assaultive employee. Daniels v. Swofford, 55 N.C. App. 555, 286 S.E.2d 582 (1982).

Where the evidence supported only a finding of ordinary negligence on the part of coemployees, plaintiff was barred from bringing an action against them and against employer under the theory of respondeat superior and was limited to recovery under the Workers' Compensation Act. Abernathy v. Consolidated Freightways Corp., 321 N.C. 236, 362 S.E.2d 559 (1987).

Third Person Aggravating Injury May Be Sued. — There is no basis in the act for making a distinction between the right to sue a third person who, by negligence, causes the original injury and the right to sue a third person who, by negligence, causes an aggravation of it. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

As to liability of insurance carrier as a third party, see Smith v. Liberty Mut. Ins. Co., 449 F. Supp. 928 (M.D.N.C. 1978), aff'd, 598 F.2d 616 (4th Cir. 1979).

Fellow Employee Driving Automobile in Employer's Business. — Two employees, traveling in an automobile in the discharge of the employer's business, had a collision with another vehicle. In an action by the employee passenger against the owner and driver of such other vehicle, the employee driver was improperly joined as an additional defendant on motion of the original defendant for the purpose of contribution as a joint tortfeasor, since the employee driver was immune from liability under the provisions of this section. Bass v. Ingold, 232 N.C. 295, 60 S.E.2d 114 (1950).

Where plaintiff was injured in the course and scope of his employment while riding in an automobile driven by defendant, a fellow employee of plaintiff, who at the time was carrying plaintiff to his home in the conduct of his employer's business and pursuant to authority and direction given him by his employer, plaintiff could not hold defendant liable in an action at law for negligence, since defendant was a person conducting the business of his employer within the purview of the immunity provision of this section. Burgess v. Gibbs, 262 N.C. 462, 137 S.E.2d 806 (1964).

Vehicle of Fellow Employee Striking Plaintiff in Parking Lot. — Where the employer furnished a parking lot for his employees and plaintiff employee, after parking her car and while walking to the plant to report for work, was struck by a vehicle operated by another employee who was then backing into a parking space preparatory to reporting for work, the accident arose in the course of the employment, precluding an action at common law by either employee against the other. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

Employee of Independent Contractor. — Evidence was sufficient to be submitted to the jury and sustain its determination that the contractor was an independent contractor and that the crane operator was his employee and not an employee of the builder. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Wife's Immunity Not Extended to Husband. — By reason of the fact that an employee was within the course of her employment at the time of the alleged injury to the plaintiff, this section threw about her a cloak of immunity from suit on account of such injury even if it was caused by her negligence in the operation of automobile. This section did not, however, extend this immunity to her husband, if it was established that she was driving the automobile as his agent and within the course of such employment. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

Where a judgment in favor of a defendant, the employee or agent of her husband, did not rest upon the ground that she was not negligent, but rested upon the ground that this section made her personally immune from suit on account of her negligence because, at the time of her negligent act or omission, she was in the course of her employment by a company, it was error to dismiss the action as against her husband since this statutory immunity had no connection with her employment by her husband to drive his automobile. He was acting, through her, in the driving of the automobile, if she was operating it with his consent and pursuant to the family purpose for which he maintained the automobile. It was as if he were personally present driving the vehicle in the same manner. Obviously, if he had brought his wife to her work, and had driven as she was alleged to have done, the act would not have made him immune to suit by the plaintiff, for he was not conducting the company's business. He was equally subject to suit when, by the fiction of the law, he so drove by and through his wife as his agent. Though she, his agent or employee, was immune to suit by the plaintiff, he was not. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

Evidence held insufficient to prove employer engaged in conduct that was willful, wanton, or reckless where employee was injured from manually cleaning a machine which lacked a safety guard. Regan v. Amerimark Bldg. Prods., Inc., 127 N.C. App. 225, 489 S.E.2d 421 (1997), aff'd, 347 N.C. App. 665, 496 S.E.2d 378 (1998).

Applied in McNair v. Ward, 240 N.C. 330, 82 S.E.2d 85 (1954); Nance v. Parks, 266 N.C. 206, 146 S.E.2d 24 (1966); Fender v. GE Co., 380 F.2d 150 (4th Cir. 1967).

Cited in Ohlhaver v. Narron, 195 F.2d 676 (4th Cir. 1952); Johnson v. United States, 133 F. Supp. 613 (E.D.N.C. 1955); Jones v. Douglas Aircraft Co., 253 N.C. 482, 117 S.E.2d 496 (1960); Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970); Warren v. Parks, 31 N.C. App. 609, 230 S.E.2d 684 (1976); Mueller v. Daum & Dewey, Inc., 636 F. Supp. 192 (E.D.N.C. 1986); Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992); Bynum v. Frederickson Motor Express Corp., 112 N.C. App. 125, 434 S.E.2d 241 (1993); North Carolina Steel, Inc. v. National Council on Comp. Ins., 123 N.C. App. 163, 472 S.E.2d 578 (1996), aff'd in part and rev'd in part, 347 N.C. 627, 496 S.E.2d 369 (1998); Boone v. Vinson, 127 N.C. App. 604, 492 S.E.2d 356 (1997), cert. denied, 347 N.C. 573, 498 S.E.2d 377 (1998); North Carolina Steel, Inc. v. National Council Comp. Ins., 347 N.C. 627, 496 S.E.2d 369 (1998); Poe v. Atlas-Soundelier/American Trading & Prod. Corp., 132 N.C. App. 472, 512 S.E.2d 760 (1999); Bruno v. Concept Fabrics, Inc., 140 N.C. App. 81, 535 S.E.2d 408, 2000 N.C. App. LEXIS 1096 (2000); Wood v. Guilford County, 355 N.C. 161, 558 S.E.2d 490, 2002 N.C. LEXIS 16 (2002).

§ 97-10: Repealed by Session Laws 1959, c. 1324.

Editor's Note. — See now G.S. 97-10.1 through 97-10.3.

§ 97-10.1. Other rights and remedies against employer excluded.

If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death. (1929, c. 120, s. 11; 1933, c. 449, s. 1; 1943, c. 622; 1959, c. 1324; 1973, c. 1291, s. 6.)

Legal Periodicals. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For note, "Pleasant v. Johnson: The North Carolina Supreme Court Enters the Twilight Zone — Is a Co-employee Liable in Tort for Willful, Reckless, and Wanton Conduct?," see 64 N.C.L. Rev. 688 (1986).

For note, "A New Exception to the Exclusivity Provision of the North Carolina Workers' Compensation Act — Woodson v. Rowland," see 14 Campbell L. Rev. 261 (1992).

For note, "North Carolina's Expansion of the Definition of 'Intentional' in Exceptions to the Exclusivity of Workers' Compensation: Is Legislative Action 'Substantially Certain' to Follow? — Woodson v. Rowland," see 27 Wake Forest L. Rev. 797 (1992).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For article, "The Substantial Certainty Exception to Workers' Compensation," see 17 Campbell L. Rev. 413 (1995).

For a survey of 1996 developments in the law regarding prisoner rights, see 75 N.C.L. Rev. 2428 (1997).

For a survey of 1996 developments in workers' compensation law, see 75 N.C.L. Rev. 2505 (1997).

For comment, "A Proposal to Reform the North Carolina Workers' Compensation Act to Address Mental-Mental Claims," see 32 Wake Forest L. Rev. 193 (1997).

Survey of Developments in North Carolina Law and the Fourth Circuit, 1999: Potential Violence to the Bottom Line — Expanding Employer Liability for Acts of Workplace Violence in North Carolina, 78 N.C.L. Rev. 2053 (2000).

CASE NOTES

Editor's Note. *— Several of the cases annotated below were decided under former G.S. 97-10.*

For additional cases relating to rights and remedies against employer and coemployee, see the case notes under G.S. 97-9.

This section is not arbitrary legislation unrelated to the valid objective of compensating injured employees or their dependents. Carpenter v. Hawley, 53 N.C. App. 715, 281 S.E.2d 783, cert. denied and appeal dismissed, 304 N.C. 587, 289 S.E.2d 564 (1981).

As It Contemplates Mutual Concessions. — The Workers' Compensation Act contemplates mutual concessions by employee and employer; for that reason, its validity has been upheld, and its policy approved. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Under the Workers' Compensation Act, the master, in exchange for limited liability, was willing to pay on some claims in the future where in the past there had been no liability at all. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

This section is designed to carry out the purpose of the Workers' Compensation Act, which is to provide limited benefits to an employee for an injury by accident arising out of and in the course of his employment, and for certain occupational diseases, regardless of negligence or other fault on the part of the employer, and on the other hand, to limit the liability of the employer so as to protect him against the possibility of a much larger judgment, such as was possible at common law when negligence by the employer was found. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

This section implements the purpose of the act, which is to provide certain limited benefits to an injured employee regardless of negligence on the part of the employer, and simultaneously to deprive the employee of certain rights he had at the common law. Brown v. Motor Inns of Carolina, Inc., 47 N.C. App. 115, 266 S.E.2d 848 (1980).

Section Not Applicable to Injury Occurring Prior to June 20, 1959. — This section and G.S. 97-10.2 do not apply to an injury which occurred prior to June 20, 1959, the effective date thereof. Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969).

Employee's Rights and Remedies Hereunder Are Exclusive. — Where the employer and the employee are subject to and have complied with the provisions of the act, the rights and remedies therein granted to the employee exclude all other rights and remedies in his favor against the employer. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966); Brown v. Motor Inns of Carolina, Inc., 47 N.C. App. 115, 266 S.E.2d 848 (1980).

Where the allegations and evidence in an action for damages at common law show that the injury in suit was caused by an accident arising out of and in the course of plaintiff's employment, defendant's motion of nonsuit will be granted, as plaintiff's remedy under this act is exclusive of all other remedies. McNeely v. Carolina Asbestos Co., 206 N.C. 568, 174 S.E. 509 (1934). See also Miller v. Roberts, 212 N.C. 126, 193 S.E. 286 (1937); Lee v. American Enka Corp., 212 N.C. 455, 193 S.E. 809 (1937); Tscheiller v. National Weaving Co., 214 N.C. 449, 199 S.E. 623 (1938); Champion v. Vance County Bd. of Health, 221 N.C. 96, 19 S.E.2d 239 (1942).

Where both the plaintiff and the defendant are subject to the provisions of the act they are bound thereby, and the rights and remedies therein granted are exclusive, and the contention that since the act does not provide for the award of punitive damages, plaintiff has not waived his right to trial by jury for the ascertainment thereof, is untenable. McCune v. Rhodes-Rhyne Mfg. Co., 217 N.C. 351, 8 S.E.2d 219 (1940).

Even where a complaint alleges willful and wanton negligence and prays for punitive damages, the remedies under the act are exclusive. McAllister v. Cone Mills Corp., 88 N.C. App. 577, 364 S.E.2d 186 (1988).

This section applied to bar alternative actions for relief by a participant in the federally funded Comprehensive Employment and Training Act (CETA) program against the county, as employer, and a fellow employee. Sutton v. Ward, 92 N.C. App. 215, 374 S.E.2d 277 (1988).

Defendant principal contractor was plaintiff's statutory employer and the workers' compensation benefits available to plaintiff through defendant's workers' compensation carrier constituted plaintiff's exclusive remedy against defendant for plaintiff's injuries. Rich v. R.L. Casey, Inc., 118 N.C. App. 156, 454 S.E.2d 666 (1995).

Where the plaintiff was permanently injured while working on a silage harvesting machine operated by the Department of Correction, and he filed a claim with the Industrial Commission under the Tort Claims Act, his claim was properly dismissed on the grounds that workers' compensation was plaintiff's exclusive remedy. Richardson v. State Dep't of Cor., 118 N.C. App. 704, 457 S.E.2d 325, 1995 N.C. App. LEXIS 377 (1995), cert. granted, 341 N.C. 652, 461 S.E.2d 772 (1995), aff'd, 345 N.C. 128, 478 S.E.2d 501 (1996).

Where defendant failed to meet its summary judgment burden of showing that decedent was a joint employee of both defendant and the wrecking company, defendant failed to establish that plaintiff's claim was barred by the affirmative defense of the exclusivity provisions of the Act. Anderson v. Demolition Dynamics, Inc., 136 N.C. App. 603, 525 S.E.2d 471, 2000 N.C. App. LEXIS 105 (2000).

In a workers' compensation case where an employee, employer, and carrier agree in advance as to the disposition of any lien on a recovery against a third party, a carrier's insistence on the agreed-upon lien amount may be viewed as an insistence on receiving the benefit of the bargain previously struck with the employee, and these bargains are committed to the discretion of the Industrial Commission, under G.S. 97-10.1 and G.S. 97-17. Holden v. Boone, 153 N.C. App. 254, 569 S.E.2d 711, 2002 N.C. App. LEXIS 1119 (2002).

An employee cannot elect to pursue an alternate avenue of recovery, but is required to proceed under the act with respect to compensable injuries. McAllister v. Cone Mills Corp., 88 N.C. App. 577, 364 S.E.2d 186 (1988).

Where a prisoner who suffered accidental death arising out of and in the course of the employment to which he had been assigned, his dependents or next of kin were entitled to specific benefits under this Act; therefore, inmate's mother could not maintain a wrongful death action against defendants under the Tort Claims Act. Blackmon v. North Carolina Dep't of Cors., 118 N.C. App. 666, 457 S.E.2d 306 (1995), aff'd, 343 N.C. 259, 470 S.E.2d 8 (1996).

Employee who waited almost 30 minutes to get a ride home from another employee and who was injured when the other employee caused a vehicle accident in the employer's parking lot was covered by the North Carolina Workers' Compensation Act and the trial court properly dismissed a lawsuit which the injured employee filed against the employee who gave the injured employee a ride. Ragland v. Harris, 152 N.C. App. 132, 566 S.E.2d 827, 2002 N.C. App. LEXIS 894 (2002).

Civil Action Allowed for Employer's Misconduct Substantially Certain to Cause Injury or Death. — When an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer as well as a claim for workers' compensation as such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Workers' Compensation Act. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Employer, as a matter of law, did not know that workplace "risks" were substantially certain to cause death or serious injury to deceased employee in a wrongful death action brought by a deceased employee's estate where the employer may have known of the risky procedures, but this knowledge alone did not demonstrate a genuine issue of material fact that the employer knew that these risks were substantially certain to cause death or serious injury and incur liability under the Woodson exception to the North Carolina Workers' Compensation Act., G.S. 97-9 and G.S. 97-10.1. Specifically, the employer could not have known that there was a substantial certainty that the deceased would wear a loose coat, slip where he did, have his coat get caught in the machine in the exact place where it did, and be crushed before someone could turn off the machine. Richmond v. Indalex Inc., 308 F. Supp. 2d 648, 2004 U.S. Dist. LEXIS 3851 (M.D.N.C. 2004).

"Substantial Certainty" Defined. — A "substantial certainty" is more than a possibility or substantial probability of serious injury but is less than actual certainty. Wiggins v. Pelikan, Inc., 132 N.C. App. 752, 513 S.E.2d 829 (1999).

Evidence of Employer's Intentional Misconduct. — When deciding whether an employer acted with "substantial certainty" of the consequences of its conduct, factors to consider may include: whether the risk existed in the workplace for a long time without causing substantial injury; whether the risk was created by a defective instrumentality with a high probability of causing the harm; whether there was evidence the employer, prior to the accident, attempted to remedy the risk that caused the harm; whether the employer's conduct that created the risk violated state or federal work safety regulations; whether the employer created a risk by failing to adhere to an industry practice, even though there was no violation of a state or federal safety regulation; and whether the employer offered safety training in the context of the risk causing the harm. Wiggins v. Pelikan, Inc., 132 N.C. App. 752, 513 S.E.2d 829 (1999).

Election Between Remedies Not Required. — A claimant may, but is not required to, elect between a civil remedy and a remedy under the Workers' Compensation Act but, in any event, is entitled to but one recovery. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Action Under Woodson v. Rowland. — The plaintiff's claim, that the defendant delayed in responding to requests to raise her computer monitor, knowing that the delay would cause serious injury, and that as a result plaintiff's neck pain increased and her range of motion diminished, did not rise to the level of a claim under Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991) or death. Keith v. U.S. Airways, Inc., 994 F. Supp. 692 (M.D.N.C. 1998).

Employee did not adequately state a claim under Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), against his employers for intentional misconduct substantially certain to cause serious injury because allegations that other employees had been seriously ill and had complained of a variety of symptoms, maladies and serious illnesses insufficiently alleged the employers' knowledge of a substantial certainty of serious injury. Cameron v. Merisel, Inc., 163 N.C. App. 224, 593 S.E.2d 416, 2004 N.C. App. LEXIS 380 (2004), cert. denied, 358 N.C. 731, 602 S.E.2d 676 (2004).

Woodson v. Rowland Applies Retroactively. — The Supreme Court's decision in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), which is annotated above, applies retroactively, even though the Woodson court was silent on whether its decision was to operate retroactively. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Evidence Insufficient for Exception to Apply. — Where there was no evidence that defendant was aware, prior to employee's death, of a high probability that his equipment would fail, plaintiff failed to forecast evidence sufficient to create a genuine issue of material fact regarding defendant's liability under the Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), exception to the exclusivity provisions of the Worker's Compensation Act. Mickles v. Duke Power Co., 342 N.C. 103, 463 S.E.2d 206 (1995).

Employer was not liable for intentional misconduct, where the cart that caused the employee's injury had been used for many years previously without causing an injury, and there was no evidence that alleged defects in the cart violated state or federal workplace safety regulations or industry safety standards, or that the employer was aware of and refused to implement relevant safety measures. Wiggins v. Pelikan, Inc., 132 N.C. App. 752, 513 S.E.2d 829 (1999).

Employees could not state a claim against the employer under the exception to the exclusivity provisions of the North Carolina Workers' Compensation Act because the employees could not show that the employer intentionally engaged in conduct that it knew was substantially certain to cause serious injury or death to the employees since the hazards due to toxic mold were not "obvious" to the employer, the employer did not violate any safety regulations, the allegations failed to show that the employer recognized the immediate hazards of its conduct and consciously elected to forgo critical safety precautions or that the employer disregarded all safety measures. Allen v. IBM, 308 F. Supp. 2d 638, 2004 U.S. Dist. LEXIS 3850 (M.D.N.C. 2004).

Even if a forklift driver was not trained to sound a horn when entering or exiting defendant employer's plant, there was no evidence injury or death was substantially certain to occur as the forklift had been operated in a similar manner for a number of years with no similar accident. Thus, the elements of Woodson v. Rowland were not present, and the wrongful death action filed by deceased worker's representative under the North Carolina Wrongful Death Act, G.S. 28A-18-1 through G.S. 28A-18-8, was precluded by G.S. 97-9 and G.S. 97-10.1, of the North Carolina Workers' Compensation Act. Southern v. Metromont Materials, L.L.C., 331 F. Supp. 2d 386, 2004 U.S. Dist. LEXIS 6958 (W.D.N.C. 2004).

Although a violation of state and federal regulations is an important factor in determining whether the employer's conduct can be found to have been substantially certain to cause injury or death, such violation, without more, is insufficient evidence of the employer's state of mind to make out a case of liability for intentional misconduct. Wiggins v. Pelikan, Inc., 132 N.C. App. 752, 513 S.E.2d 829 (1999).

Co-employee Civil Liability. — The Workers' Compensation Act does not bar an employee from suing a co-employee for injuries caused by willful, wanton, or reckless negligence. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

A volunteer fireman, who is injured by the negligence of a fellow volunteer fireman, at a time when both are acting in the course and scope of their duties, is barred from pursuing a negligence action against the fellow fireman. Hix v. Jenkins, 118 N.C. App. 103, 453 S.E.2d 551 (1995).

Prisoners. — Workers' compensation is the exclusive remedy for prisoners injured while working on prison jobs. Richardson v. North Carolina Dep't of Cor., 345 N.C. 128, 478 S.E.2d 501, 1995 N.C. App. LEXIS 377 (1996).

When an inmate is injured while working at his prison job, his exclusive remedy for any injury is a workers' compensation claim, but he must wait until release for a determination of entitlement to such compensation. Vereen v. N.C. Dep't of Corr., 168 N.C. App. 588, 608 S.E.2d 412, 2005 N.C. App. LEXIS 333 (2005).

Assault by Fellow Employee. — An intentional assault in the work place by a fellow employee or third party is an accident that occurs in the course of employment, but does not arise out of the employment unless a job-related motivation or some other causal relation between the job and the assault exists. Wake County Hosp. Sys. v. Safety Nat'l Cas. Corp., 127 N.C. App. 33, 487 S.E.2d 789 (1997), cert. denied, 347 N.C. 410, 494 S.E.2d 600 (1997).

Where the evidence showed that a hospital social worker was abducted from the employee parking lot, she was assaulted and killed on an adjacent street, she was carrying work materials, and the assailant was a co-employee, her death was compensable under the Workers' Compensation Act. Wake County Hosp. Sys. v. Safety Nat'l Cas. Corp., 127 N.C. App. 33, 487 S.E.2d 789 (1997), cert. denied, 347 N.C. 410, 494 S.E.2d 600 (1997).

Robbery was a risk associated with night manager's job because she was required to count money as the end of the day, and the court held that the night manager could not sue her employer for negligently hiring another employee who assaulted her because, under the circumstances, the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., provided an exclusive remedy for obtaining compensation. Caple v. Bullard Rests., Inc., 152 N.C. App. 421, 567 S.E.2d 828, 2002 N.C. App. LEXIS 919 (2002).

Where Employee's Claim for Compensation Is Denied. — Plaintiff and his employer were bound by the provisions of the act. Plaintiff's injury occurred while he was allowed by his employer to use certain machinery for his own personal ends. Compensation was denied since the accident did not arise out of and in the course of the employment. Thereafter plaintiff sued, alleging negligence on the part of the employer. But it was held that, conceding that the evidence established negligence of defendant employer, the act barred all other rights and remedies of employee except those provided in the act. Francis v. Carolina Wood Turning Co., 208 N.C. 517, 181 S.E. 628 (1935). See analysis and criticism of this case in 14 N.C.L. Rev. 199 (1936). In accord, see Tscheiller v. National Weaving Co., 214 N.C. 449, 199 S.E. 623 (1938).

In an action brought at common law, the complaint alleged that the Commission had held that the plaintiff's injury did not arise out of and in the course of his employment. The defendant demurred. It was held that the rights conferred under the act excluded the employee from bringing an action against his employer at common law. Pilley v. Greenville Cotton Mills, 201 N.C. 426, 160 S.E. 479 (1931).

The plaintiff was denied an award by the Industrial Commission on the ground that he was not injured "by accident arising out of and in the course of his employment." He did not appeal but brought a new action against his employer in the superior court alleging that his injuries were due to the employer's negligence. No recovery. Rights of an employee against his employer under this section are exclusive and no distinction is recognized by the act between injuries arising from accident and those due to the employer's negligence. Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930).

This section applies only to proceedings against the employer, and so against his insurance carrier. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

And Is Inapplicable Where Employment Relation Does Not Exist. — The act relates to the rights and liabilities of employee and employer by reason of injuries and disabilities arising out of and in the course of the employment relation. Where that relation does not exist, the act has no application. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966); Brown v. Motor Inns of Carolina, Inc., 47 N.C. App. 115, 266 S.E.2d 848 (1980).

Employee's premises liability claim, and his wife's loss of consortium claim, against the owner of his workplace, due to toxic mold contamination, was improperly dismissed because the owner was not entitled to assert workers' compensation exclusivity, even though it was a parent corporation of the employee's employers, and it was alleged that the owner knew of the condition but did nothing to warn or protect the employee. Cameron v. Merisel, Inc., 163 N.C. App. 224, 593 S.E.2d 416, 2004 N.C. App. LEXIS 380 (2004), cert. denied, 358 N.C. 731, 602 S.E.2d 676 (2004).

It Deprives Employee of Certain Common-Law Rights. — The act provides compensation for an employee who sustains an injury by accident arising out of and in the course of his employment without regard to whether his injury was caused by negligence attributable to the employer, but the act also deprives the employee of certain rights which he had at the common law. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

But Not Rights Disconnected from Employment. — The act does not take away any common-law right of the employee, even as against the employer, provided the right be one which is disconnected with the employment and pertains to the employee, not as an employee but as a member of the public. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Thus Surrender of Right of Action Is Not Absolute. — Expressions in this section and in G.S. 97-10.2 regarding the surrender of the right to maintain common-law or statutory actions against the employer are not absolute — not words of universal import, making no contact with time, place or circumstance. They must be construed within the framework of the act, and as qualified by its subject and purposes. Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943).

And Does Not Extend to Claim Against Employer Disconnected With Employment. — An employee was killed by an explosion on a motorboat on a Sunday fishing trip organized and conducted by the employer's agent. The employee was not required to go, nor was he paid for the time spent, but his expenses were paid. His widow and administratrix brought an action for wrongful death against the employer alleging negligence of the agent. Defendant moved to dismiss on the ground that the Industrial Commission had sole jurisdiction of an employee's claims against his employer under the exclusive remedy provision of this section. It was held, two justices dissenting, that the jurisdiction of the Commission does not extend to claims arising against an employer when "disconnected with the employment." Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943).

North Carolina Workers' Compensation Act did not provide the exclusive remedy to a state employee who was sexually assaulted in a county courthouse where the county had employed a security firm to provide security in the courthouse. Wood v. Guilford County, 355 N.C. 161, 558 S.E.2d 490, 2002 N.C. LEXIS 16 (2002).

Action Against Employer for Intentional Conduct Is Not Barred. — The Workers' Compensation Act does not bar a common law action by an employee against his employer for the intentional conduct of the employer. Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116, cert. denied, 317 N.C. 334, 346 S.E.2d 140, 346 S.E.2d 141 (1986); Ridenhour v. Concord Screen Printers, Inc., 40 F. Supp. 2d 598 (M.D.N.C. 1999).

Actions for intentional infliction of mental and emotional distress are not barred by this section. Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116, cert. denied, 317 N.C. 334, 346 S.E.2d 140, 346 S.E.2d 141 (1986); Ridenhour v. Concord Screen Printers, Inc., 40 F. Supp. 2d 598 (M.D.N.C. 1999).

Intentional assault by an employer removes the employer from his common-law immunity and the employee must choose between suing his employer at common law or accepting compensation. Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

Where the employer is guilty of a felonious or willful assault on an employee he cannot relegate him to the compensation act for recovery. Daniels v. Swofford, 55 N.C. App. 555, 286 S.E.2d 582 (1982).

Fellow Employees Are Excluded from Common-Law Liability. — By reading G.S. 97-9 in conjunction with this section, fellow employees are excluded from common-law liability. Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

A rationale supporting coemployee immunity is that immunity from common-law suit for ordinary negligence is part of that which an employee receives for forfeiting his own right to bring a negligence action. Furthermore, since negligence connotes unconscious inadvertence, allowing injured workers to sue coemployees would not reduce injuries caused by ordinary negligence. The same cannot be said in cases involving intentional torts. Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985).

But the Workers' Compensation Act does not insulate a coemployee from his willful, wanton and reckless negligence. An injured worker in such situations may receive benefits under the act and also maintain a common-law action against the coemployee. Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985).

Employee adequately stated a claim under Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985), and a claim for punitive damages against a co-employee, and his wife adequately stated a loss of consortium claim, by alleging that the co-employee engaged in conduct that threatened the safety of others and was so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent was justified, when the co-employee, as director of security at the employee's workplace, who was responsible for workplace maintenance, knowingly failed to reveal the existence of toxic mold. Cameron v. Merisel, Inc., 163 N.C. App. 224, 593 S.E.2d 416, 2004 N.C. App. LEXIS 380 (2004), cert. denied, 358 N.C. 731, 602 S.E.2d 676 (2004).

Willful, Wanton and Reckless Negligence. — When an employee's injury is covered by the Workers' Compensation Act, the right to bring an independent negligence action against the employer is barred by the existence of the workers' compensation remedy. Since the Act's coverage extends to injuries resulting from an employer's willful, wanton and reckless negligence, there was no issue regarding an election of remedies in this action. Stack v. Mecklenburg County, 86 N.C. App. 550, 359 S.E.2d 16, cert. denied, 321 N.C. 121, 361 S.E.2d 597 (1987).

Where the evidence supported only a finding of ordinary negligence on the part of coemployees, plaintiff was barred from bringing an action against them and against employer under the theory of respondeat superior and was limited to recovery under the Workers' Compensation Act. Abernathy v. Consolidated Freightways Corp., 321 N.C. 236, 362 S.E.2d 559 (1987).

Assaultive behavior removes a coemployee from his immunity to common-law actions. Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

North Carolina's Workers' Compensation Act is not the exclusive remedy for an employee intentionally injured by a fellow employee. Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

Assaultive behavior by a coemployee limits the employee's immunity under this Chapter. Such misconduct is outside the realm of industrial accidents which workers' compensation laws were designed to exclusively cover. Daniels v. Swofford, 55 N.C. App. 555, 286 S.E.2d 582 (1982).

Mental and Emotional Distress. — Where plaintiff alleged that she suffered "mental and emotional distress" as a result of intentional tortious acts by defendant, her complaint alleged a common law action against defendant's employer for its intentional conduct, and plaintiff sought recovery for damages which were not compensable under the North Carolina Worker's Compensation Act; therefore, plaintiff's claim is not barred by the provisions of the Act. Brown v. Burlington Indus., Inc., 93 N.C. App. 431, 378 S.E.2d 232 (1989).

Negligence and Emotional Distress from Sexual Harassment. — Plaintiff's claim that employer negligently retained managerial employee, and that she suffered severe mental and emotional distress resulting from managerial employee's sexual harassment, was not barred by the exclusive remedies provision of the North Carolina Workers' Compensation Act. Harrison v. Edison Bros. Apparel Stores, Inc., 724 F. Supp. 1185 (M.D.N.C. 1989), aff'd in part, rev'd in part, 924 F.2d 530 (4th Cir. 1991).

Where a former employee filed claims of negligent infliction of emotional distress against her former employers, alleging that she suffered from post-traumatic stress disorder as a result of verbal abuse and humiliation she experienced at work, claims based on conduct other than sexual harassment were barred by the Workers' Compensation Act because the alleged emotional injuries arose from and were in the course of employment and the Act barred negligence actions against employers for injuries caused by conduct other than sexual harassment. Boggess v. Roper, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 63057 (W.D.N.C. Sept. 1, 2006).

Sexual Harassment by Coemployee. — Although the North Carolina Workers' Compensation Act eliminated negligence as a basis of recovery against an employer, the act covers only those injuries which arise out of and in the course of employment. Emotional injury allegedly suffered by plaintiff, resulting from coemployee's sexual harassment, was not a natural and probable consequence or incident of the employment so as to bar her claim for negligence against employer in retaining the coemployee in a supervisory position after having actual notice of his proclivity to engage in sexually offensive conduct. Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116, cert. denied, 317 N.C. 334, 346 S.E.2d 140, 346 S.E.2d 141 (1986).

Student Performing Respiratory Therapy at Hospital Gained Apprentice Status. — While plaintiff may have been a student at technical institute, when he entered the hospital to perform respiratory therapy, his status changed to apprentice, making him subject to the Workers' Compensation Act. Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487, cert. denied, 333 N.C. 169, 424 S.E.2d 406 (1992).

Section Not Applicable to Action Brought by Independent Contractor. — When it appears in a common-law action to recover for injuries that the Commission has held that the plaintiff was an independent contractor and not an employee, an action will lie against the defendant for negligence, as this section has no application to actions instituted by independent contractors. Odum v. National Oil Co., 213 N.C. 478, 196 S.E. 823 (1938). See also Barnhardt v. City of Concord, 213 N.C. 364, 196 S.E. 310 (1938).

Nor to Liability of Physician Treating Employee. — This section has no relation to the liability of an attending physician or surgeon for negligence in the treatment of an injured employee. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Or to Patron of Employer's Business Such as Shareholder or Member. — The immunity granted by this section does not extend to an independent contractor, or to the employees of such independent contractor, engaged in work upon the premises of the employer of the injured plaintiff. It would surely follow that immunity would not extend to a mere patron of the employer's business, even though such patron be also a stockholder, or otherwise a member, of the corporation which owns the business and employs the injured plaintiff. McWilliams v. Parham, 269 N.C. 162, 152 S.E.2d 117 (1967).

Allegations that defendant was enjoying the privileges of membership in playing on a golf course, even if such allegations were construed to mean that defendant was a member and stockholder of the club, did not show that defendant was an employer of a caddy of preceding players, and did not show that defendant was "conducting" the business of the club, and therefore such defendant was not entitled to allege the defense of immunity under the act in an action by the caddy to recover for injuries resulting when struck by a ball driven by defendant. McWilliams v. Parham, 269 N.C. 162, 152 S.E.2d 117 (1967).

Liability based on negligence was eliminated by the Workers' Compensation Act. Horney v. Meredith Swimming Pool Co., 267

N.C. 521, 148 S.E.2d 554 (1966).

Hence, Separate Tort Action Against Employer Is Barred. — When plaintiff has been compensated by the payment of workers' compensation benefits, she cannot maintain a separate action against her employer for additional compensation. Having already selected one avenue of recovery, plaintiff is precluded from maintaining a tort action. Freeman v. SCM Corp., 66 N.C. App. 341, 311 S.E.2d 75, modified and aff'd, 311 N.C. 294, 316 S.E.2d 81 (1984).

The monetary benefit afforded to plaintiff by G.S. 97-13(c) entitled her to compensation and this section applied to bar plaintiff's wrongful death action under the Tort Claims Act. Blackmon v. N.C. Dept. Of Correction, 343 N.C. 259, 470 S.E.2d 8 (1996).

Joint employer status does not provide an injured plaintiff-employee with two recoveries; rather, it merely provides two potential sources of recovery. Thus, where a temporary employee was injured at work and was compensated by temporary agency's insurance carrier, this section prevented him from recovering in a civil action against the employer. Poe v. Atlas-Soundelier/American Trading & Prod. Corp., 132 N.C. App. 472, 512 S.E.2d 760 (1999).

Even for Gross Negligence. — Even though plaintiff may have been injured by defendant's gross negligence, rather than by accident, where she has been compensated by workers' compensation benefits, she is still precluded from maintaining an action against defendant. Freeman v. SCM Corp., 66 N.C. App. 341, 311 S.E.2d 75, modified and aff'd, 311 N.C. 294, 316 S.E.2d 81 (1984).

Action for Loss of Consortium Not Maintainable. — This section is clear and unambiguous and requires the result that plaintiff cannot maintain an action for loss of consortium resulting from injuries to plaintiff's spouse when those injuries are compensable under the Workers' Compensation Act. Sneed v. Carolina Power & Light Co., 61 N.C. App. 309, 300 S.E.2d 563 (1983).

Statutes Authorizing Recovery for Negligent Death Rendered Ineffective. — The philosophy of workers' compensation is that when employer and employee accept the terms of the act their relations become contractual, and other statutes authorizing recovery for negligent death become ineffective. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Wrongful Death Action Precluded. — An award by the Industrial Commission to the widow of an employee excludes all other rights and remedies, and the administrator of the employee may not maintain an action against the employer for wrongful death, and the fact that the injury resulted from negligence in the violation by the employer of a criminal statute does not alter this result. Bright v. N.B. & C. Motor Lines, 212 N.C. 384, 193 S.E. 391 (1937).

Since the Workers' Compensation Act by its terms repeals all inconsistent legislation, the rights and remedies thereby given are substituted for those theretofore provided by the Death Act. The result is that where an employee contracts to work under the act, the damages to be paid by the employer in case of death are limited by that act, and an action cannot be maintained in disregard of that act. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Under the Workers' Compensation Act a certain liability is imposed for death, and that liability is exclusive. No other responsibility is left which springs from the occurrence upon which liability rests — death — and the effect of the compensation as a satisfaction of all other claims is in no way limited or impaired by the circumstances or the identity of the persons to whom it is paid or because in a given case no one survives to take advantage of the statute. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

If an employee's action would be barred by the Workers' Compensation Act, then a wrongful death action brought by the employee's representative is also barred. McAllister v. Cone Mills Corp., 88 N.C. App. 577, 364 S.E.2d 186 (1988).

Where deceased was a prisoner who suffered "accidental death arising out of and in the course of the employment to which he had been assigned," his dependents or next of kin were statutorily "entitled" to specific benefits under the exclusive remedy provisions of this section, and could not maintain a wrongful death action against defendants under the Tort Claims Act. Blackmon v. North Carolina Dep't of Cors., 118 N.C. App. 666, 457 S.E.2d 306 (1995), aff'd, 343 N.C. 259, 470 S.E.2d 8 (1996).

Employers' motion for summary judgment was granted because the administratrix's wrongful death action was barred by the North Carolina's Workers' Compensation Act, G.S. 97-1, et seq., since: (1) the shooting occurred at the deceased's place of employment, and (2) regardless of whether the deceased was the intended victim, the shooting arose out of the deceased's employment because the gunman intended to shoot a co-worker. Champion v. PPG Indus., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 9034 (W.D.N.C. Apr. 2, 2004).

Right Under Death by Wrongful Act Statute of Another State — Not Affected. — The acceptance of compensation under this act cannot affect the right to pursue a remedy against a third person under the wrongful death statute of another state, unless there is something in the law of the other state which so provides. Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934).

Same — When Assignment of Such Claim Is Governed by Law of This State. — The assignment of the right of recovery against a third person under the wrongful death statute of one state as the result of acceptance by the beneficiary of compensation from the employer under the Workers' Compensation Act of this State, in the absence of any provision to the contrary in the law of the state of the injury, is governed by the law of this State. Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934).

A worker for a company providing civilian mess services to the United States Army may bring an action against the federal government under the Federal Tort Claims Act, since the exclusivity provision of this section does not apply, the United States being neither a joint employer nor statutory employer of worker. Pinckney v. United States, 671 F. Supp. 405 (E.D.N.C. 1987).

Allegations Sufficient to Withstand Motion to Dismiss. — Allegations of employee who suffered serious injuries when his arm and body were caught in paint machine, for which emergency switches were inoperable, were held sufficient to withstand a motion to dismiss for failure to state a claim. Regan v. Amerimark Bldg. Prods., Inc., 118 N.C. App. 328, 454 S.E.2d 849 (1995).

Dismissal or Nonsuit Upheld. — Plaintiff contracted tuberculosis in working with chemicals in defendant's plant. In a common-law action it was alleged that the disease was caused by inherently dangerous working conditions. Both plaintiff and defendant had accepted the act. Judgment dismissing the action was held proper. Lee v. American Enka Corp., 212 N.C. 455, 193 S.E. 809 (1937). See also Jenkins v. American Enka Corp., 95 F.2d 755 (4th Cir. 1938), where plaintiff instituted an action at common law alleging that he had contracted a disease as a result of improper working conditions negligently permitted by defendant. Murphy v. American Enka Corp., 213 N.C. 218, 195 S.E. 536 (1938).

Where, in a suit by a student nurse to recover damages for injuries sustained while being transported by the hospital which employed her, the plaintiff judicially admitted that her employment was within the coverage of the Workers' Compensation Act except as to number of employees regularly employed and the uncontradicted evidence showed that more than five employees were regularly employed, a nonsuit was properly granted. Powers v. Robeson County Mem. Hosp., 242 N.C. 290, 87 S.E.2d 510 (1955).

Summary Judgment Appropriate. — In an action by employee against employer seeking compensatory and punitive damages for accident that occurred at work, the trial court did not err in granting defendant's motion for summary judgment, because no genuine issue of material fact existed as to whether defendant engaged in intentional misconduct knowing this conduct was substantially certain to cause death or serious injury to plaintiff. Vaughan v. J.P. Taylor Co., 114 N.C. App. 651, 442 S.E.2d 538 (1994), cert. denied, 336 N.C. 615, 447 S.E.2d 413 (1994).

All of plaintiff's claims, except for his claim for intentional infliction of emotional distress, were subject to the exclusivity provision of this section, where the suit arose on account of a video tape prepared by defendants, purporting to demonstrate the functions of plaintiff's job, which caused plaintiff's doctor to change his opinion that plaintiff's condition was job-related. Groves v. Travelers Ins. Co., 139 N.C. App. 795, 535 S.E.2d 105, 2000 N.C. App. LEXIS 1044 (2000).

Applied in Burgess v. Gibbs, 262 N.C. 462, 137 S.E.2d 806 (1964); Fender v. GE Co., 260 F. Supp. 75 (W.D.N.C. 1966); Fender v. GE Co., 380 F.2d 150 (4th Cir. 1967); Wright v. Wilson Mem. Hosp., 30 N.C. App. 91, 226 S.E.2d 225 (1976); Horne v. GE Co., 716 F.2d 253 (4th Cir. 1983); Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983); Freeman v. SCM Corp., 311 N.C. 294, 316 S.E.2d 81 (1984); Pangburn v. Saad, 73 N.C. App. 336, 326 S.E.2d 365 (1985); Matthews v. Charlotte-Mecklenburg Hosp. Auth., 132 N.C. App. 11, 510 S.E.2d 388 (1999); Whitaker v. Town of Scotland Neck, 357 N.C. 552, 597 S.E.2d 665, 2003 N.C. LEXIS 1263 (2003).

Cited in Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970); Sharpe v. Bradley Lumber Co., 446 F.2d 152 (4th Cir. 1971); Smith v. Liberty Mut. Ins. Co., 409 F. Supp. 1211 (M.D.N.C. 1976); Sneed v. Carolina Power & Light Co., 61 N.C. App. 309, 300 S.E.2d 563 (1983); Poythress v. Libbey-Owens Ford Co., 67 N.C. App. 720, 313 S.E.2d 893 (1984); Anderson v. Texas Gulf, Inc., 83 N.C. App. 634, 351 S.E.2d 109 (1986); Mueller v. Daum & Dewey, Inc., 636 F. Supp. 192 (E.D.N.C. 1986); Lemmerman v. A.T. Williams Oil Co., 318 N.C. 577, 350 S.E.2d 83 (1986); Amos v. Oakdale Knitting Co., 331 N.C. 348, 416 S.E.2d 166 (1992); Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992); Bynum v. Frederickson Motor Express Corp., 112 N.C. App. 125, 434 S.E.2d 241 (1993); Henderson v. Henderson, 121 N.C. App. 752, 468 S.E.2d 454 (1996); Bullins v. Abitibi-Price Corp., 124 N.C. App. 530, 477 S.E.2d 691 (1996); Boone v. Vinson, 127 N.C. App. 604, 492 S.E.2d 356 (1997), cert. denied, 347 N.C. 573, 498 S.E.2d 377 (1998); Seigel v. Patel, 132 N.C. App. 783, 513 S.E.2d 602 (1999); Buser v. Southern Food Serv., 73 F. Supp. 2d 556 (M.D.N.C. 1999); Reece v. Forga, 138 N.C. App. 703, 531 S.E.2d 881, 2000 N.C. App. LEXIS 790 (2000).

§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

(a) The right to compensation and other benefits under this Article for disability, disfigurement, or death shall not be affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person hereinafter being referred to as the "third party." The respective rights and interests of the employee-beneficiary under this Article, the employer, and the employer's insurance carrier, if any, in respect of the common-law cause of action against such third party and the damages recovered shall be as set forth in this section.

(b) The employee, or his personal representative if he be dead, shall have the exclusive right to proceed to enforce the liability of the third party by appropriate proceedings if such proceedings are instituted not later than 12 months after the date of injury or death, whichever is later. During said 12-month period, and at any time thereafter if summons is issued against the third party during said 12-month period, the employee or his personal representative shall have the right to settle with the third party and to give a valid and complete release of all claims to the third party by reason of such injury or death, subject to the provisions of (h) below.

(c) If settlement is not made and summons is not issued within said 12-month period, and if employer shall have filed with the Industrial Commission a written admission of liability for the benefits provided by this Chapter, then either the employee or the employer shall have the right to proceed to enforce the liability of the third party by appropriate proceedings; either shall have the right to settle with the third party and to give a valid and complete release of all claims to the third party by reason of such injury or death, subject to the provisions of (h) below. Provided that 60 days before the expiration of the period fixed by the applicable statute of limitations if neither the employee nor the employer shall have settled with or instituted proceedings against the third party, all such rights shall revert to the employee or his personal representative.

(d) The person in whom the right to bring such proceeding or make settlement is vested shall, during the continuation thereof, also have the exclusive right to make settlement with the third party and the release of the person having the right shall fully acquit and discharge the third party except as provided by (h) below. A proceeding so instituted by the person having the right shall be brought in the name of the employee or his personal representative and the employer or the insurance carrier shall not be a necessary or proper party thereto. If the employee or his personal representative shall refuse to cooperate with the employer by being the party plaintiff, then the action shall be brought in the name of the employer and the employee or his personal representative shall be made a party plaintiff or party defendant by order of court.

(e) The amount of compensation and other benefits paid or payable on account of such injury or death shall be admissible in evidence in any proceeding against the third party. In the event that said amount of compensation and other benefits is introduced in such a proceeding the court shall instruct the jury that said amount will be deducted by the court from any amount of damages awarded to the plaintiff. If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of employer joined and concurred with the negligence of the third party in producing the injury or death. The employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding. Such issue shall be the last of the issues submitted to the jury. If the verdict shall be that actionable negligence of the employer did join and concur with that of the third party in producing the injury or death, then the court shall reduce the damages awarded by the jury against the third party by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation hereunder and the entire amount recovered, after such reduction, shall belong to the employee or his personal representative free of any claim by the employer and the third party shall have no further right by way of contribution or otherwise against the employer, except any right which may exist by reason of an express contract of indemnity between the employer and the third party, which was entered into prior to the injury to the employee. In the event that the court becomes aware that there is an express contract of indemnity between the employer and the third party the court may in the interest of justice exclude the employer from the trial of the claim against the third party and may meet the issue of the actionable negligence of the employer to the jury in a separate hearing.

(f)(1) If the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:

a. First to the payment of actual court costs taxed by judgment and/or reasonable expenses incurred by the employee in the litigation of the third-party claim.

b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and except for the fee on the subrogation interest of the employer such fee shall not be subject to the provisions of G.S. 97-90 but shall not exceed one third of the amount obtained or recovered of the third party.

c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.

d. Fourth to the payment of any amount remaining to the employee or his personal representative.

(2) The attorney fee paid under (f)(1) shall be paid by the employee and the employer in direct proportion to the amount each shall receive under (f)(1)c and (f)(1)d hereof and shall be deducted from such payments when distribution is made.

(g) The insurance carrier affording coverage to the employer under this Chapter shall be subrogated to all rights and liabilities of the employer hereunder but this shall not be construed as conferring any other or further rights upon such insurance carrier than those herein conferred upon the employer, anything in the policy of insurance to the contrary notwithstanding.

(h) In any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest under (f) hereof upon any payment made by the third party by reason of such injury or death, whether paid in settlement, in satisfaction of judgment, as consideration for covenant not to sue, or otherwise and such lien may be enforced against any person receiving such funds. Neither the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal representative join therein; provided, that this sentence shall not apply:

(1) If the employer is made whole for all benefits paid or to be paid by him under this Chapter less attorney's fees as provided by (f)(1) and (2) hereof and the release to or agreement with the third party is executed by the employee; or

(2) If either party follows the provisions of subsection (j) of this section.

(i) Institution of proceedings against or settlement with the third party, or acceptance of benefits under this Chapter, shall not in any way or manner affect any other remedy which any party to the claim for compensation may have except as otherwise specifically provided in this Chapter, and the exercise of one remedy shall not in any way or manner be held to constitute an election of remedies so as to bar the other.

(j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien. If the matter is pending in the federal district court such determination may be made by a federal district court judge of that division. (1929, c. 120, s. 11; 1933, c. 449, s. 1; 1943, c. 622; 1959, c. 1324; 1963, c. 450, s. 1; 1971, c. 171, s. 1; 1979, c. 865, s. 1; 1983, c. 645, ss. 1, 2; 1991, c. 408, s. 1; c. 703, s. 2; 1999-194, s. 1; 2004-199, s. 13(b).)

Legal Periodicals. — For article, "Settlement with a Third Party," see 8 N.C.L. Rev. 424 (1930).

For survey of 1976 case law on workers' compensation, see 55 N.C.L. Rev. 1116 (1977).

For survey of 1977 workers' compensation law, see 56 N.C.L. Rev. 1166 (1978).

For article, "Third-Party Action Over Against Workers' Compensation Employer," see 1982 Duke L.J. 483.

For note, "Pleasant v. Johnson: The North Carolina Supreme Court Enters the Twilight Zone — Is a Co-employee Liable in Tort for Willful, Reckless, and Wanton Conduct?," see 64 N.C.L. Rev. 688 (1986).

For note, "A New Exception to the Exclusivity Provision of the North Carolina Workers' Compensation Act — Woodson v. Rowland," see 14 Campbell L. Rev. 261 (1992).

For a survey of 1996 developments in the law regarding prisoner rights, see 75 N.C.L. Rev. 2428 (1997).

CASE NOTES

I. In General.
II. Respective Liability of Third Party, Employer and Carrier.
III. Parties and Procedure.
IV. Disbursement of Proceeds.

I. IN GENERAL.

Editor's Note. *— Several of the cases cited in this note were decided under former G.S. 97-10.*

Legislative History. — For case reviewing the legislative history of this section, see Hogan v. Johnson Motor Lines, 38 N.C. App. 288, 248 S.E.2d 61 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

Legislative Intent. — Subsection (j) allows plaintiff double recovery at expense of employer or carrier, in discretion of superior court judge. Since language is clear and unambiguous, the legislature intended this possible result. Allen v. Rupard, 100 N.C. App. 490, 397 S.E.2d 330 (1990), appeal withdrawn, 328 N.C. 328, 404 S.E.2d 864 (1992), citing Pollard v. Smith, 90 N.C. App. 585, 369 S.E.2d 84 (1988), rev'd on other grounds, 324 N.C. 424, 378 S.E.2d 771 (1989).

Absent extenuating circumstances, the Worker's Compensation Act in general and this section specifically were never intended to provide the employee with a windfall of a recovery from both the employer and the third-party tortfeasor. Radzisz v. Harley Davidson of Metrolina, Inc., 346 N.C. 84, 484 S.E.2d 566 (1997).

In granting a trial court the discretion to determine subrogation amounts in workers' compensation cases under G.S. 97-10.2(j) to facilitate settlement of third party claims, the legislature did not intend to undermine the authority of the Industrial Commission to do the same for workers' compensation claims. Holden v. Boone, 153 N.C. App. 254, 569 S.E.2d 711, 2002 N.C. App. LEXIS 1119 (2002).

Subsection (j) Held Constitutional. — Subsection (j) of this section does not violate "Law of the Land" clause of N.C. Const., Art. I, § 19, and is not unconstitutionally vague. Allen v. Rupard, 100 N.C. App. 490, 397 S.E.2d 330 (1990), appeal withdrawn, 328 N.C. 328, 404 S.E.2d 864 (1992).

Discretion given trial court by subsection (j) of this section does not violate United States or North Carolina Constitution. Allen v. Rupard, 100 N.C. App. 490, 397 S.E.2d 330 (1990), appeal withdrawn, 328 N.C. 328, 404 S.E.2d 864 (1992).

This section is not unconstitutionally vague or violative of due process. In re Biddix, 138 N.C. App. 500, 530 S.E.2d 70, 2000 N.C. App. LEXIS 639 (2000), cert. denied, 352 N.C. 674, 545 S.E.2d 418 (2000).

Trial court did not abuse its discretion in extinguishing county's subrogation lien against a deputy sheriff regarding a settlement that he received following an injury in the course of his employment because G.S. 97-10.2(j) did not violate the Exclusive Emoluments Clause of N.C. Const. art. I, § 32. Helsius v. Robertson, 174 N.C. App. 507, 621 S.E.2d 263, 2005 N.C. App. LEXIS 2469 (2005), appeal dismissed, review denied, 360 N.C. 363, 629 S.E.2d 851, recons. denied, 360 N.C. 533, 633 S.E.2d 815 (2006).

Purpose of Section. — Manifestly, the statute was designed primarily to secure prompt and reasonable compensation for an employee, and at the same time to permit an employer or his insurance carrier, who has made a settlement with the employee, to recover the amount so paid from a third party causing the injury to such employee. The statute was not designed as a city of refuge for a negligent third party. Brown v. Southern Ry., 204 N.C. 668, 169 S.E. 419 (1933).

Section Does Not Apply to Injuries Occurring Prior to June 20, 1959. — This section and G.S. 97-10.1 do not apply to an injury which occurred prior to June 20, 1959, the effective date of those statutes. Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969).

Choice of Law. — Pursuant to this section it is sound public policy of North Carolina to provide for a right of action on behalf of an injured employee against a third party tortfeasor (even a fellow subcontractor) and even though the injured employee applied for and received workers' compensation benefits. Virginia law which violated this policy was not applied even though injury occurred in Virginia. Braxton v. Anco Elec., Inc., 100 N.C. App. 635, 397 S.E.2d 640 (1990), aff'd, 330 N.C. 124, 409 S.E.2d 914 (1991).

Where plaintiff sought and received workers' compensation benefits pursuant to the North Carolina Workers' Compensation Act for an injury received in Virginia and caused by a third-party subcontractor, and, inter alia, North Carolina was the place of plaintiff's residence, the location of defendant's business, and the place of the initial hiring, North Carolina had significant interests in applying its own law based on the employment relationship and its connection with North Carolina. Braxton v. Anco Elec., Inc., 100 N.C. App. 635, 397 S.E.2d 640 (1990), aff'd, 330 N.C. 124, 409 S.E.2d 914 (1991).

Where all the parties were North Carolina citizens; the plaintiff's contract of employment and the contracts giving rise to the workers' compensation coverage were signed in North Carolina; and the plaintiff was receiving benefits under our workers' compensation statute, North Carolina's interests in implementing the protections afforded by its statute were paramount. An employee's temporary presence in Virginia so as to carry out his employment contract did not strip him of the rights he otherwise enjoyed under the North Carolina workers' compensation statute with regard to the breadth of North Carolina's exclusive remedy bar on common law actions in tort. Braxton

v. Anco Elec., Inc., 330 N.C. 124, 409 S.E.2d 914 (1991).

Virginia Law Compared. — North Carolina Workers' Compensation Act provides for a right of action on behalf of an injured employee against a third party even though the injured party applied for and received workers' compensation benefits. In contrast, Virginia law prohibits a similar right of action. Braxton v. Anco Elec., Inc., 100 N.C. App. 635, 397 S.E.2d 640 (1990), aff'd, 330 N.C. 124, 409 S.E.2d 914 (1991).

This section applies only to persons who are strangers to the employment and negligently cause an injury. Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

And Is Inapplicable to Negligent Employee. — This section, which provides for actions against "some person other than the employer," has been held inapplicable to the negligent employee. Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

The enactment of subsection (e) of this section evidences a strong public policy in North Carolina of prohibiting a negligent employer from recouping any workers' compensation benefits paid to an injured employee. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

Subsection (e) represents a codification of the holding in Brown v. Southern Ry., 204 N.C. 668, 169 S.E. 419 (1933). Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

Subsection (e) delineates the rights between parties who are jointly liable for a tort: the employer under workers' compensation law and the third party under traditional tort law. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

The provisions of subsection (e) govern in all actions by a plaintiff employee against a third party as a matter of North Carolina law, even where plaintiff has recovered workers' compensation under the workers' compensation laws of another state. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

The doctrine of governmental immunity is inapplicable where a defendant alleges a municipality's negligence under subsection (e). Jackson v. Howell's Motor Freight, Inc., 126 N.C. App. 476, 485 S.E.2d 895 (1997), review denied, 347 N.C. 267, 493 S.E.2d 456 (1997).

Employee of Subcontractor May Maintain Action Against Main Contractor. — An employee of a subcontractor is not precluded by the Workers' Compensation Act from maintaining an action at common law against the main contractor for injuries resulting from alleged negligence on the part of the main contractor, since the action is not against plaintiff's employer but against a third person. Cathey v. Southeastern Constr. Co., 218 N.C. 525, 11 S.E.2d 571 (1940); Tipton v. Barge, 243 F.2d 531 (4th Cir. 1957). See also Sayles v. Loftis, 217 N.C. 674, 9 S.E.2d 393 (1940). which held a principal contractor liable at common law as a third person for negligent injuries to employees of a subcontractor. And see § 97-19, which enlarges the compensation responsibility of a principal contractor to the employees of subcontractors.

No Conflict Between Subsection (f)(1)c and Former § 28-173. — There is no conflict in the language in G.S. 28-173 (see now G.S. 28A-18-2), which prohibits use of the wrongful death recovery to pay a debt of the decedent, and the language in subsection (f)(1)c of this section, which directs that a portion of the recovery be applied to the reimbursement of the employer for benefits paid under award of the Industrial Commission. Byers v. North Carolina State Hwy. Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968), aff'd, 275 N.C. 229, 166 S.E.2d 649 (1969).

Subsection (j) permitted superior court to adjust amount of a subrogation lien if the agreement between the parties was finalized so that only performance of the agreement was necessary to bind the parties; a trial court erred in holding that it lacked jurisdiction to reduce liens held by an employer and an insurer against a workers' compensation award. Childress v. Fluor Daniel, Inc., 172 N.C. App. 166, 615 S.E.2d 868, 2005 N.C. App. LEXIS 1577 (2005).

The Workers' Compensation Act does not create two causes of action, one for the employee's estate and the other for the employer and insurance carrier. The right to bring action for damages for wrongful death is conferred by former G.S. 28-173 (see now G.S. 28A-18-2). The act merely governs the respective rights of the employee's estate, the employer and the insurance carrier to maintain an action for damages against third parties. Groce v. Rapidair, Inc., 305 F. Supp. 1238 (W.D.N.C. 1969).

Verdict to Be for Full Amount of Damages. — This section clearly contemplates that the action against the third party is to be tried on its merits as an action in tort, and that any verdict of the jury adverse to the third party is to declare the full amount of damages suffered by the employee on account of his injury, notwithstanding any award of payment of compensation to him under the provisions of the Workers' Compensation Act. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Trial court did not err in limiting interest allowed plaintiff to the interest on the amount of the jury award as reduced pursuant to this section. Absher v. Vannoy-Lankford Plumbing Co., 78 N.C. App. 620, 337 S.E.2d 877 (1985), cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

Amount of Judgment. — Giving the statute its plain meaning requires the court to read the term "judgment" to mean just that, and to reject the argument that the court should look only at the insurance "proceeds" that a party is to receive, as opposed to the entire judgment, in determining the applicability of this section. Hieb v. Lowery, 121 N.C. App. 33, 464 S.E.2d 308 (1995), aff'd, 344 N.C. 403, 474 S.E.2d 323 (1996).

Appeal from Reduced Award. — Plaintiff was not a "party aggrieved" by judgment entered in superior court reducing her ultimate recovery to the difference between jury award and workers' compensation award pursuant to this section, so as to permit her appeal from such recovery. Absher v. Vannoy-Lankford Plumbing Co., 78 N.C. App. 620, 337 S.E.2d 877 (1985), cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

Evidence of out-of-state worker's compensation payments is admissible in actions against third parties. Frugard v. Pritchard, 338 N.C. 508, 450 S.E.2d 744 (1994).

Interaction with Tort Claims Act. — Where the plaintiff was permanently injured while working on a silage harvesting machine operated by the Department of Correction, and he filed a claim with the Industrial Commission under the Tort Claims Act, his claim was properly dismissed on the grounds that workers' compensation was plaintiff's exclusive remedy. Richardson v. State Dep't of Cor., 118 N.C. App. 704, 457 S.E.2d 325, 1995 N.C. App. LEXIS 377 (1995), cert. granted, 341 N.C. 652, 461 S.E.2d 772 (1995), aff'd, 345 N.C. 128, 478 S.E.2d 501 (1996).

Employers May Not Recover Benefits Paid. — The employer was not entitled to a lien on the settlement proceeds in order to recoup the payments which it made to the employee although it was free from culpability with respect to the accident in which employee was injured. In re Biddix, 138 N.C. App. 500, 530 S.E.2d 70, 2000 N.C. App. LEXIS 639 (2000), cert. denied, 352 N.C. 674, 545 S.E.2d 418 (2000).

Attorney's malpractice in failing to timely file a third-party tort action was not an injury under G.S. 97-2(6) for purposes of an employer's right of subrogation and the employer, therefore, had no subrogation rights under G.S. 97-10.2(h) with respect to the proceeds of the employee's legal malpractice claim. Grant Constr. Co. v. McRae, 146 N.C. App. 370, 553 S.E.2d 89, 2001 N.C. App. LEXIS 947 (2001).

The superior court's determination that the lien be reduced in its entirety was factually supported and a proper, constitutional exercise of its discretion. The court made findings with respect to the extent of the employee's injuries—her ongoing pain and suffering, her medical expenses as paid by the employer, her compensation for temporary disability, as well as the amount of the settlement and the fact that the third party tortfeasor had no additional assets from which she could recover—and concluded that the amount of the settlement inadequately compensated plaintiff for her injuries. In re Biddix, 138 N.C. App. 500, 530 S.E.2d 70, 2000 N.C. App. LEXIS 639 (2000), cert. denied, 352 N.C. 674, 545 S.E.2d 418 (2000).

Trial court had jurisdiction to determine amount of a workers' compensation lien and to distribute the third party recovery pursuant to this section, where the insurer was a "third party" in that plaintiff's injury was "caused under circumstances creating a liability in some person . . . to pay damages therefor," and where a settlement, albeit contested by the employer, existed between plaintiff and the third party, the insurer. Levasseur v. Lowery, 139 N.C. App. 235, 533 S.E.2d 511, 2000 N.C. App. LEXIS 888 (2000), cert. denied, in part, 352 N.C. 675, 545 S.E.2d 426 (2000), aff'd, 353 N.C. 358, 543 S.E.2d 476 (2001).

Employers Limited to Recovery of Benefits Paid. — The full provisions of this section reveal a statutory scheme whereby employers are limited to recovery of benefits they have paid to an employee. M.B. Haynes Corp. v. Strand Electro Controls, Inc., 127 N.C. App. 177, 487 S.E.2d 819 (1997).

Applied in Sheppard v. Zep Mfg. Co., 114 N.C. App. 25, 441 S.E.2d 161 (1994); Martinez v. Lovette, 121 N.C. App. 712, 468 S.E.2d 251 (1996); Tise v. Yates Constr. Co., 345 N.C. 456, 480 S.E.2d 677 (1997); Horton v. Powell Plumbing & Heating of N.C., Inc., 135 N.C. App. 211, 519 S.E.2d 550 (1999).

Cited in Ray v. French Broad Elec. Membership Corp., 252 N.C. 380, 113 S.E.2d 806 (1960); Young v. Baltimore & O.R.R., 266 N.C. 458, 146 S.E.2d 441 (1966); Bowen v. Iowa Nat'l Mut. Ins. Co., 270 N.C. 486, 155 S.E.2d 238 (1967); Thrift v. Trethewey, 272 N.C. 692, 158 S.E.2d 777 (1968); Warren v. Parks, 31 N.C. App. 609, 230 S.E.2d 684 (1976); Raines v. Thompson, 62 N.C. App. 752, 303 S.E.2d 413 (1983); Barrino v. Radiator Specialty Co., 315 N.C. 500, 340 S.E.2d 295 (1986); Higgins v. Simmons, 324 N.C. 100, 376 S.E.2d 449 (1989); Hieb v. Lowery, 344 N.C. 403, 474 S.E.2d 323 (1996); Tinch v. Video Indus. Servs., Inc., 347 N.C. 380, 493 S.E.2d 426 (1997); Whaley v. White Consol. Indus., Inc., 144 N.C. App. 88, 548 S.E.2d 177, 2001 N.C. App. LEXIS 333 (2001); Holden v. Boone, 153 N.C. App. 254, 569 S.E.2d 711, 2002

N.C. App. LEXIS 1119 (2002); Austin v. Midgett, 159 N.C. App. 416, 583 S.E.2d 405, 2003 N.C. App. LEXIS 1537 (2003).

II. RESPECTIVE LIABILITY OF THIRD PARTY, EMPLOYER AND CARRIER.

Section Governs Rights to Sue Third Persons. — This section governs the respective rights of the employee, the employer, and the employer's insurance carrier to maintain actions for damages against third parties; that is, persons other than the employer and those conducting his business. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Third Party Responsible for Total Pecuniary Loss. — The third party whose negligence caused the death may be held responsible for the total pecuniary loss to the estate. Byers v. North Carolina State Hwy. Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

Action against Third Party Does Not Abate upon Making of Award Under the Act. — Where an award is made under the act after an action at law has been begun by the employee's representative against the third party, such an action does not abate. Phifer v. Berry, 202 N.C. 388, 163 S.E. 119 (1932).

No Cause of Action to Recover Increased Insurance Costs. — An employer whose workers' compensation insurance premiums have risen as the result of an employee's injury by a third party may not maintain a cause of action against the third party to recover its increased insurance costs. M.B. Haynes Corp. v. Strand Electro Controls, Inc., 127 N.C. App. 177, 487 S.E.2d 819 (1997).

Subsection (j) of this section must be read in pari materia with the rest of this section, and the legislature intended that the procedure for settling a case, as described in other parts of this section, be followed when settling a matter pursuant to subsection (j). Pollard v. Smith, 324 N.C. 424, 378 S.E.2d 771 (1989).

As the employer is not a joint tortfeasor, and thus an acceptance of an award against said employer for compensation would not discharge a third person whose negligence had contributed to the injury or death of the employee. Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934).

Where deceased is killed as a result of the concurring negligence of his employer and a third party, the employer is not a joint tortfeasor who may be made a party defendant at the instance of the negligent third party. Brown v. Southern Ry., 202 N.C. 256, 162 S.E. 613 (1932); Essick v. City of Lexington, 232 N.C. 200, 60 S.E.2d 106 (1950).

Nor May Third Person Hold Employer for Contribution or Indemnity. — Third party, who was sued for damages for negligently inflicting a compensable injury upon an employee, could not hold the employer liable for contribution under the statute embodied in former G.S. 1-240 (see now G.S. 1B-1) or for indemnity under the doctrine of primary and secondary liability, even when the injury was the result of the joint or concurrent negligence of the employer and the third person. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953); Johnson v. United States, 133 F. Supp. 613 (E.D.N.C. 1955).

Since it relieves the employer of liability to his injured employee as a tortfeasor, the Workers' Compensation Act abrogates both the statutory right of a negligent third party to claim contribution from a negligent employer in equal fault, and the common-law right of a passively negligent third party to demand indemnity from an actively negligent employer. And this construction of the act is not invalidated by the mere circumstance that such construction may occasion hardship or injustice to a passively negligent third party. Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953).

Unless There Is Express Contract of Indemnity Between Third Person and Employer. — If there is an express contract of indemnity between third party and employer providing against loss to third party arising from the negligence of the employer, the third party if sued for damages by the employee may bring in the employer for contribution or indemnity. Johnson v. United States, 133 F. Supp. 613 (E.D.N.C. 1955).

The Workers' Compensation Act provides that a third party shall have no right (other than to assert the joint or concurring negligence of the employer) "by way of contribution or otherwise against the employer, except any right which may exist by reason of an express contract of indemnity between the employer and the third party, which was entered into prior to the injury to the employee." Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

This section recognizes the right of third parties to provide by contract with employers for indemnity against liability to employees for the consequences of their negligence and to enforce the contracts. Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

Rights and Liabilities of Third Person Not Affected. — The insurance carrier who has paid compensation to an injured employee for which the employer was liable under this Chapter may maintain an action against a third person upon allegations that the negligence of such third person caused the injury, but the rights and liabilities of such third person are in nowise affected by the Chapter.

Hinson v. Davis, 220 N.C. 380, 17 S.E.2d 348 (1941).

But This Act Does Reduce Tort Liability of Passively Negligent Third Person. — There is no substance in the proposition that the North Carolina Workers' Compensation Act confers no right whatever upon the passively negligent third party. It reduces his liability in tort for the injury to the employee by the amount of the workers' compensation received by the employee from the actively negligent employer or his insurance carrier. Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953).

As to the liability of insurance carrier of employer as third party, see Smith v. Liberty Mut. Ins. Co., 449 F. Supp. 928 (M.D.N.C. 1978), aff'd, 598 F.2d 616 (4th Cir. 1979).

Industrial Commission Has Exclusive Original Jurisdiction to Determine Right to Subrogation. — The Declaratory Judgment Act may not be used to determine whether or not the employer's insurance carrier is entitled to the right of subrogation against the funds received from the third-party tortfeasor, under the provisions of this section, since the Industrial Commission has the exclusive original jurisdiction to determine the question. Cox v. Pitt County Transp. Co., 259 N.C. 38, 129 S.E.2d 589 (1963).

This statutory provision does not provide for a direct action against the negligent employer nor does it allow for the recovery of direct damages from the employer. Jackson v. Howell's Motor Freight, Inc., 126 N.C. App. 476, 485 S.E.2d 895 (1997), review denied, 347 N.C. 267, 493 S.E.2d 456 (1997).

The doctrine of governmental immunity is inapplicable where a defendant alleges a municipality's negligence under subsection (e). Jackson v. Howell's Motor Freight, Inc., 126 N.C. App. 476, 485 S.E.2d 895 (1997), review denied, 347 N.C. 267, 493 S.E.2d 456 (1997).

Evidence of out-of-state worker's compensation payments is admissible in actions against third parties. Frugard v. Pritchard, 338 N.C. 508, 450 S.E.2d 744 (1994).

Effect of Contributory Negligence of Injured Employee. — The contributory negligence of the injured employee cannot be made the basis of an independent plea in bar of the right of the employer to recover over against the original and primary wrongdoer. Poindexter v. Johnson Motor Lines, 235 N.C. 286, 69 S.E.2d 495 (1952).

Any alleged negligence of such employee who has received, or whose estate has received, compensation from the employer under the act, must be pleaded, if at all, as a bar to the whole action, without reference to any rights of the employer to share in the recovery. Poindexter v. Johnson Motor Lines, 235 N.C. 286, 69 S.E.2d 495 (1952).

Contributory negligence of the injured employee constitutes a complete defense to an action against a third-person tortfeasor, and may be pleaded and proved by such third person irrespective of whether the action is instituted by the employer, the insurance carrier, or the employee. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Effect of Compromise and Settlement by Widow with Employer in Her Capacity as Administratrix. — The widow of a deceased employee, in her capacity as administratrix, executed a compromise and settlement with the employer on a common-law claim for wrongful death under the mistaken belief that the Workers' Compensation Act was not applicable. It was held that the compromise and settlement barred the widow in her capacity as a dependent from recovery under the act. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

But the compromise and settlement did not bar claim under the act of the deceased's child under 18 years of age without guardian, since the administratrix had no authority to act for the dependent child except in respect of claims or causes of action vested in the administratrix as such. However, the child's recovery under the act should be diminished to the extent of the benefits ultimately received by the child from the compromise and settlement. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

Allegations Failing to Show Contract by Employer and Carrier Not to Sue. — An action was instituted by the administrator of a deceased employee against a third-party tortfeasor. Compensation had been paid for the employee's death under the Workers' Compensation Act. Defendant alleged in its answer that in the collision causing the death of plaintiff's intestate, other persons were killed or injured, that the other actions growing out of the collision were compromised, and that in the settlement defendant made a substantial contribution upon the assurance of the attorneys for the employer and insurance carrier that they would recommend that this action not be instituted. It was held that the allegations failed to show a contract by the employer or the insurance carrier not to sue, or that the attorneys did not make the promised recommendation in good faith; and the allegations were properly stricken upon motion in the administrator's action. Penny v. Stone, 228 N.C. 295, 45 S.E.2d 362 (1947).

Employer is not relieved of liability by insurer's insolvency after recovery against third person. Roberts v. City Ice & Fuel Co., 210 N.C. 17, 185 S.E. 438 (1936).

Effect of Contributory Negligence of Employer. — When the employee or his estate has been satisfied, and the employer seeks to recover the amount paid by him from a third party, such third party may raise as a defense that the employer's negligence caused the employee's death. Leonard v. Johns-Manville Sales Corp., 309 N.C. 91, 305 S.E.2d 528 (1983).

If the defense of contributory negligence of the employer was not recognized, an employer could by his own negligence participate in the killing or injuring of the worker, pay for it, and then wash his hands of his own wrong, merely because he brought a suit against a third party who also contributed to the injury or death. Leonard v. Johns-Manville Sales Corp., 309 N.C. 91, 305 S.E.2d 528 (1983).

Employer's Negligence as Defense in Claim Against Subcontractor. — In a case brought by an employee's estate against a subcontractor seeking to recover for a work-related accident, the subcontractor was allowed under G.S. 97-10.2 to raise the employer's negligence as a defense despite the fact that, in the settlement of the workers' compensation claim, the employer had waived its right to subrogation. Estate of Harvey v. Kore-Kut, Inc., — N.C. App. —, 636 S.E.2d 210, 2006 N.C. App. LEXIS 2241 (2006).

The liability of an automobile insurer, who was also the workers' compensation carrier, for underinsured motorist benefits had to be reduced by the amount of workers' compensation benefits after reduction of the amount received from the tort-feasor's liability insurer. Manning v. Fletcher, 102 N.C. App. 392, 402 S.E.2d 648 (1991), aff'd, 331 N.C. 114, 413 S.E.2d 798 (1992).

The mandatory nature of workers' compensation insurance carrier's lien on a recovery from the third-party tort-feasor is not altered by the discretionary authority of the trial judge to apportion the recovery between the employee and the insurance carrier, if that recovery is inadequate to satisfy the insurance carrier's lien. Manning v. Fletcher, 102 N.C. App. 392, 402 S.E.2d 648 (1991), aff'd, 331 N.C. 114, 413 S.E.2d 798 (1992).

The workers' compensation carrier for plaintiffs had a subrogation lien on the uninsured motorist policy proceeds paid to plaintiff employee who was injured in an automobile accident occurring while within the scope of employment. Bailey v. Nationwide Mut. Ins. Co., 112 N.C. App. 47, 434 S.E.2d 625 (1993), overruled on other grounds, McMillian v. North Carolina Farm Bureau Mut. Ins. Co., 347 N.C. 560, 495 S.E.2d 352 (1998).

III. PARTIES AND PROCEDURE.

This section provides a negligent defendant with recourse against an also negligent employer by allowing defendant to: (1) allege that the employer's negligence concurred in producing plaintiff's injury and, (2) seek a reduction in damages as provided in the statute. Jackson v. Howell's Motor Freight, Inc., 126 N.C. App. 476, 485 S.E.2d 895 (1997), review denied, 347 N.C. 267, 493 S.E.2d 456 (1997).

Action Prosecuted in Behalf of Any Person Entitled to Share in Recovery. — A necessary implication of the statutory requirement respecting the disbursement of the recovery is that the action against the third party is prosecuted in behalf of any person entitled to claim a share in the recovery, regardless of whether he is a party to the action. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Ownership of Policy Irrelevant. — Under this section the distinction between an underinsured motorist policy purchased by the employee and one covering the employee but purchased by his spouse while a resident of the same household is unimportant. Creed v. R.G. Swaim & Son, 123 N.C. App. 124, 472 S.E.2d 213 (1996).

Jurisdiction Over Subrogation Claim. — In a workers' compensation appeal, the North Carolina Industrial Commission did not err in denying a motion by a successor employer and a successor insurer to withdraw or to stay the effect of an award to the employee because a final award had not yet been entered in the matter due to the appeal, and thus, the Commission did not have jurisdiction over a subrogation claim pursuant to G.S. 97-10.2(f)(1). Childress v. Fluor Daniel, Inc., 162 N.C. App. 524, 590 S.E.2d 893, 2004 N.C. App. LEXIS 185 (2004).

Joinder of Employer or Carrier in Action Against Third Person. — Whether the employer or insurance carrier who has paid compensation may proceed in the action which has been instituted against a third person by an injured employee or his personal representative, or must institute a new and independent action, is a question of procedure, and under the law of this State it is proper to proceed in the action which has been instituted. Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934).

Employer's Third Party Negligence Claim Time-Barred. — In the employer and employee's third party negligence claim against the general contractor and subcontractor, where the requirements of G.S. 97-10.2(c) were not met, as the employee and employer did not settle with the general contractor or subcontractor within 12 months of the employee's injuries, and the employer did not file a written admission of liability with the industrial commission, under G.S. 97-10.2(b), the employee had the sole right to proceed after the employer did not file suit within 12 months of the injuries. Blair Concrete Servs., Inc. v. Van-Allen Steel Co., 152 N.C. App. 215, 566 S.E.2d 766, 2002 N.C. App. LEXIS 869 (2002).

As to appealability of order joining em-

ployer and insurance carrier, see Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Defendant Not Entitled to Joinder of Employer and Insurance Carrier. — In an action instituted by the employee against the third person tortfeasor, defendant was not entitled to the joinder of the employer and the insurance carrier. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Employer Cannot Be Made Party Defendant. — The remedy under the act is exclusive, and an employer is relieved of all further liability for injury to or death of an employee, and where the administrator of a deceased employee brings an action against third persons for the employee's wrongful death, the motion of the defendants that the deceased's employer be made a party as a joint tortfeasor with them should be denied. Brown v. Southern Ry., 202 N.C. 256, 162 S.E. 613 (1932).

Court May Not Join Unnecessary Additional Parties. — Where the plaintiff is the party authorized by this section to maintain the action against the tortfeasor, he is entitled to prosecute same to final judgment, and the court may not interfere with this privilege by the joinder of wholly unnecessary additional parties. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Employee is to have the exclusive privilege to prosecute his action to a final conclusion without the presence of either the employer or the insurance carrier unless extraordinary circumstances require their joinder. Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

An action by an employee against a third party shall not be encumbered by including as parties, plaintiff or defendant, the employer or insurance carrier, nor by bringing in irrelevant causes of action. Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

Employer's Right of Subrogation Not Forfeited by Failure to Participate in Trial and Appeal of Wrongful Death Action. — Employer, by its failure to participate in the trial and appeal of a wrongful death action brought by the administratrix of the estate of the deceased employee, did not forfeit its subrogation right to be reimbursed out of the recovery from the third party whose negligence caused the death, since, the suit having been brought within one year from the employee's death, his personal representative had exclusive control of the proceedings against the negligent third party. Byers v. North Carolina State Hwy. Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

As to employee filing counterclaim in action by third person, see Rowe v. Rowe-Coward Co., 208 N.C. 484, 181 S.E. 254 (1935).

Action by Insurance Carrier Instituted After Action by Employee. — Where it appeared that an injured employee's action against third-person tortfeasor was instituted prior to the institution of an action by the compensation insurance carrier against the tortfeasor, defendant's plea in abatement in the employee's action on the ground of the pendency of a prior action could not be sustained. Thompson v. Virginia & C.S.R.R., 216 N.C. 554, 6 S.E.2d 38 (1939), commented on in 18 N.C.L. Rev. 375 (1940).

Recovery by Employee's Administrator Bars Action by Employer or Carrier. — Where the employee's administrator has recovered and collected a judgment at law against third persons for the employee's death, the employer and carrier cannot, in their own name, sue the defendants under the subrogation provisions of this section. Suits for wrongful death must be brought in the name of the personal representative, and the employee's administrator having collected, there remains no cause to which the employer or carrier can be subrogated. Whitehead & Anderson, Inc. v. Branch, 220 N.C. 507, 17 S.E.2d 637 (1941).

Action Not Governed by Code of Civil Procedure. — An action in behalf of an injured employee against a third-person tortfeasor is governed by this section and not by the Code of Civil Procedure. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Insofar as the provisions of this section are in conflict with or supersede any of the rules of civil procedure, an action against a third party by an employee or employer to recover for injury to employee caused by the alleged negligence of the third party is governed by the provisions of the act and not by the Code of Civil Procedure. Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

As to action for wrongful death against third person, see Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934); Mack v. Marshall Field & Co., 217 N.C. 55, 6 S.E.2d 889 (1940); Sayles v. Loftis, 217 N.C. 674, 9 S.E.2d 393 (1940); Taylor v. Hunt, 245 N.C. 212, 95 S.E.2d 589 (1956).

For cases holding that evidence of compensation payments was inadmissible in action by employee against third party, decided prior to the 1983 amendment to this section, see Penny v. Stone, 228 N.C. 295, 45 S.E.2d 362 (1947); Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953); Redding v. Braddy, 258 N.C. 154, 128 S.E.2d 147 (1962); Spivey v. Babcock & Wilcox Co., 264 N.C. 387, 141 S.E.2d 808 (1965); Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Right of Employer and Carrier to Trial by Jury — Preserved by Subsection (e). — Subsection (e) of this section preserves the employer/carrier's right to trial by jury, providing that it has been demanded by a party in the pleadings and not waived by all the parties.

Williams v. International Paper Co., 89 N.C. App. 256, 365 S.E.2d 724 (1988), modified on other grounds, 324 N.C. 567, 380 S.E.2d 510 (1989).

Same — Effect of Settlement of Claim Against Third Parties. — In enacting subsection (j) of this section, the legislature did not contemplate and intend to deprive the employer/carrier of its right to trial by jury by virtue of the settlement of the plaintiff's claim against third party defendants. Williams v. International Paper Co., 89 N.C. App. 256, 365 S.E.2d 724 (1988), modified on other grounds, 324 N.C. 567, 380 S.E.2d 510 (1989).

Under G.S. 1A-1, Rule 38(d), absent a showing that employer/carrier consented to elimination of requested jury trial on the issue of employer negligence, it could not be deemed waived. Although the two original parties to the action had reached a settlement, there still remained the issue of employer negligence to be determined. Williams v. International Paper Co., 89 N.C. App. 256, 365 S.E.2d 724 (1988), modified on other grounds, 324 N.C. 567, 380 S.E.2d 510 (1989).

Subsection (j) must be read in pari materia with the rest of this section; other parts of the section provide a procedure for settling a case and the legislature did not intend this procedure to be ignored when settling a case pursuant to subsection (j). Pollard v. Smith, 324 N.C. 424, 378 S.E.2d 771 (1989).

Settlement reached by employee and third parties without the written consent of employer was void since employer did not give its written consent to the settlement between employee and the third parties; subsection (j) of this section does not supersede subsection (h) of this section and subsection (j) should be read in pari materia with the other provisions of the statute. Williams ex rel. Heidgerd v. International Paper Co., 324 N.C. 567, 380 S.E.2d 510 (1989).

A trial court's reduction of a workers' compensation subrogation lien was erroneous because the trial court based its jurisdiction upon a contingent settlement agreement containing an unfulfilled condition precedent; G.S. 97-10.2(j) only permits a superior court to adjust the amount of a subrogation lien if the agreement between the parties has been finalized so that only performance of the agreement is necessary to bind the parties. Ales v. T. A. Loving Co., 163 N.C. App. 350, 593 S.E.2d 453, 2004 N.C. App. LEXIS 369 (2004).

Trial court erred in concluding that employer did not have a lien on UIM benefits recovered by plaintiff from insurer; plaintiff's private settlement with the insurer, which allowed the insurance carrier to reduce the arbitration award by the amount of the employer's workers' compensation lien, did not extinguish his employer's workers' compensation lien, and the trial court was obligated to make findings and conclusions in support of its reasoned disbursement choice to provide meaningful review on appeal. Levasseur v. Lowery, 139 N.C. App. 235, 533 S.E.2d 511, 2000 N.C. App. LEXIS 888 (2000), cert. denied, in part, 352 N.C. 675, 545 S.E.2d 426 (2000), aff'd, 353 N.C. 358, 543 S.E.2d 476 (2001).

The workers' compensation benefits received by plaintiff under Virginia's Workers' Compensation Act should have been allowed into evidence pursuant to subsection (e) in plaintiff's third party personal injury action. Frugard v. Pritchard, 112 N.C. App. 84, 434 S.E.2d 620 (1993), rev'd on other grounds, 338 N.C. 508, 450 S.E.2d 744 (1994), cert. granted, 335 N.C. 554, 441 S.E.2d 113 (1994).

Employer Entitled to Jury Trial. — In a tort action brought by an injured employee against third parties who alleged that the employer was jointly and concurrently liable for the employee's injuries, the employer was entitled to a jury trial on the issue of employer negligence under subsection (e) of this section; there had been no showing that the employer consented to a waiver or withdrawal of the initial demand by third parties and employee for a jury trial since the settlement between the employee and third parties, to which the employer was not a party, neither extinguished the employer's right to trial by jury nor did it settle the issue of the employer's negligence. Williams ex rel. Heidgerd v. International Paper Co., 324 N.C. 567, 380 S.E.2d 510 (1989).

Defendants Waived Entitlement to Lien. — Where by the explicit terms of an agreement between plaintiff and third party tortfeasor — to the making of which defendants stipulated their consent — lifetime monthly payments from third party to plaintiff were plainly proceeds of the structured settlement reached in that third party action, and federal district court, after reviewing the settlement agreement and hearing extensive argument from all parties, including counsel for defendants' employer and insurer, found that defendants had agreed to waive any lien which they had as to the proceeds from this settlement and recovery, the facts fully supported the commission's determination that defendants, by virtue of their waiver, were not entitled to a lien in the lifetime monthly payments due plaintiff from the third party action. Turner v. CECO Corp., 98 N.C. App. 366, 390 S.E.2d 685 (1990).

Retroactive Application. — The trial court's application of the amended version of this section deprived employer and insurer of vested rights under lien and, thus, was unconstitutionally retroactive. Fogleman v. D & J Equip. Rental, Inc., 111 N.C. App. 228, 431 S.E.2d 849, cert. denied, 335 N.C. 172, 436 S.E.2d 374 (1993).

Trial court's order eliminating an insur-

ance carrier's workers' compensation lien in the proceeds from the decedent's wife's negligence action against a railway company was vacated where the wife and railway company had settled the negligence claim contingent on the elimination of the lien and, as a result, the settlement was not final under the appellate court's prior judicial precedent. Wilkerson v. Norfolk S. Ry., 167 N.C. App. 607, 606 S.E.2d 187, 2004 N.C. App. LEXIS 2321 (2004).

IV. DISBURSEMENT OF PROCEEDS.

Constitutionality of Subdivision (f)(2). — The provision in subdivision (f)(2) of this section, which directs that the attorney fee incurred by the party who effects recovery against a third- party tortfeasor be apportioned between and paid by the employee and employer in proportion to the amount which each receives from the recovery, is constitutional. It does not unjustifiably impair the freedom of the employer and its carrier to negotiate a contract on their own for representation by attorneys of their choice in the prosecution and settlement of their subrogation rights against a third-party tortfeasor. Hogan v. Johnson Motor Lines, 38 N.C. App. 288, 248 S.E.2d 61 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

Legislative Intent. — It is clear from the provisions of subsection (j) that it was and is the intent of the legislature that non-negligent employers are to be reimbursed for those amounts they pay to employees who are injured by the negligence of third parties, and that employees are not intended to receive double recoveries. Johnson v. Southern Indus. Constructors, Inc., 347 N.C. 530, 495 S.E.2d 356 (1998).

Evidence of Liability Insurance. — In suit regarding automobile accident, evidence of defendant's liability insurance coverage should not have been introduced just because evidence of plaintiff's recovery in workers' compensation was introduced pursuant to subsection (e). Anderson v. Hollifield, 123 N.C. App. 426, 473 S.E.2d 399 (1996), rev'd on other grounds, 345 N.C. 480, 480 S.E.2d 661 (1997).

Coverage by Same Entity Not Required. — In order to have amounts payable under underinsured motorist coverage reduced by amounts paid under workers' compensation coverage, G.S. 20-279.21(e) does not require that the same entity provide both coverages. Brantley v. Starling, 336 N.C. 567, 444 S.E.2d 170 (1994).

Jurisdiction over Distribution with Court or Commission. — Under this section, the distribution of proceeds received from a tortfeasor between an injured employee and an employer entitled to reimbursement can be decided in some instances by either the Industrial Commission or the trial court. Buckner v. City of Asheville, 113 N.C. App. 354, 438 S.E.2d 467, cert. denied, 336 N.C. 602, 447 S.E.2d 385 (1994).

The Industrial Commission, not the superior court, had exclusive jurisdiction over distribution of the proceeds recovered from third party tortfeasor where third party judgment exceeded the subrogation claim of the worker's compensation insurance carrier even if the actual proceeds of the judgment were insufficient to compensate the subrogation claim. Hieb v. Howell's Child Care Ctr., Inc., 123 N.C. App. 61, 472 S.E.2d 208 (1996).

Although the Industrial Commission, not the superior court, had exclusive jurisdiction to disburse third party proceeds, the Commission did not have the authority to stay a superior court order, even if the order was in error. Hieb v. Howell's Child Care Ctr., Inc., 123 N.C. App. 61, 472 S.E.2d 208 (1996).

Where there had been no settlement, nor had a judgment been obtained, which was insufficient to compensate the subrogation claim of workers' compensation insurance carrier, the trial court lacked authority to direct disbursement of judgment proceeds under this section and the case would be remanded to the Industrial Commission. Hieb v. Lowery, 134 N.C. App. 1, 516 S.E.2d 621 (1999).

Subdivision (f)(1)(c) Construed in Pari Materia with § 97-25. — Subdivision (f)(1)(c) and § 97-25 relate to the same subject matter and must be construed in pari materia. Roberts v. ABR Assocs., 101 N.C. App. 135, 398 S.E.2d 917 (1990).

The distribution of any recovery is a matter for the Industrial Commission under subsection (f) of this section. Spivey v. Babcock & Wilcox Co., 264 N.C. 387, 141 S.E.2d 808 (1965); Byers v. North Carolina State Hwy. Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

Limitation on Commission; Authority. — The authority of the Industrial Commission to distribute the proceeds of the employer-employee settlement with the tortfeasor is governed by subsection (f) which does not have the authority to make a distribution pursuant to subsection (j). Buckner v. City of Asheville, 113 N.C. App. 354, 438 S.E.2d 467, cert. denied, 336 N.C. 602, 447 S.E.2d 385 (1994).

Findings of Fact Required to Be Made by Commission. — The commission must make findings of fact regarding the benefits provided for the treatment of an injured employee for which an employer is entitled to reimbursement. Buckner v. City of Asheville, 113 N.C. App. 354, 438 S.E.2d 467, cert. denied, 336 N.C. 602, 447 S.E.2d 385 (1994).

Subsection (f) provides adequate protection against double recovery by the injured employee on account of aggravation of his original injury through the physician's negligence. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Reimbursement Under Subdivision (f)(1)(c). — The party claiming a right to reimbursement under subsection (f)(1)(c), i.e., the employer or its insurance carrier, must show, pursuant to G.S. 97-25, (1) that the treatment provided was in the form of medical treatment, surgical treatment, hospital treatment, nursing services, medicines, sick travel, rehabilitation services, or other treatment including medical and surgical supplies, and (2) that the treatment provided was reasonably required for at least one of three purposes, namely, to effect a cure, give relief, or lessen the period of the plaintiff's disability. Roberts v. ABR Assocs., 101 N.C. App. 135, 398 S.E.2d 917 (1990).

Proceeds of any settlement or judgment must be disbursed according to the provisions of the act. Cox v. Pitt County Transp. Co., 259 N.C. 38, 129 S.E.2d 589 (1963); Byers v. North Carolina State Hwy. Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968), aff'd, 275 N.C. 229, 166 S.E.2d 649 (1969).

Since the passage of the Workers' Compensation Act, the Supreme Court has held that recovery from a responsible third party must be distributed by the Industrial Commission according to the order of priority set out in the act. Byers v. North Carolina State Hwy. Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

Recovery by Employer of His Underinsured Motorist Benefits. — The employer's underinsured motorist benefits received in an action against the tortfeasor are subject to a subrogation claim by an employer who has paid workers' compensation benefits to its employee. Buckner v. City of Asheville, 113 N.C. App. 354, 438 S.E.2d 467, cert. denied, 336 N.C. 602, 447 S.E.2d 385 (1994).

Recovery by Personal Representative. — The net recovery from the responsible third party (except that which must be returned to the subrogee for its outlay) goes to the personal representative under subsection (f)(1)d. Byers v. North Carolina State Hwy. Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

For case where petitioners, who were not the administrators, lacked standing to appeal Industrial Commission's order of distribution, see Montgomery v. Bryant Supply Co., 91 N.C. App. 734, 373 S.E.2d 299 (1988), cert. denied, 324 N.C. 248, 377 S.E.2d 755 (1989).

Employer's Lien Against Settlement. — Subsection (j) permits a party to have a superior court judge determine the subrogation amount that an employer is entitled to in the event that a settlement has been agreed upon by the employee and the third party and the judge shall determine the amount, if any, of the employer's lien. United States Fid. & Guar. Co. v. Johnson, 128 N.C. App. 520, 495 S.E.2d 388 (1998).

Trial court did not abuse its discretion in extinguishing county's subrogation lien against deputy sheriff regarding a settlement that he received following an injury in the course of his employment because the county government was subject to the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., regarding payment and compensation under the Act, and there was specific statutory authority authorizing the deputy sheriff to seek a determination under G.S. 97-10.2(j) of the county's authority to file a lien against his settlement proceeds. Helsius v. Robertson, 174 N.C. App. 507, 621 S.E.2d 263, 2005 N.C. App. LEXIS 2469 (2005), appeal dismissed, review denied, 360 N.C. 363, 629 S.E.2d 851, recons. denied, 360 N.C. 533, 633 S.E.2d 815 (2006).

Amounts Paid as Compensation Constitute a Lien on Wrongful Death Action Recovery. — Under the provisions of this section, the amounts paid by an employer and the employer's insurance carrier as compensation or other benefits to a decedent under the Workers' Compensation Act for disability, disfigurement, or death caused under circumstances creating a liability in some person other than the employer to pay damages therefor constitute a lien on the amount recovered in a wrongful death action; and this is a lawful claim against the estate. Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234, cert. denied, 279 N.C. 395, 183 S.E.2d 246 (1971).

In order to adjust the amount of a lien upon a recovery against a third party agreed to in a workers' compensation claim settlement approved by the Industrial Commission, the parties must apply to the commission under G.S. 97-17; a party may not use G.S. 97-10.2(j) to avoid a duly executed and commission-approved settlement agreement, and a trial court has no jurisdiction to adjust a lien amount agreed upon in such an agreement. Holden v. Boone, 153 N.C. App. 254, 569 S.E.2d 711, 2002 N.C. App. LEXIS 1119 (2002).

General language of G.S. 97-10.2(j) is clear and unambiguous, granting a trial judge authority to use its discretion in adjusting a workers' compensation lien amount, even if the result is a double recovery for the plaintiff. Holden v. Boone, 153 N.C. App. 254, 569 S.E.2d 711, 2002 N.C. App. LEXIS 1119 (2002).

Lien on Underinsured Motorist Benefits. — Industrial Commission properly concluded that workers' compensation carrier had a lien on the proceeds of plaintiff's underinsured motorist benefits. Creed v. R.G. Swaim & Son, 123 N.C. App. 124, 472 S.E.2d 213 (1996).

Amounts Obtained "by Settlement with, Judgment," etc. — Cash payment and value of remainder interest in real estate conveyed to widow for the death of her husband-employee by shooting constitute amounts obtained by her "by settlement with, judgment against, or otherwise" from the third party tortfeasor by reason of her husband's death so as to subject such amounts to the disbursement authority of the Industrial Commission under subsection (f). Nivens v. Firestone Tire & Rubber Co., 24 N.C. App. 473, 211 S.E.2d 505, cert. denied, 286 N.C. 723, 213 S.E.2d 722 (1975).

Authority to Order Employer to Pay Attorney's Fees. — This section does not confer any authority upon the district court to order an employer to pay attorney's fees. This action is within the exclusive province of the Industrial Commission. Westmoreland v. Safe Bus, Inc., 20 N.C. App. 632, 202 S.E.2d 605 (1974).

Illegal Agreement Between Employee's Dependents and Employer for Distribution of Recovery. — In an action by the administrator of a deceased employee against the third-party tortfeasor, allegations in defendant's answer of an illegal agreement between the dependents and the employer for the distribution of the fund are properly stricken on motion, since the administrator is an official of the court under duty to make disbursement of any recovery in conformity with statute, and could not be bound by the terms of the agreement alleged. Penny v. Stone, 228 N.C. 295, 45 S.E.2d 362 (1947).

Attorney's Fees Improperly Disbursed. — Trial court properly ruled that any determination with respect to the payment of counsel fees in a workers' compensation lien case must be made by the Industrial Commission and that court's disbursement of attorney's fees had therefore not been proper. Hieb v. Lowery, 134 N.C. App. 1, 516 S.E.2d 621 (1999).

Employer's insurance company can be subrogated for the amount of workers' compensation paid by it to the employee Manning v. Fletcher, 91 N.C. App. 393, 371 S.E.2d 770 (1988), rev'd on other grounds, 324 N.C. 513, 379 S.E.2d 854 (1989).

Amount and Distribution of Recovery in Action by Insurance Carrier. — When an action is maintained by the insurance carrier against the third-person tortfeasor causing the injury, the tortfeasor is liable for the amount ascertained by the jury as sufficient to compensate the employee for the injuries sustained, which the statute prescribes shall be first applied to the actual court costs, then to the payment of attorneys' fees, then to the reimbursement of the insurance carrier for money paid by it under the award, and any amount remaining to the injured employee, and an instruction on the issue of damages that defendant would be liable for such sum as would reimburse the insurance carrier and would fairly compensate the injured employee is error. Rogers v. Southeastern Constr. Co., 214 N.C. 269, 199 S.E. 41 (1938).

This statute clearly provides for a different standard for disbursement when the case is before the superior court than that for cases before the Industrial Commission. When the General Assembly added subsection (j), it made no reference to subsection (f). Pollard v. Smith, 90 N.C. App. 585, 369 S.E.2d 84 (1988), rev'd on other grounds, 324 N.C. 424, 378 S.E.2d 771 (1989).

Trial Court to Enter Judgment Safeguarding Rights of Persons Entitled to Share in Recovery. — In the event of a verdict for the plaintiff in the action against third party, the trial court, sitting without a jury, is to determine the amount of compensation paid or payable to the injured employee under the act on the basis either of a stipulation of the interested persons or of evidence submitted to it, and after so doing is to enter a judgment safeguarding the rights of any person entitled to share in the recovery, regardless of whether or not such person is a party to the action. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Authority of Court to Reduce Lien Amount Where Settlement Approved by Industrial Commission. — G.S. 97-10.2(j) did not give a trial court the authority to reduce the amount of an employer's and insurer's lien against an employee's recovery against a third party where the employee had agreed to the amount of that lien in a settlement approved by the Industrial Commission. Holden v. Boone, 153 N.C. App. 254, 569 S.E.2d 711, 2002 N.C. App. LEXIS 1119 (2002).

Distribution of Wrongful Death Settlement Following Disapproval of Compensation Agreement. — Where the Industrial Commission disapproved an agreement for compensation for death only because the employee's widow was a minor and the death benefits had been miscalculated, but the employer's admission of liability was not disapproved, the Commission had jurisdiction to issue an order for the distribution of a wrongful death settlement made before the Commission finally approved the compensation agreement. Williams v. Insurance Repair Specialists of N.C., Inc., 32 N.C. App. 235, 232 S.E.2d 5, cert. denied, 292 N.C. 735, 235 S.E.2d 789 (1977).

Distribution of Wrongful Death Settlement Despite Liability Carrier's Possible Loss. — Where an employee's death arose out of and in the course of his employment, the employer filed with the Industrial Commission a written admission of liability, the compensation insurance carrier notified the third-party tortfeasor's liability insurance carrier that a compensation settlement was in process and that it would expect its lien upon any settlement of a wrongful death claim by the liability carrier, the liability carrier settled the wrongful death claim for $55,000.00 and paid that amount to the deceased employee's administrator, and the Industrial Commission later approved a workers' compensation settlement awarding $28,500.00 to the widow, the Industrial Commission thereafter had authority under this section to issue an order of distribution of the $55,000.00 wrongful death settlement, including a requirement that the liability carrier pay $28,500.00 to the compensation carrier in settlement of its subrogation interest, notwithstanding that the widow may have spent her entire distributive share of the wrongful death settlement and all of the workers' compensation benefits paid to her and the liability carrier might be unable to recoup any of the amount previously paid from the widow or the decedent's administrator. Williams v. Insurance Repair Specialists of N.C., Inc., 32 N.C. App. 235, 232 S.E.2d 5, cert. denied, 292 N.C. 735, 235 S.E.2d 789 (1977).

Distribution of Sum Collected by Plaintiff from Third Party. — Where defendant employer had not previously made any payments to plaintiff, the Commission should have directed it to pay plaintiff the compensation he was entitled to under G.S. 97-61.5. Then, following the distribution scheme set out in subdivision (f)(1), the sum collected by plaintiff from the third-party recovery should have been used first to pay court costs; secondly, to pay plaintiff's attorneys' fee; thirdly, to reimburse defendant for the compensation it paid to plaintiff, less defendant's proportionate share of plaintiff's attorneys' fees incurred in achieving the third-party recovery; and finally, the remainder of the third-party recovery should have been disbursed to the employee. Davis v. Weyerhaeuser Co., 96 N.C. App. 584, 386 S.E.2d 740 (1989).

Payment of Prejudgment Interest to Employee Not Double Recovery. — An award to the employee of the entire amount of prejudgment interest on his jury verdict against a third party, less the amount paid to the employer and insurer to satisfy their subrogation lien, did not constitute a double recovery. Bartell v. Sawyer, 132 N.C. App. 484, 512 S.E.2d 93 (1999).

Calculation of Prejudgment Interest. — Prejudgment interest on a workers' compensation claimant's recovery in a third-party action is to be calculated based on the amount of money claimant is entitled to receive once an employer's subrogation lien for workers' compensation benefits has been satisfied. Bartell v. Sawyer, 132 N.C. App. 484, 512 S.E.2d 93 (1999).

Employer and Insurer Not Entitled to Share of Prejudgment Interest. — The employer and insurer were entitled to recover out of the proceeds of the employee's third party action the amount of all benefits paid to the employee, but not to any of the prejudgment interest awarded. Bartell v. Sawyer, 132 N.C. App. 484, 512 S.E.2d 93 (1999).

Reimbursement. — This section mandates that the payor of benefits be reimbursed with duplicative amounts received by plaintiff employee from a civil suit. Radzisz v. Harley Davidson of Metrolina, Inc., 123 N.C. App. 602, 473 S.E.2d 655 (1996), aff'd, 346 N.C. 84, 484 S.E.2d 566 (1997).

Reimbursement of Employer and Insurer from Recovery in Action by Employee's Personal Representative. — Where the suit was instituted by the personal representative of the deceased, and the employer and its insurance carrier have taken no action except to file an affidavit of interest, this in itself would not have prevented them from being reimbursed from the recovery. Essick v. City of Lexington, 233 N.C. 600, 65 S.E.2d 220 (1951).

Amount and Reasonableness of Attorneys' Fees. — Under paragraph (f)(1)b of this section, the attorneys' fee taken from the employee's share may not exceed one-third of the amount recovered, but it is not otherwise subject to the reasonableness requirement of G.S. 97-90(c); the attorneys' fee on the subrogation interest of the employer (or its carrier) is subject to the reasonableness requirement of G.S. 97-90(c) and may not exceed one-third of the amount recovered from the third party. Hardy v. Brantley Constr. Co., 87 N.C. App. 562, 361 S.E.2d 748 (1987), rev'd on other grounds, 322 N.C. 106, 366 S.E.2d 485 (1988).

Subrogation or Lien Interest. — The Industrial Commission erred in concluding that defendant employer and insurance company were not entitled to a subrogation interest or lien interest against the proceeds received by plaintiff employee in settlement of a civil action. Radzisz v. Harley Davidson of Metrolina, Inc., 123 N.C. App. 602, 473 S.E.2d 655 (1996), aff'd, 346 N.C. 84, 484 S.E.2d 566 (1997).

Subrogation of Carrier to Employer's Right to Payment upon Employee Reimbursement. — This section provides for the subrogation of the workers' compensation insurance carrier to the employer's right, upon reimbursement of the employee, to any payment, including uninsured/underinsured motorist insurance proceeds, made to the employee by or on behalf of a third party as a result of the employee's injury. Ohio Cas. Group v. Owens, 99 N.C. App. 131, 392 S.E.2d 647 (1990), review denied, 327 N.C. 483, 396 S.E.2d 614 (1990), overruled by McMillian v. North Carolina Farm Bureau Mut. Ins. Co., 347 N.C. 560, 495 S.E.2d 352 (1998).

Subsection (j) is independent from the other subsections in this section, and the Superior Court has discretionary authority to determine the lien amount. Wiggins v. Bushranger Fence Co., 126 N.C. App. 74, 483 S.E.2d 450 (1997), cert. denied, 346 N.C. 556, 488 S.E.2d 825 (1997).

No Condition Precedent for Subrogation Rights. — The provisions of this statute cannot logically be construed as requiring establishment of a condition precedent in the nature of a written admission or a final award before a payor of workers' compensation benefits obtains subrogation rights. Radzisz v. Harley Davidson of Metrolina, Inc., 123 N.C. App. 602, 473 S.E.2d 655 (1996), aff'd, 346 N.C. 84, 484 S.E.2d 566 (1997).

Trial Court Did Not Have to Follow Distribution Priority in Subsection (f). — In distributing settlement under subsection (j) of this section, trial court did not have to follow the distribution priority set forth in subsection (f) of this section. Allen v. Rupard, 100 N.C. App. 490, 397 S.E.2d 330 (1990), appeal withdrawn, 328 N.C. 328, 404 S.E.2d 864 (1992).

Trial Court Must Make Findings of Fact and Conclusions of Law. — The trial court, in considering request for disbursement under subsection (j) of this section, must enter order with findings of fact and conclusions of law sufficient to provide for meaningful appellate review. Allen v. Rupard, 100 N.C. App. 490, 397 S.E.2d 330 (1990), appeal withdrawn, 328 N.C. 328, 404 S.E.2d 864 (1992).

Equal Division of Proceeds Proper Exercise of Trial Court's Discretion. — Trial court did not abuse its discretion in determining that it was fair, equitable and just for injured party and insurance carrier to share equally settlement proceeds which fell far short of being sufficient to reimburse injured party for his pain, suffering and other losses; or to reimburse insurance carrier for its payment of injured party's extensive medical bills. Allen v. Rupard, 100 N.C. App. 490, 397 S.E.2d 330 (1990), appeal withdrawn, 328 N.C. 328, 404 S.E.2d 864 (1992).

Commission Approval Not Necessary for Rehabilitation Services Charges. — Insurance carrier did not need the Commission's approval for charges connected with rehabilitation services in order to obtain reimbursement for those expenses under this section because G.S. 97-90(a) does not require approval of the Commission for rehabilitation services. Roberts v. ABR Assocs., 101 N.C. App. 135, 398 S.E.2d 917 (1990).

Authority of Trial Court to Reduce Workers' Compensation Lien on Proceeds of Settlement. — G.S. 97-10.2(j) allowed a trial court to reduce the amount of a lien which a company that paid workers' compensation benefits to an injured employee asserted against the proceeds of a settlement the employee received from a third party, and given the nature of the employee's injuries, the trial court did not abuse its discretion by reducing the amount of the insurance company's lien from $168,000 to $55,667 and ordering the insurance company to pay part of the employee's litigation costs. Sherman v. Home Depot U.S.A., Inc., 160 N.C. App. 404, 588 S.E.2d 478, 2003 N.C. App. LEXIS 1787 (2003), cert. denied sub nom. Sherman v. Home Depot United States, Inc.,358 N.C. 156, 592 S.E.2d 696 (2004).

Trial Court's Discretion. — Trial court did not abuse its discretion in reducing a workers' compensation lien on the proceeds of a widow's wrongful death settlement after taking into account the testimony, the evidence presented, the court file, and the parties' arguments; the amendment to G.S. 97-10.2(j) was applicable, making the amount of the subrogation lien a matter for the trial court's discretion without a finding that the judgment obtained by the injured employee against the third party was insufficient to satisfy the carrier's subrogation interest. Wood v. Weldon, 160 N.C. App. 697, 586 S.E.2d 801, 2003 N.C. App. LEXIS 1912 (2003), cert. denied, 358 N.C. 550, 600 S.E.2d 469 (2004).

There is no mathematical formula or set list of factors for the trial court to consider in making its determination of a subrogation amount under G.S. 97-10.2(j); the statute plainly affords the trial court discretion to determine the appropriate amount of defendant's lien, which requires that the trial court make a reasoned choice, a judicial value judgment, which is factually supported. Wood v. Weldon, 160 N.C. App. 697, 586 S.E.2d 801, 2003 N.C. App. LEXIS 1912 (2003), cert. denied, 358 N.C. 550, 600 S.E.2d 469 (2004).

§ 97-10.3. Minors illegally employed.

In any case where an employer and employee are subject to the provisions of this Chapter, any injury to a minor while employed contrary to the laws of this State shall be compensable under this Chapter as if said minor were an adult, subject to the other provisions of this Chapter. (1929, c. 120, s. 11; 1933, c. 449, s. 1; 1943, c. 622; 1959, c. 1324.)

CASE NOTES

Injury to Minor Employed Contrary to Law. — Where the evidence disclosed that infant plaintiff was one of the minimum number of employees required under the act in a business owned by two of defendants and conducted by the third defendant as general manager, and that he was injured in the performance of the duties of his employment, nonsuit was proper, since the evidence disclosed that the cause was within the exclusive jurisdiction of the Industrial Commission, notwithstanding the infant plaintiff might have been hired contrary to law. (Decided under former § 97-10) McNair v. Ward, 240 N.C. 330, 82 S.E.2d 85 (1954).

§ 97-11. Employer not relieved of statutory duty.

Nothing in this Article shall be construed to relieve any employer or employee from penalty for failure or neglect to perform any statutory duty. (1929, c. 120, s. 12.)

CASE NOTES

Cited in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

§ 97-12. Use of intoxicant or controlled substance; willful neglect; willful disobedience of statutory duty, safety regulation or rule.

No compensation shall be payable if the injury or death to the employee was proximately caused by:

(1) His intoxication, provided the intoxicant was not supplied by the employer or his agent in a supervisory capacity to the employee; or
(2) His being under the influence of any controlled substance listed in the North Carolina Controlled Substances Act, G.S. 90-86, et seq., where such controlled substance was not by prescription by a practitioner; or
(3) His willful intention to injure or kill himself or another.

When the injury or death is caused by the willful failure of the employer to comply with any statutory requirement or any lawful order of the Commission, compensation shall be increased ten percent (10%). When the injury or death is caused by the willful failure of the employee to use a safety appliance or perform a statutory duty or by the willful breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury compensation shall be reduced ten percent (10%). The burden of proof shall be upon him who claims an exemption or forfeiture under this section.

"Intoxication" and "under the influence" shall mean that the employee shall have consumed a sufficient quantity of intoxicating beverage or controlled substance to cause the employee to lose the normal control of his or her bodily or mental faculties, or both, to such an extent that there was an appreciable impairment of either or both of these faculties at the time of the injury.

A result consistent with "intoxication" or being "under the influence" from a blood or other medical test conducted in a manner generally acceptable to the scientific community and consistent with applicable State and federal law, if any, shall create a rebuttable presumption of impairment from the use of alcohol or a controlled substance. (1929, c. 120, s. 13; 1975, c. 740; 2005-448, s. 2.)

Legal Periodicals. — As to effect of breach by statute upon willful misconduct, see 8 N.C.L. Rev. 326 (1930).

For note on the range of compensable consequences of a work-related injury, see 49 N.C.L. Rev. 583 (1971).

For survey of 1976 case law on workers' compensation, see 55 N.C.L. Rev. 1116 (1977).

For survey of 1977 workers' compensation law, see 56 N.C.L. Rev. 1166 (1978).

For survey of 1982 law on workers' compensation, see 61 N.C. L. Rev. 1243 (1983).

CASE NOTES

I. In General.
II. Illustrative Cases.

I. IN GENERAL.

Editor's Note. *— For case notes on willful injuries, see also the case notes under G.S. 97-2.*

Legislative Intent. — This section is an integral part of the Workers' Compensation Act and evidences the legislature's intention to relieve an employer of the obligation to pay compensation to an employee when the accident giving rise to the employee's injuries is proximately caused by his intoxication. The oft-quoted rule that the act should be liberally construed does not license either commission or the courts to disregard the manifest intention of the legislature in enacting this section. Anderson v. Century Data Sys., Inc., 71 N.C. App. 540, 322 S.E.2d 638 (1984), cert. denied, 313 N.C. 327, 327 S.E.2d 887 (1985).

Presumption from Use of Controlled Substances. — Once an employer proves employee's use of a non-prescribed controlled substance, it is presumed that the employee was impaired; once the employer presents competent evidence that the impairment was a proximate cause of the accident, the burden shifts to the employee to rebut the presumption of impairment or to show that the impairment was not a contributing proximate cause of the accident. Willey v. Williamson Produce, 149 N.C. App. 74, 562 S.E.2d 1, 2002 N.C. App. LEXIS 139 (2002), cert. denied, 356 N.C. 624, 575 S.E.2d 762 (2002).

Additional Award Does Not Constitute Punitive Damages. — Ten percent additional award does not constitute punitive and exemplary damages, even though the effect of the 10 percent increase might appear to penalize an insurer, since G.S. 97-12 does not explicitly mention punitive damages, but in fact says that compensation shall be increased 10 percent; although there was no North Carolina caselaw on point, the trial court followed caselaw under a similar statute, Ky. Rev. Stat. Ann. § 342.165(1). Vogler v. Branch Erections Co., — N.C. App. —, 640 S.E.2d 419, 2007 N.C. App. LEXIS 365 (2007).

Act Eliminates Fault of Worker as Basis for Denying Recovery. — Compensation acts were intended to eliminate the fault of the worker as a basis for denying recovery. Hartley v. North Carolina Prison Dep't, 258 N.C. 287, 128 S.E.2d 598 (1962).

OSHA Regulations Applicable. — By virtue of G.S. 95-131(a), the requirements of 29 C.F.R. § 1910.22(b)(1) are a statutory requirement that brings an employee's injury and an employer's subsequent citation within the scope of G.S. 97-12. Brown v. Kroger Co., 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005).

Employee's Negligence Does Not Bar Him from Compensation. — An act of negligence by an employee while he was in the performance of his duty of waiting for his foreman did not bar the employee's right to compensation for the accident resulting from the negligence. Stubblefield v. Watson Elec. Constr. Co., 277 N.C. 444, 177 S.E.2d 882 (1970).

Not even gross negligence is a defense to a compensation claim. Hartley v. North Carolina Prison Dep't, 258 N.C. 287, 128 S.E.2d 598 (1962).

Only intoxication or injury intentionally inflicted will defeat a claim. Hartley v. North Carolina Prison Dep't, 258 N.C. 287, 128 S.E.2d 598 (1962).

The negligence of the employee does not disbar him from compensation, except only in cases where the injury is occasioned by his intoxication or willful intention to injure himself or another. Archie v. Greene Bros. Lumber Co., 222 N.C. 477, 23 S.E.2d 834 (1943).

Forfeiture for Intoxication Only If Cause of the Injury. — This statute does not provide for forfeiture of benefits if an employee was intoxicated at the time of the injury, but only if the injury or death "was occasioned by the intoxication." Lassiter v. Town of Chapel Hill, 15 N.C. App. 98, 189 S.E.2d 769 (1972); Inscoe v. DeRose Indus., Inc., 292 N.C. 210, 232 S.E.2d 449 (1977).

The employer has the burden of proof on the affirmative defense of intoxication. However, the employer is not required to come forward with evidence disproving all possible causes other than intoxication. Nor is he required to prove that intoxication was the sole proximate cause of the employee's injuries. Anderson v. Century Data Sys., Inc., 71 N.C.

App. 540, 322 S.E.2d 638 (1984), cert. denied, 313 N.C. 327, 327 S.E.2d 887 (1985).

In asserting the defense of intoxication set out in this section, the employer is required to prove only that the employee's intoxication was more probably than not a cause in fact of the accident resulting in injury to the employee. Anderson v. Century Data Sys., Inc., 71 N.C. App. 540, 322 S.E.2d 638 (1984), cert. denied, 313 N.C. 327, 327 S.E.2d 887 (1985).

This section places the burden of defense based upon intoxication on the defendants, to prove intoxication and to prove that death was proximately caused thereby. Smith v. Central Transp. & Liberty Mut. Ins. Co., 51 N.C. App. 316, 276 S.E.2d 751 (1981).

The employer has the burden of proving intoxication as an affirmative defense. He must prove not only that the employee was intoxicated at the time of the accident causing the injury or death, but also that the accident was proximately caused by the employee's intoxication. Torain v. Fordham Drug Co., 79 N.C. App. 572, 340 S.E.2d 111 (1986).

The employer need not disprove all other possible causes of the accident and injury, nor need he prove that intoxication was the sole proximate cause of the accident; he is only required to prove that the employee's intoxication was more probably than not a proximate cause of the accident and resulting injury. Torain v. Fordham Drug Co., 79 N.C. App. 572, 340 S.E.2d 111 (1986).

Intoxication, willful intention and being under the influence of a controlled substance are affirmative defenses which place the burden of proof on the employer in a claim for workers' compensation. Harvey v. Raleigh Police Dep't, 85 N.C. App. 540, 355 S.E.2d 147, cert. denied, 320 N.C. 631, 360 S.E.2d 86 (1987).

Evidence of Intoxication. — The Industrial Commission had the power to determine whether physician was qualified to testify as an expert in stating his opinion as to deceased employee's intoxication at 2:50 p.m., based on a blood alcohol test administered at 5:00 p.m. Torain v. Fordham Drug Co., 79 N.C. App. 572, 340 S.E.2d 111 (1986).

Finding of Intoxication by Commissioner Not Required. — This statute does not require the Commissioner to find whether the employee was intoxicated or not as a matter of law. Lassiter v. Town of Chapel Hill, 15 N.C. App. 98, 189 S.E.2d 769 (1972); Inscoe v. DeRose Indus., Inc., 292 N.C. 210, 232 S.E.2d 449 (1977).

Subdivision (3) presents an affirmative defense to a claim under the Workers' Compensation Act. It requires a finding that the claimant had the willful intention to injure or kill himself or another and that this intention was the proximate cause of the claimant's injuries. Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 295 S.E.2d 458 (1982).

Burden Under Subdivision (3). — Since subdivision (3) of this section is an affirmative defense, the burden of proof is on the employer to show that compensation should be denied notwithstanding the fact that the injury arose out of and in the course of the employment. Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 295 S.E.2d 458 (1982).

Cause of Fact Standard Applicable to Subdivision (3). — Using a cause in fact standard, the claimant's injuries must be the result of a natural and continuous sequence of events, unbroken by a new independent cause, stemming from the claimant's willful intention to injure himself or another. It is also necessary that some injury be foreseeable from the claimant's actions, although the extent or nature of the injury suffered need not have been foreseen. Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 295 S.E.2d 458 (1982).

Under subdivision (3) of this section, for the claimant's injuries to be proximately caused by her actions, the willful intention of the claimant must be more than a cause of her injuries. However, it need not be the sole cause. Rather, a cause in fact standard is required. Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 295 S.E.2d 458 (1982).

Injuries Must Be Proximately Caused by Claimant's Willful Intent. — Once willful intention has been established, in order to deny recovery it is necessary to find that the claimant's injuries were "proximately caused by" an act resulting from such intent. Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 295 S.E.2d 458 (1982).

But This Need Not Be the "Sole" Proximate Cause. — This section was designed to be an exception to the general rule that the employee would receive compensation for an injury arising out of and in the course of employment. To utilize a "sole" proximate cause standard would virtually vitiate the statute and defeat the express will of the General Assembly. Whenever an employee intends to injure another, that employee will usually not be injured unless the intended victim retaliates. The actions of the intended victim could always be considered a cause of the claimant's injuries, and therefore the willful intention of the claimant would rarely if ever be the sole cause. Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 295 S.E.2d 458 (1982).

The sole proximate cause standard is inapplicable to this section. Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 295 S.E.2d 458 (1982).

Need Not Show Intent to Inflict "Serious" Injury. — Neither acts by the claimant, nor mere words spoken by the claimant and unaccompanied by any overt act, will be sufficient to bar compensation, unless the willful intent to injure is apparent from the context and nature of the physical or verbal assault. However, no intent to inflict "serious" injury must be shown before the statutory bar to recovery will apply. The bar to recovery, set forth in subdivision (3) of this section, applies when a general willful intent to inflict some injury is established by the evidence. Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 295 S.E.2d 458 (1982).

Crucial Question Is Willful Intent. — The crucial question is whether the claimant had a willful intention to injure the other employee. The fact that the other employee may have produced the knife and therefore escalated the fight is immaterial. The claimant may not have intended to kill or even seriously injure the other employee, but subdivision (3) of this section does not require that any such intent be shown before recovery will be denied. Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 295 S.E.2d 458 (1982).

Suicide Induced by Injury. — In those cases where the injuries suffered by the deceased result in his becoming devoid of normal judgment and dominated by a disturbance of mind directly caused by his injury and its consequences, his suicide cannot be considered "willful" within the meaning and intent of the act. Petty v. Associated Transp., 276 N.C. 417, 173 S.E.2d 321 (1970).

Suicide cannot be intentionally self-inflicted if, in spite of the act being one of conscious volition, the employee, because of mental condition resulting from the injury, is unable to control the impulse to kill himself. Petty v. Associated Transp., 276 N.C. 417, 173 S.E.2d 321 (1970).

If the sole motivation controlling the will of the employee when he knowingly decides to kill himself is the pain and despair caused by the injury, and if his will itself is deranged and disordered by these consequences of the injury, then it seems wrong to say that this exercise of will is "independent," or that it breaks the chain of causation. Rather, it seems to be in the direct line of causation. Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970); Thompson v. Lenoir Transf. Co., 48 N.C. App. 47, 268 S.E.2d 534, cert. denied, 301 N.C. 405, 273 S.E.2d 450 (1980).

While suicide may be an independent intervening cause in some cases, it is certainly not so in those cases where the incontrovertible evidence shows that, without the injury, there would have been no suicide. Petty v. Associated Transp., 276 N.C. 417, 173 S.E.2d 321 (1970).

An employee who becomes mentally deranged and deprived of normal judgment as a result of a compensable accident and commits suicide in consequence does not act willfully within the meaning of this section. Elmore v. Broughton Hosp., 76 N.C. App. 582, 334 S.E.2d 231, cert. denied, 315 N.C. 390, 338 S.E.2d 879 (1985).

An employee's suicide caused by an occupational disease is compensable under the Workers' Compensation Act. This is so because G.S. 97-52 makes it clear that the death of an employee resulting from an occupational disease shall be treated as the happening of an injury by accident. Harvey v. Raleigh Police Dep't, 85 N.C. App. 540, 355 S.E.2d 147, cert. denied, 320 N.C. 631, 360 S.E.2d 86 (1987).

When suicide is the "end result" of an injury sustained in a compensable accident, it is an intervening act but not an intervening cause. An intervening cause is one occurring entirely independent of a prior cause. When a first cause produces a second cause that produces a result, the first cause is a cause of that result. Petty v. Associated Transp., 276 N.C. 417, 173 S.E.2d 321 (1970).

Compensation for Suicide. — Using the statute to deny compensation for suicides arising out of the employment is anomalous, because to do so produces a narrower basis for recovery under the remedial workers' compensation acts than would have been possible under common-law tort doctrine. Petty v. Associated Transp., 276 N.C. 417, 173 S.E.2d 321 (1970).

A ruling prohibiting compensation to the dependents of an employee who intentionally killed himself is not compatible with the objective of the Workers' Compensation Act, which is to provide for the injured worker, or his dependents in the event of his death, at the cost of the industry which he was serving. To this end, the rule is that benefits under the act should not be denied by a technical, narrow, and strict construction. Petty v. Associated Transp., 276 N.C. 417, 173 S.E.2d 321 (1970).

Failure to Use Safety Appliances or Observe Rules. — This section does not deny compensation when it appears that an injury was caused by the willful failure of an employee to use a safety appliance, or by the willful breach of a rule or regulation adopted by the employer and approved by the Industrial Commission, but only subjects the injured employee to the penalty of a reduction in the compensation to be awarded. Archie v. Greene Bros. Lumber Co., 222 N.C. 477, 23 S.E.2d 834 (1943).

An intentional violation of an approved safety rule of which the employee had prior notice will not defeat, but will only reduce the amount of an award. Hartley v. North Carolina Prison Dep't, 258 N.C. 287, 128 S.E.2d 598 (1962).

Legal Standard of Causation Correctly Applied. — Competent evidence supported commission's findings that although plaintiff was under the influence of alcohol at the time of the accident, other factors caused the accident;

therefore, intoxication was not a proximate cause of accident, and commission correctly applied the legal standard of causation required under subdivision (1) of this section. Suggs v Snow Hill Milling Co., 100 N.C. App. 527, 397 S.E.2d 240 (1990), cert. denied, 329 N.C. 276, 407 S.E.2d 851 (1991).

Proximate Cause Is Question for Finder of Fact. — The determination of the proximate cause of the claimant's injuries is a question for the finder of fact. Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 295 S.E.2d 458 (1982).

Insurer Obligated to Pay As Additional Award Did Not Constitute Punitive Damages. — North Carolina Insurance Guaranty Association (NCIGA) was obligated to pay a 10 percent additional award as the additional award did not constitute punitive and exemplary damages, even though the effect of the 10 percent increase might appear to penalize NCIGA, since G.S. 97-12 did not explicitly mention punitive damages, but in fact said that compensation would be increased 10 percent; further, the language of an insurance policy did not preclude NCIGA's liability for the increase. Vogler v. Branch Erections Co., — N.C. App. —, 640 S.E.2d 419, 2007 N.C. App. LEXIS 365 (2007).

Applied in Yates v. Hajoca Corp., 1 N.C. App. 553, 162 S.E.2d 119 (1968); Petty v. Associated Transp., 4 N.C. App. 361, 167 S.E.2d 38 (1969); McCuiston v. Addressograph-Multigraph Corp., 59 N.C. App. 76, 295 S.E.2d 490 (1982); Pittman v. Twin City Laundry & Cleaners, 61 N.C. App. 468, 300 S.E.2d 899 (1983); Patterson v. Gaston County, 62 N.C. App. 544, 303 S.E.2d 182 (1983).

Cited in Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952); Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962); Hoyle v. Isenhour Prick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (1982); Coleman v. City of Winston-Salem, 57 N.C. App. 137, 291 S.E.2d 155 (1982); Diaz v. United States Textile Corp., 60 N.C. App. 712, 299 S.E.2d 843 (1983); Prevette v. Clark Equip. Co., 62 N.C. App. 272, 302 S.E.2d 639 (1983); Barrino v. Radiator Specialty Co., 315 N.C. 500, 340 S.E.2d 295 (1986); Harrelson v. Soles, 94 N.C. App. 557, 380 S.E.2d 528 (1989).

II. ILLUSTRATIVE CASES.

"Psychological Autopsy" Properly Admitted. — "Psychological autopsy" on decedent, involving interviewing family members and reviewing records to determine the probable cause of death or the decedent's state of mind at the time of his death, was competent and properly admitted for the purpose of determining the mental state of the deceased at the time of his suicide in a workers' compensation proceeding wherein plaintiff alleged that decedent's suicide was caused by a dysthymic disorder (depression) caused by his employment as a police officer. Harvey v. Raleigh Police Dep't, 85 N.C. App. 540, 355 S.E.2d 147, cert. denied, 320 N.C. 631, 360 S.E.2d 86 (1987).

Where it was shown that police chief's death resulted from a bullet wound, such showing raised a prima facie case only of death by accident, placing upon the employer the burden of going forward with evidence to show that the employee killed himself within the exemption or forfeiture under this section. McGill v. Town of Lumberton, 215 N.C. 752, 3 S.E.2d 324 (1939), in which police chief was found dead in town building, his gun by his side; compensation was denied by the Commission, reversed and remanded by the Supreme Court, three justices dissenting; a subsequent award of compensation was affirmed in McGill v. Town of Lumberton, 218 N.C. 586, 11 S.E.2d 873 (1940), two justices concurring only because of the former decision; one dissent.

Where a department store manager was found dead in his store early in the morning, a pistol by his side, with no other evidence of how he met his death, the court held that while there might be a presumption of injury by accident, the award of compensation was defeated because there was no presumption or evidence to support a conclusion that the injury arose out of the employment. The causal connection between the injury and the employment was not apparent as was the case in McGill v. Lumberton. Bolling v. Belk-White Co., 228 N.C. 749, 46 S.E.2d 838 (1948).

Employer's Failure to Meet Burden. — Given the presence of competent evidence on both sides of the issue of whether intoxication was a proximate cause of death, the employer did not carry its burden on this issue. Strickland v. Carolina Classics Catfish, Inc., 119 N.C. App. 97, 458 S.E.2d 10 (1995), aff'd, 342 N.C. 640, 466 S.E.2d 276 (1996).

All of the competent evidence supported the Commission's finding that defendants did not meet their burden of showing that plaintiff's use of controlled substances was a proximate cause of his injury. Bursey v. Kewaunee Scientific Equip. Corp., 119 N.C. App. 522, 459 S.E.2d 40 (1995).

Injury Held Result of Intoxication. — When considered together, the evidence with respect to the manner in which deceased employee was driving, the presence of an odor of alcohol about his person, his statement that he had been drinking, and the level of alcohol found in his blood supported the Commission's finding of fact that he was intoxicated at the time of the accident, and that his intoxication was a proximate cause of the accident and his resulting injuries and death, as did evidence negating brake failure as a cause of the accident. Torain v. Fordham Drug Co., 79 N.C. App.

572, 340 S.E.2d 111 (1986).

There was competent evidence in the record to support a finding that the deceased was intoxicated where decedent's blood alcohol level of .202, would have rendered her borderline between simple impairment and extreme excitement and confusion. Sidney ex rel. Sidney v. Raleigh Paving & Patching, Inc., 109 N.C. App. 254, 426 S.E.2d 424 (1993).

Injury Held Not Result of Intoxication. — In Brooks v. Carolina Rim & Wheel Co., 213 N.C. 518, 196 S.E. 835 (1938), it was held that the evidence was sufficient to support the finding of the Industrial Commission that the accident causing injury was not the result of the employee's intoxication, although defendants introduced evidence in conflict therewith. See Gant v. Crouch, 243 N.C. 604, 91 S.E.2d 705 (1956).

Despite fact that employee's blood alcohol level was 387 milligrams per liter (.387) when measured following his accident, the Industrial Commission found that the employee's intoxication was not the proximate cause of his injury sustained when employee's hand got stuck in a lumber conveyor. Gaddy v. Anson Wood Prods., 92 N.C. App. 483, 374 S.E.2d 477 (1988).

Where the Commission's finding plaintiff was injured because he was attempting to help a fellow employee was substantially supported by the evidence and sufficient to explain the cause of plaintiff's injury, that plaintiff may have erred in judgment did not mandate the conclusion that the error was the result of his intoxication. Gaddy v. Anson Wood Prods., 92 N.C. App. 483, 374 S.E.2d 477 (1988).

Commission's finding that claimant's intoxication was not a proximate cause of accident was supported by evidence, even though claimant's blood alcohol level was .11 to .13 in terms of breathalyzer test at time of accident, where evidence showed that claimant had pre-existing mental and visual handicap and that equipment provided by employer malfunctioned, and his supervisor testified that he did not smell alcohol on claimant's breath and felt perfectly safe in having claimant operate equipment. Suggs v Snow Hill Milling Co., 100 N.C. App. 527, 397 S.E.2d 240 (1990), cert. denied, 329 N.C. 276, 407 S.E.2d 851 (1991).

Injury Held Not Result of Alcohol Withdrawal Seizure. — Where doctor stated that it would not be normal to have an alcohol withdrawal seizure after more than three days and that an alcohol withdrawal seizure probably would not happen five days after consuming alcohol and plaintiff's blood alcohol level was 0.000 at the time of the incident, the Industrial Commission did not err in finding that plaintiff's injury was not approximately caused by an alcohol withdrawal seizure. Tharp v. Southern Gables, Inc., 125 N.C. App. 364, 481 S.E.2d 339 (1997), cert. denied, 346 N.C. 184, 486 S.E.2d 219 (1997).

Where there was insufficient evidence to establish that the blood alcohol test was scientifically reliable or correctly administered, it could not be used to deny plaintiff's claim pursuant to the intoxication defense in subdivision (1). Johnson v. Charles Keck Logging, 121 N.C. App. 598, 468 S.E.2d 420 (1996).

Impairment by Cocaine. — As the employer produced substantial competent evidence to show that its employee was impaired by cocaine before his fatal truck crash, the Commission's award of workers' compensation death benefits to the employee's dependant would be reversed. Willey v. Williamson Produce, 149 N.C. App. 74, 562 S.E.2d 1, 2002 N.C. App. LEXIS 139 (2002), cert. denied, 356 N.C. 624, 575 S.E.2d 762 (2002).

Substance Abuse as Intervening Cause of Disabling Psychosis. — Finding of the Commission that although plaintiff's on the job hand injury, for which he was compensated, was a contributing factor in his subsequent disabling psychosis, his willful substance abuse was an intervening cause which prohibited an award of benefits was supported by the evidence and would not be disturbed. Wagoner v. Douglas Battery Mfg. Co., 89 N.C. App. 67, 365 S.E.2d 298, cert. denied, 322 N.C. 486, 371 S.E.2d 274 (1988).

Death Occasioned by Violation of Safety Statute and Intoxication. — Findings, supported by evidence, that in overtaking a truck preceding him on the highway, employee's car left skid marks for 75 feet straight in a line forward and then skid marks sideways across the center of the highway to his left, and that his car was struck by a car approaching from the opposite direction, together with evidence that his blood contained .20 percent of alcohol, were held sufficient to show that the accident resulted from the employee's violation of a safety statute and to support the finding of the Industrial Commission that the employee's death was occasioned by his intoxication, and judgment denying compensation was affirmed. Osborne v. Colonial Ice Co., 249 N.C. 387, 106 S.E.2d 573 (1959).

Employer's Willful Failure to Comply With Safety Standards. — When an injury or death is caused by the willful failure of an employer to comply with any statutory requirement or any lawful order of the North Carolina Industrial Commission, compensation shall be increased 10 percent. An act is considered willful when there exists a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, a duty assumed by contract or imposed by law. Jenkins v. Easco Aluminum, 165 N.C. App. 86, 598 S.E.2d 252, 2004 N.C. App. LEXIS 1158 (2004).

Suicide Induced by Insanity. — Evidence was sufficient to support a finding that by reason of insanity a suicide was the result of an uncontrollable impulse, or in a delirium of frenzy without conscious volition to cause death. Painter v. Mead Corp., 258 N.C. 741, 129 S.E.2d 482 (1963).

Rejoining Course of Employment. — Where employee traveled to New York, slept in a motel and ate at restaurants at the direction of his employer, and at the time of the accident resulting in his death, he was returning to his motel from the place where he had eaten dinner, even if his remaining at the restaurant to drink alcohol and watch a ball game constituted a personal endeavor, intoxication was not a cause of his death, and sufficient evidence existed to support the Industrial Commission's finding that he had rejoined his course of employment at the time of the accident. Cauble v. Soft-Play, Inc., 124 N.C. App. 526, 477 S.E.2d 678 (1996).

Unsafe Press Brake Machine. — The Commission did not make sufficient findings of fact to support its conclusion that plaintiff employee was not entitled to a 10% increase in compensation for defendant's alleged violation of statutory safety requirements; additionally, it inexplicably failed to make any findings based on the testimony of plaintiff's coworker regarding the facts that (1) the press brake machine operated by plaintiff was not "guarded," as defined by the North Carolina OSHA manual, and (2) the machine did not prevent entry of the hands and fingers into the point of operation. Jenkins v. Easco Aluminum Corp., 142 N.C. App. 71, 541 S.E.2d 510, 2001 N.C. App. LEXIS 38 (2001).

Reversal by the North Carolina Industrial Commission of a previous award was upheld on appeal where sufficient evidence existed entitling an injured employee to temporary disability payments and prosthetic fingers at the employer's expense. Increase in the employee's compensation award of 10 percent was upheld where the employer had violated OSHA standards by failing to have a guard on a brake press machine and the employee established that the failure to have the guard was the proximate cause of her injury. Jenkins v. Easco Aluminum, 165 N.C. App. 86, 598 S.E.2d 252, 2004 N.C. App. LEXIS 1158 (2004).

Employee who injured himself when a crane he was improperly operating toppled over was not barred from workers' compensation award because there was no evidence that his injuries were the result of a willful intention to injure himself, or a willful breach of a safety rule or procedure adopted by his employer. Harris v. Thompson Contractors, 148 N.C. App. 472, 558 S.E.2d 894, 2002 N.C. App. LEXIS 26 (2002), aff'd, 356 N.C. 664, 576 S.E.2d 323 (2003).

Employer Liability Based on OSHA Regulation. — Full Commission of the North Carolina Industrial Commission did not err by awarding an injured employee a 10 percent increase in compensation, after the employee tripped and fell over an extension cord in a hallway at work, because the presence of the extension cord in the hallway violated a federal regulation that was adopted by the State of North Carolina pursuant to G.S. 95-131(a) of the North Carolina Occupational Safety and Health Act, G.S. 95-126 et seq., and the employer was put on sufficient notice regarding the duties, consequences, and application of the North Carolina Workers' Compensation Act, G.S. 91-1 et seq., and its relevant safety standards. Brown v. Kroger Co., 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005).

Insurance Guaranty Association Obligated to Pay Additional Award. — Employee's workers' compensation claim, including a 10 percent increase in compensation awarded pursuant to G.S. 97-12, was a "covered claim" as defined by G.S. 58-48-20 since, inter alia, the employer's policy with its insurer provided that the insurer would pay promptly when due the benefits required of the insured by the workers' compensation law, and the policy stated that the terms of the insurance policy that conflicted with the workers' compensation law were changed by to conform to that law. Vogler v. Branch Erections Co., — N.C. App. —, 640 S.E.2d 419, 2007 N.C. App. LEXIS 365 (2007).

§ 97-13. Exceptions from provisions of Article.

(a) Employees of Certain Railroads. — This Article shall not apply to railroads or railroad employees nor in any way repeal, amend, alter or affect Article 8 of Chapter 60 or any section thereof relating to the liability of railroads for injuries to employees, nor upon the trial of any action in tort for injuries not coming under the provisions of this Article, shall any provision herein be placed in evidence or be permitted to be argued to the jury. Provided, however, that the foregoing exemption to railroads and railroad employees shall not apply to employees of a State-owned railroad company, as defined in G.S. 124-11, or to electric street railroads or employees thereof; and this Article shall apply to electric street railroads and employees thereof and to this extent the provisions of Article 8 of Chapter 60 are hereby amended.

(b) Casual Employment, Domestic Servants, Farm Laborers, Federal Government, Employer of Less than Three Employees. — This Article shall not apply to casual employees, farm laborers when fewer than 10 full-time nonseasonal farm laborers are regularly employed by the same employer, federal government employees in North Carolina, and domestic servants, nor to employees of such persons, nor to any person, firm or private corporation that has regularly in service less than three employees in the same business within this State, except that any employer without regard to number of employees, including an employer of domestic servants, farm laborers, or one who previously had exempted himself, who has purchased workers' compensation insurance to cover his compensation liability shall be conclusively presumed during life of the policy to have accepted the provisions of this Article from the effective date of said policy and his employees shall be so bound unless waived as provided in this Article; provided however, that this Article shall apply to all employers of one or more employees who are employed in activities which involve the use or presence of radiation.

(c) Prisoners. — This Article shall not apply to prisoners being worked by the State or any subdivision thereof, except to the following extent: Whenever any prisoner assigned to the State Department of Correction shall suffer accidental injury or accidental death arising out of and in the course of the employment to which he had been assigned, if there be death or if the results of such injury continue until after the date of the lawful discharge of such prisoner to such an extent as to amount to a disability as defined in this Article, then such discharged prisoner or the dependents or next of kin of such discharged prisoner may have the benefit of this Article by applying to the Industrial Commission as any other employee; provided, such application is made within 12 months from the date of the discharge; and provided further that the maximum compensation to any prisoner or to the dependents or next of kin of any deceased prisoner shall not exceed thirty dollars ($30.00) per week and the period of compensation shall relate to the date of his discharge rather than the date of the accident. If any person who has been awarded compensation under the provisions of this subsection shall be recommitted to prison upon conviction of an offense committed subsequent to the award, such compensation shall immediately cease. Any awards made under the terms of this subsection shall be paid by the State Department of Correction from the funds available for the operation of the Department of Corrections. The provisions of G.S. 97-10.1 and 97-10.2 shall apply to prisoners and discharged prisoners entitled to compensation under this subsection and to the State in the same manner as said section applies to employees and employers.

(d) Sellers of Agricultural Products. — This Article shall not apply to persons, firms or corporations engaged in selling agricultural products for the producers thereof on commission or for other compensation, paid by the producers, provided the product is prepared for sale by the producer. (1929, c. 120, s. 14; 1933, c. 401; 1935, c. 150; 1941, c. 295; 1943, c. 543; 1945, c. 766; 1957, c. 349, s. 10; c. 809; 1967, c. 996, s. 13; 1971, c. 284, s. 2; c. 1176; 1975, c. 718, s. 3; 1979, c. 247, s. 1; c. 714, s. 2; 1981, c. 378, s. 1; 1983 (Reg. Sess., 1984), c. 1042, s. 2; 1987, c. 729, s. 3; 2000-146, s. 11.)

Local Modification. — Mecklenburg: 1933, c. 401.

Cross References. — For definitions under this article, see G.S. 97-2.

Editor's Note. — Article 8 of Chapter 60, referred to in subsection (a) of this section, was repealed by Session Laws 1963, c. 1165.

Legal Periodicals. — For 1984 survey, "Employee Exclusion Clauses in Automobile Liability Insurance Policies," see 63 N.C.L. Rev. 1228 (1985).

For a survey of 1996 developments in the law regarding prisoner rights, see 75 N.C.L. Rev. 2428 (1997).

CASE NOTES

I. In General.
II. Casual Employees.
III. Farm Laborers.
IV. Domestic Servants.
V. Number of Employees.
VI. Prisoners.

I. IN GENERAL.

Editor's Note. *— See also the case notes under G.S. 97-2.*

Purchase of Insurance Subjects Employer and Employees to Act. — By purchasing a workers' compensation insurance policy, the employer and his employees become subject to the act and continue to be "so bound unless waived as provided in this Article." Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969).

And Failure of Third-Party Insurance Agent to Renew Policy Does Not Constitute Waiver. — By purchasing a workers' compensation insurance policy, the employer and his employees become subject to the act and continue to be "so bound unless waived as provided in this Article." The failure of a third party, such as the insurance agent, to fulfill his agreement to see that other insurance was obtained upon the cancellation of the insurance policy does not constitute a waiver "as provided in this Article." Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969). But see Wiggins v. Rufus Tart Trucking Co., 63 N.C. App. 542, 305 S.E.2d 749 (1983).

A self-insured employer is presumptively subjected to the provisions of the Act only for the life of the policy. Once the policy ends, this presumption ends. Wiggins v. Rufus Tart Trucking Co., 63 N.C. App. 542, 305 S.E.2d 749 (1983).

For case as to former provisions of subsection (b) of this section that proof that the employer obtained insurance and filed claim should be prima facie evidence that the employer and employee had elected to be bound by the act, see Gassaway v. Gassaway & Owens, Inc., 220 N.C. 694, 18 S.E.2d 120 (1942).

Applied in Rape v. Town of Huntersville, 214 N.C. 505, 199 S.E. 736 (1938); Bennett v. Hertford County Bd. of Educ., 69 N.C. App. 615, 317 S.E.2d 912 (1984).

Cited in Borders v. Cline, 212 N.C. 472, 193 S.E. 826 (1937); Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966); Crawford v. General Ins. & Realty Co., 266 N.C. 615, 146 S.E.2d 651 (1966); Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968); Hicks v. Brown Shoe Co., 64 N.C. App. 144, 306 S.E.2d 543 (1983); State v. Frazier, 142 N.C. App. 207, 541 S.E.2d 800 (2001).

II. CASUAL EMPLOYEES.

Employment in Employer's Regular Course of Business Not Casual. — Two employees were hired by a fertilizer dealer "whenever a carload of fertilizer arrived, to unload and deliver the fertilizer." This was held not to be "casual" employment, but "work pertaining to the regular course of defendant's business." Hunter v. Peirson, 229 N.C. 356, 49 S.E.2d 653 (1948).

Employment continuously for five or six weeks in construction of facilities for handling material in defendant's plant could not be held to be either casual or not in the course of defendant's business. Smith v. Southern Wastepaper Co., 226 N.C. 47, 36 S.E.2d 730 (1946).

Plaintiff who had been employed full-time for three months prior to accident, and who also worked on Saturdays by choice and with the agreement of his employer, was not merely a casual employee. Murray v. Biggerstaff, 81 N.C. App. 377, 344 S.E.2d 550, cert. denied, 318 N.C. 696, 350 S.E.2d 858 (1986).

Civilian Summoned by Forest Warden to Help Extinguish Fire. — A civilian who had been summoned by a forest warden to assist in extinguishing a fire was held to be not a casual employee. Moore v. State, 200 N.C. 300, 156 S.E. 806 (1930).

III. FARM LABORERS.

Nearness to Planting, Cultivation, etc. — Whether an employee is a farm laborer depends, in a large degree, upon the nearness of his occupation to the planting, cultivation, and harvesting of crops. Hinson v. Creech, 286 N.C. 156, 209 S.E.2d 471 (1974).

Emphasis upon Nature of Employee's Tasks. — In considering the question of whether an employee is a farm laborer, a majority of the jurisdictions have placed emphasis upon the nature of the employee's work rather than upon the nature of the employer's business. Hinson v. Creech, 286 N.C. 156, 209 S.E.2d 471 (1974).

Although the character of the "employment" of an employee must be determined from the "whole character" of his employment and not upon the particular work he is performing at the time of his injury, nevertheless the coverage of an employee under the act is dependent upon the character of the work he is hired to perform and not upon the nature and scope of his employer's business. Hinson v. Creech, 286 N.C. 156, 209 S.E.2d 471 (1974).

Employee of State Engaged in Farm Labor Is Covered by Act. — An employee of the State engaged in farm labor was covered by the act, as the exemption was intended for the protection of farmers as an occupational class and G.S. 97-2(2) includes all State "officers and employees" except those elected or appointed by the Governor or General Assembly. Barbour v. State Hosp., 213 N.C. 515, 196 S.E. 812 (1938).

Plaintiff, who was employed to process oats, soybeans and barley through the gin process, and to do other work incidental to the ginning operation, was not a farm laborer under subsection (b) of this section, and the fact that plaintiff was operating a tractor in a field in which crops were eventually to be planted when he was injured, during a one-time excursion out of the ginning process and into an activity more akin to farming or agricultural labor, did not interrupt his compensation coverage. Murray v. Biggerstaff, 81 N.C. App. 377, 344 S.E.2d 550, cert. denied, 318 N.C. 696, 350 S.E.2d 858 (1986).

Laborer in Large-Scale Commercial Production, etc., of Chicken Eggs. — The duties of employee, consisting of cleaning, grading, packaging and delivering eggs, keeping records of sales and collecting the eggs delivered, were sufficiently removed from the normal process of agriculture to prevent her exclusion from coverage under the Workers' Compensation Act as a "farm laborer." Hinson v. Creech, 286 N.C. 156, 209 S.E.2d 471 (1974).

Insurance carrier was estopped from denying the plaintiff's status as an employee when he was injured, even though the plaintiff was a working partner in a farming operation, where the carrier had treated the plaintiff as an employee before the injury, and had accepted the benefits of that status. Garrett v. Garrett & Garrett Farms, 39 N.C. App. 210, 249 S.E.2d 808 (1978), cert. denied, 296 N.C. 736, 254 S.E.2d 178 (1979).

IV. DOMESTIC SERVANTS.

Dual Employment. — Plaintiff was employed for a single wage to do janitorial, window cleaning, and delivery work at defendant's paint store and also to do janitor and garden work at defendant's home. He was paid at the store. His injuries arose from an accident connected with lawn mowing at the employer's home. An award by the Commission was affirmed in the superior court but reversed on the insurance carrier's appeal. The personal work done for the employer was not within the coverage of the act. Burnett v. Palmer-Lipe Paint Co., 216 N.C. 204, 4 S.E.2d 507 (1939).

V. NUMBER OF EMPLOYEES.

Editor's Note. *— The annotations under this analysis line below were decided prior to the 1987 amendment to subsection (b) of this section, which changed the regular employment requirement to three employees.*

Whether or not the minimum number of persons are regularly employed in one business is a jurisdictional matter that cannot be waived. Dependents of Thompson v. Johnson Funeral Home, 205 N.C. 801, 172 S.E. 500 (1934), where the jurisdiction of the Industrial Commission was first challenged in an appeal from the Commission to the superior court. See same case on rehearing, 208 N.C. 178, 179 S.E. 801 (1935), noted critically in 14 N.C.L. Rev. 76 (1936).

The requirement that five (now three) or more employees be regularly employed in the same business or establishment is jurisdictional. Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501, aff'd, 318 N.C. 410, 348 S.E.2d 595 (1986).

The plaintiff has the burden of proving that the employer regularly employed five (now three) or more employees. Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501, aff'd, 318 N.C. 410, 348 S.E.2d 595 (1986).

Employment of the Minimum Number of Persons or More Must Affirmatively Appear. — It must appear affirmatively by evidence or by admission of record that a defendant sought to be held liable under this Chapter had in his employ five (now three) or more employees in order to sustain the jurisdiction of the Commission. Chadwick v. North Carolina Dep't of Conservation & Dev., 219 N.C. 766, 14 S.E.2d 842 (1941). See also Hanks v. Southern Pub. Utils. Co., 204 N.C. 155, 167 S.E. 560 (1933).

To sustain the jurisdiction of the Commission, it must affirmatively appear that the employer which it undertakes to bind by its award had as many as five (now three) men in his or its employment. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962).

Evidence showing that a defendant had in his employ five (now three) or more employees must affirmatively appear in the record to sustain the jurisdiction of the Industrial Commission over the claim. Durham v. McLamb, 59 N.C. App. 165, 296 S.E.2d 3 (1982).

Number of workers on job site on date of injury, standing alone, is not determinative of the issue. If the defendant had four (now three) or more "regularly employed" employees, the fact that he fell below the minimum requirement on the actual date of injury would not preclude coverage. Durham v. McLamb, 59 N.C. App. 165, 296 S.E.2d 3 (1982).

Where Number of Employees Varies. — Defendant employed three employees regularly. Two additional employees had been hired for at least a part of each week for two preceding months. It was held that the jurisdictional requirement of five (now three) regular employees was met. Hunter v. Peirson, 229 N.C. 356, 49 S.E.2d 653 (1948).

Where Employer Conducts Several Distinct Businesses. — Where the employer conducts several distinct businesses and in each employs less than the requisite number required to bring himself within the act, he is not subject to the act. This is true even though the businesses are under the same roof. Aycock v. Cooper, 202 N.C. 500, 163 S.E. 569 (1932).

Reviewing Court Must Make Independent Determination. — Whether the employer had the number of employees required to subject him to the Workers' Compensation Act is a question of jurisdictional fact, and the reviewing court is required to review and consider the evidence and make an independent determination. Durham v. McLamb, 59 N.C. App. 165, 296 S.E.2d 3 (1982).

Reversal of Commission's Award Where Number of Employees Not Affirmatively Shown. — When it is not made to affirmatively appear that the defendant sought to be held liable under this Chapter had in his employ five (now three) or more employees, the Commission's award of compensation against him must be reversed. Chadwick v. North Carolina Dep't of Conservation & Dev., 219 N.C. 766, 14 S.E.2d 842 (1941).

Where the findings of facts of the Industrial Commission that the deceased was an employee of the defendant and that the defendant employed more than five (now three) workers are not supported by any evidence in the hearing before it, upon appeal to the superior court the award should be set aside and vacated. Poole v. Signom, 202 N.C. 172, 162 S.E. 198 (1932).

Remand to Determine Number of Employees. — It is not error for the superior court to remand a proceeding in order that the facts with respect to the number of employees in the employ of the defendant at the time the employee was injured might be ascertained by the Industrial Commission. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962).

Demurrer Properly Overruled. — A demurrer to an action for death of an employee, on the ground that the action was cognizable only by the Industrial Commission, was properly overruled when it did not appear on the face of the complaint that the defendant employed more than five (now three) men in this State. Hanks v. Southern Pub. Utils. Co., 204 N.C. 155, 167 S.E. 560 (1933). See Southerland v. Harrell, 204 N.C. 675, 169 S.E. 423 (1933); Allen v. American Cotton Mills, Inc., 206 N.C. 704, 175 S.E. 98 (1934).

Where a corporate employer with less than the minimum number of employees procures a policy of compensation insurance, such employer is presumed to have accepted the provisions of the act, and such policy covers its executive officers notwithstanding the premium on the policy is based on the compensation of a single nonexecutive employee and the parties intended to cover him only, unless notice of nonacceptance by the executive officers is duly filed with the Industrial Commission. Laughridge v. South Mt. Pulpwood Co., 266 N.C. 769, 147 S.E.2d 213 (1966).

Ordinarily, an employer with less than five employees is exempt from the act. However, when such employer at his election voluntarily purchases workers' compensation insurance, he accepts all provisions of the act. In such case, the policy he purchases both creates and protects his compensation liability; and thereafter such employer and his employees are bound by the provisions of the act unless, prior to any accident resulting in injury or death, notice to the contrary is given. Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969).

VI. PRISONERS.

Suspension of Workers' Compensation Benefits During Incarceration. — Imprisonment of a person already receiving worker's compensation disability payments cuts off the employer's duty to make payments during the period of confinement. Parker v. Union Camp Corp., 107 N.C. App. 505, 422 S.E.2d 585 (1992).

Action for Wrongful Death. — Where decedent was a prisoner who suffered an accidental death arising out of and in the course of his assigned employment, plaintiff was entitled to workers' compensation benefits under subsection (c). Blackmon v. N.C. Dept. Of Correction, 343 N.C. 259, 470 S.E.2d 8 (1996).

Action for Wrongful Death Under Tort Claims Act. — Subsection (c) of this section was held not to be a bar in an action for wrongful death of a prisoner brought under the Tort Claims Act. Ivey v. North Carolina Prison Dep't, 252 N.C. 615, 114 S.E.2d 812 (1960).

The second 1957 amendment to this section, which made former G.S. 97-10 applicable to certain prisoners, did not deny to prisoners on assigned tasks rights conferred by the Tort Claims Act. Ivey v. North Carolina Prison Dep't, 252 N.C. 615, 114 S.E.2d 812 (1960). See also note to § 143-291.

Where a prisoner who suffered accidental death arising out of and in the course of the employment to which he had been assigned, his dependents or next of kin were entitled to specific benefits under the Act; therefore, inmate's mother could not maintain a wrongful death action against defendants under the Tort

Claims Act. Blackmon v. North Carolina Dep't of Cors., 118 N.C. App. 666, 457 S.E.2d 306 (1995), aff'd, 343 N.C. 259, 470 S.E.2d 8 (1996).

Where the plaintiff was permanently injured while working on a silage harvesting machine operated by the Department of Correction, and he filed a claim with the Industrial Commission under the Tort Claims Act, his claim was properly dismissed on the grounds that workers' compensation was plaintiff's exclusive remedy. Richardson v. State Dep't of Cor., 118 N.C. App. 704, 457 S.E.2d 325, 1995 N.C. App. LEXIS 377 (1995), cert. granted, 341 N.C. 652, 461 S.E.2d 772 (1995), aff'd, 345 N.C. 128, 478 S.E.2d 501 (1996).

Where deceased was a prisoner who suffered "accidental death arising out of and in the course of the employment to which he had been assigned," his dependents or next of kin were statutorily "entitled" to specific benefits under the exclusive remedy provisions of G.S. 97-10.1, and could not maintain a wrongful death action against defendants under the Tort Claims Act. Blackmon v. North Carolina Dep't of Cors., 118 N.C. App. 666, 457 S.E.2d 306 (1995), aff'd, 343 N.C. 259, 470 S.E.2d 8 (1996).

Working prisoners are excluded from suing in tort for work-related injuries. Richardson v. North Carolina Dep't of Cor., 345 N.C. 128, 478 S.E.2d 501, 1995 N.C. App. LEXIS 377 (1996).

Workers' Compensation Act Sole Remedy. — A prisoner's exclusive remedy for "accidental injury ... arising out of and in the course of the employment to which he had been assigned," whether he is incarcerated or released, as with other employees, arises under the provisions of the Workers' Compensation Act and is the plaintiff's sole remedy. Richardson v. State Dep't of Cor., 118 N.C. App. 704, 457 S.E.2d 325, 1995 N.C. App. LEXIS 377 (1995), cert. granted, 341 N.C. 652, 461 S.E.2d 772 (1995), aff'd, 345 N.C. 128, 478 S.E.2d 501 (1996).

The monetary benefit afforded to plaintiff by subsection (c) entitled her to compensation and G.S. 97-10.1 applied to bar plaintiff's wrongful death action under the Tort Claims Act. Blackmon v. N.C. Dept. Of Correction, 343 N.C. 259, 470 S.E.2d 8 (1996).

Workers' compensation is the exclusive remedy for prisoners injured while working on prison jobs. Richardson v. North Carolina Dep't of Cor., 345 N.C. 128, 478 S.E.2d 501, 1995 N.C. App. LEXIS 377 (1996).

When an inmate is injured while working at his prison job, his exclusive remedy for any injury is a workers' compensation claim, but he must wait until release for a determination of entitlement to such compensation. Vereen v. N.C. Dep't of Corr., 168 N.C. App. 588, 608 S.E.2d 412, 2005 N.C. App. LEXIS 333 (2005).

Work Release Injury. — Workers' compensation claim by prison inmate who was injured while working for a private employer on work release was not barred by statute. Harris v. Thompson Contractors, 148 N.C. App. 472, 558 S.E.2d 894, 2002 N.C. App. LEXIS 26 (2002), aff'd, 356 N.C. 664, 576 S.E.2d 323 (2003).

Burial Expenses. — It was assumed, for the purpose of the case, that this section permits the establishment of a claim for the burial expenses of a prisoner whose death occurred while a prisoner. Lawson v. North Carolina State Hwy. & Pub. Works Comm'n, 248 N.C. 276, 103 S.E.2d 366 (1958).

The payment of burial expenses was not payment of "compensation" under the Workers' Compensation Act so as to make the remedy of the personal representative of such a prisoner under subsection (c) of this section exclusive by virtue of former G.S. 97-10. Ivey v. North Carolina Prison Dep't, 252 N.C. 615, 114 S.E.2d 812 (1960).

§§ 97-14 through 97-16: Repealed by Session Laws 1973, c. 1291, ss. 7-9.

§ 97-17. Settlements allowed in accordance with Article.

(a) This article does not prevent settlements made by and between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this Article. A copy of a settlement agreement shall be filed by the employer with and approved by the Commission. No party to any agreement for compensation approved by the Commission shall deny the truth of the matters contained in the settlement agreement, unless the party is able to show to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Commission may set aside the agreement. Except as provided in this subsection, the decision of the Commission to approve a settlement agreement is final and is not subject to review or collateral attack.

(b) The Commission shall not approve a settlement agreement under this section, unless all of the following conditions are satisfied:

(1) The settlement agreement is deemed by the Commission to be fair and just, and that the interests of all of the parties and of any person, including a health benefit plan that paid medical expenses of the employee have been considered.

(2) The settlement agreement contains a list of all of the known medical expenses of the employee related to the injury to the date of the settlement agreement, including medical expenses that the employer or carrier disputes, and a list of medical expenses, if any, that will be paid by the employer under the settlement agreement.

(3) The settlement agreement contains a finding that the positions of all of the parties to the agreement are reasonable as to the payment of medical expenses.

It is not necessary, however, to satisfy the condition in subdivision (2) of this subsection when in the settlement agreement the employer agrees to pay all medical expenses of the employee related to the injury to the date of the settlement agreement.

(c) In determining whether the positions of all of the parties to the agreement are reasonable as to the payment of medical expenses under subdivision (3) of subsection (b) of this section, the Commission shall consider all of the following:

(1) Whether the employer admitted or reasonably denied the employee's claim for compensation.

(2) The amount of all of the known medical expenses of the employee related to the injury to the date of the settlement agreement, including medical expenses that the employer or carrier disputes.

(3) The need for finality in the litigation.

(d) Nothing in this section shall be construed to limit the application of G.S. 44-49 and G.S. 44-50 to funds in compensation for settlement under this section. (1929, c. 120, s. 18; 1963, c. 436; 2001-216, s. 2; 2001-487, s. 102(b); 2005-448, s. 3.)

Editor's Note. — Session Laws 2003-284, ss. 12.6C(a)-(e), as amended by Session Laws 2004-174, s. 3, and Session Laws 2004-203, s. 77, provides: "(a) The North Carolina Industrial Commission may retain the additional revenue generated by raising the fee charged to parties for the filing of compromised settlements from two hundred dollars ($200.00) to an amount that does not exceed two hundred fifty dollars ($250.00) for the purpose of replacing existing computer hardware and software used for the operations of the Commission. These funds may also be used to prepare any assessment of hardware and software needs prior to purchase. The Commission may not retain any fees for the purpose of computer system replacement unless they are in excess of the current two-hundred-dollar ($200.00) fee charged by the Commission for filing a compromise settlement.

"(b) Nothing in this section shall be deemed to limit or restrict the Commission's authority to increase fees for purposes other than those indicated in subsection (a) of this section.

"(c) Unexpended and unencumbered fees retained by the Industrial Commission under subsection (a) of this section shall not revert to the General Fund on June 30 of each fiscal year, but shall remain available to the Commission for the purposes stated in subsection (a) of this section.

"(d) All plans and purchases by the Commission utilizing fees retained under subsection (a) of this section are subject to project certification by the Information Resources Management Commission, and the Commission in making purchases under subsection (a) of this section must follow the procurement process outlined in accordance with the provisions of 09 NCAC 06B. 0300. The Commission shall report its plans to replace existing computer hardware and software to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division prior to issuing any requests for proposals.

"(e) The Commission may retain additional fees as authorized by subsection (a) of this section until the 2009-2011 fiscal biennium."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Legal Periodicals. — For survey of 1976 case law on workers' compensation, see 55 N.C.L. Rev. 1116 (1977).

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

For article, "Primary Issues in Compensation Litigation," see 17 Campbell L. Rev. 443 (1995).

For note, "The Fairness Requirement for a Workers' Compensation Agreement — The Effect of Vernon v. Steven L. Mabe Builders," see 17 Campbell L. Rev. 521 (1995).

CASE NOTES

The law, by this section, undertakes to protect the rights of the employee in contracting with respect to his injuries. Caudill v. Chatham Mfg. Co., 258 N.C. 99, 128 S.E.2d 128 (1962).

Section Contemplates Only Settlement in Respect of Amount of Compensation. — The only "settlement" contemplated by this section is a settlement in respect of the amount of compensation to which claimants are entitled under the act. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

And Does Not Apply to Compromise and Settlement of Common-Law Claim. — Compromise and settlement of the common-law claim of the administratrix of a deceased employee for the wrongful death of the employee, executed under the mistaken belief that the Workers' Compensation Act was not applicable, would not be disturbed on the ground that the Industrial Commission did not approve such settlement as required by this section. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

Settlement for out-of-the-state injury may be beyond the jurisdiction of the Commission to approve and enforce. See Reaves v. Earle-Chesterfield Mill Co., 216 N.C. 462, 5 S.E.2d 305 (1939).

Agreements as to Distribution of Proceeds. — An agreement, approved by the commission and otherwise valid, between the parties to a workers' compensation claim as to the distribution between them of proceeds recovered from a third party action is binding. Turner v. CECO Corp., 98 N.C. App. 366, 390 S.E.2d 685 (1990).

In order to adjust the amount of a lien upon a recovery against a third party agreed to in a workers' compensation claim settlement approved by the Industrial Commission, the parties must apply to the commission under G.S. 97-17; a party may not use G.S. 97-10.2(j) to avoid a duly executed and commission-approved settlement agreement, and a trial court has no jurisdiction to adjust a lien amount agreed upon in such an agreement. Holden v. Boone, 153 N.C. App. 254, 569 S.E.2d 711, 2002 N.C. App. LEXIS 1119 (2002).

In a workers' compensation case where an employee, employer, and carrier agree in advance as to the disposition of any lien on a recovery against a third party, a carrier's insistence on the agreed-upon lien amount may be viewed as an insistence on receiving the benefit of the bargain previously struck with the employee, and these bargains are committed to the discretion of the Industrial Commission, under G.S. 97-10.1 and G.S. 97-17. Holden v. Boone, 153 N.C. App. 254, 569 S.E.2d 711, 2002 N.C. App. LEXIS 1119 (2002).

An approved compensation agreement is binding on the parties unless and until set aside by the Industrial Commission. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

When Approved by the Commission. — An agreement between the employer and workers' compensation carrier and the employee for the payment of compensation benefits, when approved by the Industrial Commission, is binding on the parties thereto. Buchanan v. Mitchell County, 38 N.C. App. 596, 248 S.E.2d 399 (1978), cert. denied, 296 N.C. 583, 254 S.E.2d 35 (1979).

An agreement for the payment of compensation, when approved by the Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal. Brookover v. Borden, Inc., 100 N.C. App. 754, 398 S.E.2d 604 (1990).

Agreement between worker and employer to pay worker compensation, which is approved by the Industrial Commission, becomes an award of the Commission. Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

Under G.S. 97-17, parties to a workers' compensation claim may submit a settlement agreement to the Industrial Commission for approval, and, if approved by the commission, the agreement is considered binding on the parties involved, and can only be set aside by the Industrial Commission upon a showing of fraud, misrepresentation, undue influence, or mutual mistake; the statute provides that unless a party can make such a showing no party to any agreement for compensation approved by the commission shall deny the truth of the matters contained in the settlement agreement. Holden v. Boone, 153 N.C. App. 254, 569 S.E.2d 711, 2002 N.C. App. LEXIS 1119 (2002).

Where a settlement agreement speaks specifically to the matter of an employer and carrier's lien, and the plaintiff-employee agrees to the lien provision, G.S. 97-17 indicates that the employee is bound by the agreement and only the Industrial Commission has jurisdiction to set it aside. Holden v. Boone, 153 N.C. App. 254, 569 S.E.2d 711, 2002 N.C. App. LEXIS 1119 (2002).

But Is Not Binding If Not Approved. — Agreement for compensation which is signed by the parties but is not approved by the Commission pursuant to this section is not binding. Baldwin v. Piedmont Woodyards, Inc., 58 N.C. App. 602, 293 S.E.2d 814 (1982).

A compromise settlement agreement was void where the plaintiff's insurer, a real party in interest, did not consent and the Industrial Commission had subject matter jurisdiction over its claim. Hansen v. Crystal Ford-Mercury, Inc., 138 N.C. App. 369, 531 S.E.2d 867, 2000 N.C. App. LEXIS 628 (2000).

In approving a settlement agreement the Industrial Commission acts in a judicial capacity and the settlement as approved becomes an award enforceable, if necessary, by a court decree. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

The Industrial Commission's approval of a settlement agreement is as conclusive as if made upon a determination of facts in an adversary proceeding. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

An agreement for the payment of compensation, when approved by the Industrial Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

Effects of Agreement on Burden of Proof. — The Commission erred in concluding that as a matter of law because defendants had the burden of proof to present evidence sufficient to rebut a presumption of continued total disability raised by the Form 21 agreement, and defendants had not met that burden, plaintiff was entitled to a continuing presumption of total disability; plaintiff's later Form 26 agreement with its specific duration superseded the earlier Form 21 agreement, which covered her total disability for an indefinite period, and consequently, she had the burden of rebutting the existing presumption of partial disability through the presentation of evidence supporting total disability. Dancy v. Abbott Labs., 139 N.C. App. 553, 534 S.E.2d 601, 2000 N.C. App. LEXIS 982 (2000), review dismissed, 353 N.C. 370 (2001), aff'd, 353 N.C. 446, 545 S.E.2d 211 (2001).

The presumption is that the Industrial Commission approves compromises only after a full investigation and a determination that the settlement is fair and just. Caudill v. Chatham Mfg. Co., 258 N.C. 99, 128 S.E.2d 128 (1962); Hartsell v. Pickett Cotton Mills, Inc., 4 N.C. App. 67, 165 S.E.2d 792 (1969).

Agreement Nullifying Workers' Compensation Act Not Permitted. — The Industrial Commission has the inherent power, upon application made in due time, to relieve a party from a judicial determination of his rights when the decision is a product of mistake, fraud, or excusable neglect, but this power to prevent injustice by fraud, mistake, or excusable neglect does not extend so far as to permit a nullification of the Workers' Compensation Act by an agreement between a party entitled to receive and a party obligated to pay compensation that they will disregard its provisions. Stanley v. Brown, 261 N.C. 243, 134 S.E.2d 321 (1964).

Commission May Not Set Aside Duly Executed Agreement. — Absent a showing of fraud, misrepresentation, mutual mistake, or undue influence, the Industrial Commission may not set aside a settlement agreement duly executed by the parties, properly submitted to the Industrial Commission for approval, and approved by the Chairman of the Commission in accordance with this section and G.S. 97-82. The fact that defense counsel had attempted to revoke its consent to the agreement after it was submitted to the Commission was immaterial. Glenn v. McDonald's, 109 N.C. App. 45, 425 S.E.2d 727 (1993).

Defendant could not establish the existence of any of the factors listed in this section that would require the Commission to set aside a previously approved I.C. Form 26. Salaam v. North Carolina DOT, 122 N.C. App. 83, 468 S.E.2d 536 (1996), review denied, 345 N.C. 494, 480 S.E.2d 51 (1997).

Agreement May Be Set Aside On Certain Grounds. — An agreement between the employer and workers' compensation carrier and the employee may be set aside when there has been error due to fraud, misrepresentation, undue influence or mutual mistake. Buchanan v. Mitchell County, 38 N.C. App. 596, 248 S.E.2d 399 (1978), cert. denied, 296 N.C. 583, 254 S.E.2d 35 (1979).

The question whether the Industrial Commission has jurisdiction to rescind and set aside settlements and compromise settlements, approved by them, on the ground of mutual mistake of fact, was touched on, but not decided, in Caudill v. Chatham Mfg. Co., 258 N.C. 99, 128 S.E.2d 128 (1962).

Where an employee has received benefits from an agreement for compensation executed by himself, his employer, and the insurance carrier, which agreement was duly approved by the Industrial Commission, he may attack and have such agreement set aside only for fraud, misrepresentation, undue influence, or mutual mistake, and he may not attack it on the ground that the jurisdictional facts therein alleged in regard to the relationship of employer and employee and that the accident arose out of and in the course of the employment were untrue. Tabron v. Gold Leaf Farms, Inc., 269 N.C. 393, 152 S.E.2d 533 (1967).

This statutory provision clearly grants the Industrial Commission the authority to rehear and set aside prior orders approving settlements on any one of the stated grounds, i.e., fraud, misrepresentation, undue influence or mutual mistake. Graham v. City of Hendersonville, 42 N.C. App. 456, 255 S.E.2d 795, cert. denied, 298 N.C. 568, 261 S.E.2d 121 (1979).

Where an employee accepts benefits from an agreement for compensation executed by himself, his employer, and the insurance carrier, which agreement was duly approved by the commission, the employee may attack and have such agreement set aside only for fraud, misrepresentation, undue influence, or mutual mistake. Brookover v. Borden, Inc., 100 N.C. App. 754, 398 S.E.2d 604 (1990).

Mutual mistake justifies voiding a settlement since such settlements are guided by contract principles, but the mistake must be material; the Industrial Commission properly set aside a settlement agreement where it found, by competent evidence, that: (1) the parties entered into the agreement on the mutual mistake of a doctor's faulty diagnosis that the employee had reached his maximum medical improvement, and (2) the parties materially relied on that faulty diagnosis when they entered the contract; the Commission could enter a new award after vacating the settlement. Roberts v. Century Contrs., Inc., 162 N.C. App. 688, 592 S.E.2d 215, 2004 N.C. App. LEXIS 268 (2004).

Setting Aside Award Without Setting Aside Agreement. — An agreement for the payment of compensation is binding on the parties when approved by the Industrial Commission, and therefore where such agreement has been signed and approved by the Commission and an award has been entered thereon, and the Commission has entered an order setting aside the award alone without disturbing the Commission's approval or the agreement of the parties, for fraud, mistake, or misunderstanding, such agreement precludes action at common law. Neal v. Clary, 259 N.C. 163, 130 S.E.2d 39 (1963).

Settlement Agreement Was Not Set Aside on Mutual Mistake Ground. — A worker's compensation settlement agreement was not set aside on the ground that there was mutual mistake of fact even though the Industrial Commission's Advisory Medical Committee reported that the claimant did not have a compensable disease after the settlement was entered into. Mullinax v. Fieldcrest Cannon, Inc., 100 N.C. App. 248, 395 S.E.2d 160 (1990).

The Industrial Commission properly determined that plaintiff, who suffered a back injury and sought to set aside settlement agreement for payment of workers' compensation, was not entitled to have the agreement set aside pursuant to this section on the basis of mutual mistake. Vernon v. Steven L. Mabe Bldrs., 110 N.C. App. 552, 430 S.E.2d 676, rev'd in part, petition for discretionary review improvidently granted in part, 336 N.C. 425, 444 S.E.2d 191 (1994).

The doctrines of mutual mistake, misrepresentation, and fraud did not operate to entitle the employer to relief from a compensation award, where the award was not based on an agreement of the parties but on the defendant's unilateral initiation of payment of compensation and its subsequent failure to contest the claim under G.S. 97-18. Higgins v. Michael Powell Bldrs., 132 N.C. App. 720, 515 S.E.2d 17 (1999).

Modification of Award by Commission Not Subject to Collateral Attack. — The action by the Industrial Commission in modifying an award pursuant to this section is a quasi-judicial act which cannot be collaterally attacked in an independent action. In the absence of a direct appeal, the modified order of the Industrial Commission is conclusively presumed to be correct and cannot be collaterally attacked. Travelers Ins. Co. v. Rushing, 36 N.C. App. 226, 243 S.E.2d 420 (1978).

Where the mistake relied on to set aside a release related only to the consequences of a known injury, and uncertainties in this regard were the subject matter of the compromise settlement, the mistake was not such as to warrant a court of equity in setting aside a release executed pursuant to a settlement approved by the Industrial Commission under this section. Caudill v. Chatham Mfg. Co., 258 N.C. 99, 128 S.E.2d 128 (1962).

Timeliness of Payment. — Where a 2001 amendment to G.S. 97-17(a) shortened the time for payment of a settlement agreement to 24 days, and a payment by an employer and its insurance carrier was made 36 days after court approval of the agreement, the employee was entitled to a late payment penalty under G.S. 97-18(g). Carroll v. Living Ctrs. Southeast, Inc., 157 N.C. App. 116, 577 S.E.2d 925, 2003 N.C.

App. LEXIS 379 (2003), cert. denied, 357 N.C. 249, 582 S.E.2d 29 (2003).

Employer's Mistaken Representation Agreement Was a "Proper One." — Where documents, stipulations and findings indisputably showed that the parties and Commission acted upon defendant employer's mistaken representation that the original compensation agreement was a "proper one," and since the mistake benefited its initiator to the detriment of the misinformed, acquiescent plaintiff, fundamental equitable principles required that the mistake not be perpetuated. Cockrell v. Evans Lumber Co., 103 N.C. App. 359, 407 S.E.2d 248 (1991).

The Commission's conclusion that there was no evidence to show causation was not a basis for denying plaintiff's award in a case of admitted liability. Lucas v. Thomas Built Buses, Inc., 88 N.C. App. 587, 364 S.E.2d 147 (1988).

Releases by employers to obtain relief from the obligations created under the Workers' Compensation Act do not bar a retaliatory discharge claim under former G.S. 97-6.1. Tellado v. Ti-Caro Corp., 119 N.C. App. 529, 459 S.E.2d 27 (1995).

Payment of Costs and Attorneys Fees. — The Industrial Commission erred in ordering that defendant's costs and attorney's fees be paid by plaintiff's counsel. Evans v. Young-Hinkle Corp., 123 N.C. App. 693, 474 S.E.2d 152 (1996), cert. denied, 346 N.C. 177, 486 S.E.2d 203 (1997).

The determination of the plaintiff's 'average weekly wages' requires application of § 97-2(5) and case law and thus raises an issue of law; thus, any mistake made by either of the parties is not a basis for setting the agreement aside. Swain v. C & N Evans Trucking Co., 126 N.C. App. 332, 484 S.E.2d 845 (1997).

Action Not Barred. — Where plaintiffs alleged injuries beyond the mere loss of workers' compensation benefits, including emotional distress and punitive damages now provided for by this section, this section was not an effective remedy for the additional injuries; thus, the exclusive remedy doctrine did not apply to bar plaintiff's civil action. Johnson v. First Union Corp., 128 N.C. App. 450, 496 S.E.2d 1 (1998).

Jurisdiction of Commission after Settlement. — Because the Industrial Commission, pursuant to this article, has sole jurisdiction over the plaintiff worker's allegations, after settlement, that defendants committed fraud, bad faith, unfair and deceptive trade practices, intentional infliction of emotional distress and civil conspiracy during the handling of his workers' compensation claim, the trial court properly dismissed the post-settlement claim pursuant to G.S. 1A-1-12(b). Deem v. Treadaway & Sons Painting & Wallcovering, Inc., 142 N.C. App. 472, 543 S.E.2d 209, 2001 N.C. App. LEXIS 141 (2001).

No Determination of Whether Agreement Was Fair and Just. — North Carolina Industrial Commission erred by failing to undertake a full investigation to determine if the settlement agreement was fair and just, as required by G.S. 97-17 and G.S. 97-82; determination that there was insufficient evidence to justify setting aside the settlement agreements was not supported by competent evidence. Smythe v. Waffle House, 170 N.C. App. 361, 612 S.E.2d 345, 2005 N.C. App. LEXIS 999 (2005), cert. denied, 360 N.C. 66, 621 S.E.2d 876 (2005).

Findings of Fact and Conclusions of Law on Remand. — North Carolina Industrial Commission did not err by vacating an order approving a settlement agreement on remand and then awarding full disability benefits effective to the date of the approval of the settlement agreement, without making findings of fact or conclusions of law to support the award, as the commission's conclusions of law were merely a formalization of the appellate court's conclusions of law so that independent fact-finding and conclusions of law were inappropriate. Smythe v. Waffle House, — N.C. App. —, 643 S.E.2d 407, 2007 N.C. App. LEXIS 807 (2007).

Applied in Williams v. Insurance Repair Specialists of N.C., Inc., 32 N.C. App. 235, 232 S.E.2d 5 (1977); Little v. Anson County Schools Food Serv., 295 N.C. 527, 246 S.E.2d 743 (1978); Roberts v. Carolina Tables of Hickory, 76 N.C. App. 148, 331 S.E.2d 757 (1985); Saunders v. Edenton Ob/Gyn Ctr., 352 N.C. 136, 530 S.E.2d 62, 2000 N.C. LEXIS 439 (2000); Morris v. L.G. Dewitt Trucking, Inc., 143 N.C. App. 339, 545 S.E.2d 474, 2001 N.C. App. LEXIS 271 (2001).

Cited in Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968); Wall v. North Carolina Dep't of Human Resources, 99 N.C. App. 330, 393 S.E.2d 109 (1990); Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996); McAninch v. Buncombe County Sch., 347 N.C. 126, 489 S.E.2d 375 (1997); Felmet v. Duke Power Co., 131 N.C. App. 87, 504 S.E.2d 815 (1998); Foster v. Carolina Marble & Tile Co., 132 N.C. App. 505, 513 S.E.2d 75, 1999 N.C. App. LEXIS 202 (1999), cert. denied, 350 N.C. 830, 537 S.E.2d 822 (1999); Atkins v. Kelly Springfield Tire Co., 154 N.C. App. 512, 571 S.E.2d 865, 2002 N.C. App. LEXIS 1443 (2002), cert. granted, 357 N.C. 61, 579 S.E.2d 284 (2003) (decided prior to 2005 amendment to this section); Lee v. Wake County, 165 N.C. App. 154, 598 S.E.2d 427, 2004 N.C. App. LEXIS 1148 (2004), cert. denied, 359 N.C. 190, 607 S.E.2d 275 (2004);

Morrison v. Public Serv. Co. of N.C., Inc., — N.C. App. —, 643 S.E.2d 58, 2007 N.C. App. LEXIS 783 (2007).

§ 97-18. Prompt payment of compensation required; installments; payment without prejudice; notice to Commission; penalties.

(a) Compensation under this Article shall be paid periodically, promptly and directly to the person entitled thereto unless otherwise specifically provided.

(b) When the employer or insurer admits the employee's right to compensation, the first installment of compensation payable by the employer shall become due on the fourteenth day after the employer has written or actual notice of the injury or death, on which date all compensation then due shall be paid. Compensation thereafter shall be paid in installments weekly except where the Commission determines that payment in installments should be made monthly or at some other period. Upon paying the first installment of compensation and upon suspending, reinstating, changing, or modifying such compensation for any cause, the insurer shall immediately notify the Commission, on a form prescribed by the Commission, that compensation has begun, or has been suspended, reinstated, changed, or modified. A copy of each notice shall be provided to the employee. The first notice of payment to the Commission shall contain the date and nature of the injury, the average weekly wages of the employee, the weekly compensation rate, the date the disability resulting from the injury began, and the date compensation commenced.

(c) If the employer or insurer denies the employee's right to compensation, the employer or insurer shall notify the Commission, on or before the fourteenth day after it has written or actual notice of the injury or death, or within such reasonable additional time as the Commission may allow, and advise the employee in writing of its refusal to pay compensation on a form prescribed by the Commission. This notification shall (i) include the name of the employee, the name of the employer, the date of the alleged injury or death, the insurer on the risk, if any, and a detailed statement of the grounds upon which the right to compensation is denied, and (ii) advise the employee of the employee's right to request a hearing pursuant to G.S. 97-83. If the employer or insurer, in good faith, is without sufficient information to admit the employee's right to compensation, the employer or insurer may deny the employee's right to compensation.

(d) In any claim for compensation in which the employer or insurer is uncertain on reasonable grounds whether the claim is compensable or whether it has liability for the claim under this Article, the employer or insurer may initiate compensation payments without prejudice and without admitting liability. The initial payment shall be accompanied by a form prescribed by and filed with the Commission, stating that the payments are being made without prejudice. Payments made pursuant to this subsection may continue until the employer or insurer contests or accepts liability for the claim or 90 days from the date the employer has written or actual notice of the injury or death, whichever occurs first, unless an extension is granted pursuant to this section. Prior to the expiration of the 90-day period, the employer or insurer may upon reasonable grounds apply to the Commission for an extension of not more than 30 days. The initiation of payment does not affect the right of the employer or insurer to continue to investigate or deny the compensability of the claim or its liability therefor during this period. If at any time during the 90-day period or extension thereof, the employer or insurer contests the compensability of the claim or its liability therefor, it may suspend payment of compensation and shall promptly notify the Commission and the employee on a form prescribed by the Commission. The employer or insurer must provide on the prescribed form a detailed statement of its grounds for denying compensability of the claim or its liability therefor. If the employer or insurer does not contest the compensability of the claim or its liability therefor within 90 days from the date it first has written or actual notice of the injury or death, or within such additional period as may be granted by the Commission, it waives the right to contest the compensability of and its liability for the claim under this Article. However, the employer or insurer may contest the compensability of or its liability for the claim after the 90-day period or extension thereof when it can show that material evidence was discovered after that period that could not have been reasonably discovered earlier, in which event the employer or insurer may terminate or suspend compensation subject to the provisions of G.S. 97-18.1.

(e) The first installment of compensation payable under the terms of an award by the Commission, or under the terms of a judgment of the court upon an appeal from such an award, shall become due 10 days from the day following expiration of the time for appeal from the award or judgment or the day after notice waiving the right of appeal by all parties has been received by the Commission, whichever is sooner. Thereafter compensation shall be paid in installments weekly, except where the Commission determines that payment in installments shall be made monthly or in some other manner.

(f) The employer's or insurer's grounds for contesting the employee's claim or its liability therefor as specified in the notice suspending compensation under subsection (d) of this section are the only bases for the employer's or insurer's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered material evidence that could not reasonably have been discovered prior to the notice suspending compensation.

(g) If any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(h) Within 16 days after final payment of compensation has been made, the employer or insurer shall send to the Commission and the employee a notice, in accordance with a form prescribed by the Commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer or insurer fails to so notify the Commission or the employee within such time, the Commission shall assess against such employer or insurer a civil penalty in the amount of twenty-five dollars ($25.00). The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(i) If any bill for services rendered under G.S. 97-25 by any provider of health care is not paid within 60 days after it has been approved by the Commission and returned to the responsible party, or within 60 days after it was properly submitted, in accordance with the provisions of this Article, to an insurer or managed care organization responsible for direct reimbursement pursuant to G.S. 97-26(g), there shall be added to such unpaid bill an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such medical bill, unless such late payment is excused by the Commission.

(j) The employer or insurer shall promptly investigate each injury reported or known to the employer and at the earliest practicable time shall admit or deny the employee's right to compensation or commence payment of compensation as provided in subsections (b), (c), or (d) of this section. When an employee files a claim for compensation with the Commission, the Commission may order reasonable sanctions against an employer or insurer which does not, within 30 days following notice from the Commission of the filing of a claim, or within such reasonable additional time as the Commission may allow, do one of the following:

(1) Notify the Commission and the employee in writing that it is admitting the employee's right to compensation and, if applicable, satisfy the requirements for payment of compensation under subsection (b) of this section.

(2) Notify the Commission and the employee that it denies the employee's right to compensation consistent with subsection (c) of this section.

(3) Initiate payments without prejudice and without liability and satisfy the requirements of subsection (d) of this section.

For purposes of this subsection, reasonable sanctions shall not prohibit the employer or insurer from contesting the compensability of or its liability for the claim. (1929, c. 120, s. 181/2; 1967, c. 1229, s. 2; 1979, c. 249, ss. 1, 2; c. 599; 1993 (Reg. Sess., 1994), c. 679, s. 3.1; 1998-215, s. 114; 2005-448, s. 4; 2006-264, s. 91.7.)

Effect of Amendments. — Session Laws 2006-264, s. 91.7, effective August 27, 2006, added the last sentence of subsection (c) and deleted "deny the claim in good faith or" following "the employer or insurer may" in the first sentence of subsection (d).

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

For a survey of 1996 developments in the law regarding prisoner rights, see 75 N.C.L. Rev. 2428 (1997).

CASE NOTES

Payment of Settlement Award. — To calculate the date a compromise settlement award becomes due under the Workers' Compensation Act, a party must: (1) allow the 15 day appeal time of G.S. 97-85; (2) then add ten days pursuant to subsection (e) of this section; and (3) finally, add 14 days as required under subsection (g) of this section; thus, a paying party liable under a compromise settlement has 39 days from the date the compromise settlement is approved to tender payment, with liability for non-payment attaching on the fortieth day. Felmet v. Duke Power Co., 131 N.C. App. 87, 504 S.E.2d 815 (1998).

Notice of Final Payment to Employee Not Required by Section. — This section does not require that the employer provide a copy of notice of final payment, Form 28B, to the employee, and no such requirement is found in any of the other provisions of this Chapter. Willis v. J.M. Davis Indus., Inc., 280 N.C. 709, 186 S.E.2d 913 (1972).

Employee Has No Remedy for Employer's Failure to File a Form 28B under This Section. — The plain language of this section provides a remedy only to the Commission, not to the plaintiff employee, for the defendant employer's failure to comply with its express provisions. Hunter v. Perquimans County Bd. of Educ., 139 N.C. App. 352, 533 S.E.2d 562, 2000 N.C. App. LEXIS 902 (2000), cert. denied, 352 N.C. 674, 545 S.E.2d 424 (2000).

But Commission Rule XI (5) Requires Notice of Final Payment. — Rule XI (5) provides that employers will send a copy of Form 28B to the claimant within 16 days after his last payment of compensation. Willis v. J.M. Davis Indus., Inc., 280 N.C. 709, 186 S.E.2d 913 (1972).

Commission Rule XI (5) Conformed to This Section. — Industrial Commission Rule XI (5), adopted pursuant to the authority granted in G.S. 97-80, conformed to subsection (f) of this section insofar as the time of sending Form 28B is concerned. Willis v. J.M. Davis Indus., Inc., 280 N.C. 709, 186 S.E.2d 913 (1972).

Award of the Commission. — The employer's execution of Industrial Commission Form 60 constitutes an award of the Commission and thus entitles the employee to seek the imposition of a judgment, which in turn entitles him to seek execution for past due installments and future installments as they become due. Calhoun v. Wayne Dennis Heating & Air Conditioning, 129 N.C. App. 794, 501 S.E.2d 346 (1998).

Modification of Award Prior to Filing of Closing Receipt. — A closing receipt, also called I.C. Form 28B, must be filed with the Commission. Until it is filed with and approved by the Commission, the Commission may continue to receive evidence and modify or add to a preliminary compensation award. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1 (1986), aff'd in part, rev'd in part, 319 N.C. 167, 353 S.E.2d 392 (1987).

Determination of Final Payment. — For purposes of G.S. 97-47, the statutory one-year period for filing a claim for a change of condition begins at the time final payment is accepted, not when I.C. Form 28B is filed. Nonetheless, the Commission must be given the opportunity to determine whether a payment labeled "final" is or should be, in fact, the final payment. After this determination is made, the Commission accepts and approves a copy of Form 28B. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1 (1986), aff'd in part, rev'd in part, 319 N.C. 167, 353 S.E.2d 392 (1987).

Settlement proceeds are not "wages" as a matter of law. Allmon v. Alcatel, Inc., 124 N.C. App. 341, 477 S.E.2d 90 (1996).

The settlement of a claim for federal civil rights violations is not, nor was it intended to be, a substitute for workers' compensation benefits; the settlement agreement clearly reserved all rights to remedies available to plaintiff under the Workers' Compensation Act. Allmon v. Alcatel, Inc., 124 N.C. App. 341, 477 S.E.2d 90 (1996).

Penalties. — Competent evidence supported the Industrial Commission's decision to assess a 10% penalty for late payments, where the employer wrongfully terminated its employee's workers' compensation payments without Commission approval. Tucker v. Workable Co., 129 N.C. App. 695, 501 S.E.2d 360 (1998).

Injured employee was entitled to 10% penalty the North Carolina Industrial Commission assessed against his employer's insurance carrier for late payment of undisputed medical expenses. Stevenson v. Noel Williams Masonry, Inc., 148 N.C. App. 90, 557 S.E.2d 554, 2001 N.C. App. LEXIS 1268 (2001).

Where a 2001 amendment to G.S. 97-17(a) shortened the time for payment of a settlement agreement to 24 days, and a payment by an employer and its insurance carrier was made 36 days after court approval of the agreement, the employee was entitled to a late payment penalty under G.S. 97-18(g). Carroll v. Living Ctrs. Southeast, Inc., 157 N.C. App. 116, 577 S.E.2d 925, 2003 N.C. App. LEXIS 379 (2003), cert. denied, 357 N.C. 249, 582 S.E.2d 29 (2003).

Calculation of time period for making payment. — Plaintiff was not entitled to a 10-percent late payment penalty pursuant to G.S. 97-18, because defendants tendered settlement payments owed to plaintiff by placing the payments in the mail to plaintiff within the 24-day time period provided by the statute. Morrison v. Public Serv. Co. of N.C., Inc., — N.C. App. —, 643 S.E.2d 58, 2007 N.C. App. LEXIS 783 (2007).

Stubborn and Unfounded Litigiousness. — Workers' compensation claimant was entitled to attorney fees under G.S. 97-88.1 for the time spent responding to an employer's Forms 61 and 63, but not for the time spent responding to the claims that her subsequent surgeries were due to pre-existing conditions, as when the employer filed a Form 63 under G.S. 97-18(d), it was still gathering information and had no evidence contradicting the claimant's application. Bradley v. Mission St. Joseph's Health Sys., — N.C. App. —, 638 S.E.2d 254, 2006 N.C. App. LEXIS 2501 (2006).

Standard for Relief on the Ground of Newly Discovered Evidence. — The standard for providing relief on the ground of newly discovered evidence requires that the evidence be new, i.e., available only after the initial hearing, and that the party seeking relief show that, when the award was entered, evidence material to the case existed that he did not learn about, through due diligence, until later. Higgins v. Michael Powell Bldrs., 132 N.C. App. 720, 515 S.E.2d 17 (1999).

Findings on Issue of Newly Discovered Evidence Required. — Where employer who was paying benefits to employee for an occupational disease based on exposure to harmful materials sought to contest its liability after the 90 day period for contesting benefits under G.S. 97-18(d) had expired, based on the fact that after leaving its employ the employee had worked for another employer where he was exposed to the same harmful materials, the Commission had the obligation to make findings as to whether the employee's subsequent exposure was newly discovered evidence allowing the employer to contest the payment of benefits after 90 days, under G.S. 97-18(d). Shockley v. Cairn Studios Ltd., 149 N.C. App. 961, 563 S.E.2d 207, 2002 N.C. App. LEXIS 363 (2002), cert. dismissed, 356 N.C. 678, 577 S.E.2d 887 (2003), cert. denied, 356 N.C. 678, 577 S.E.2d 888 (2003).

When Doctrines of Mutual Mistake, Misrepresentation, and Fraud Not Applicable. — The doctrines of mutual mistake, misrepresentation, and fraud did not operate to entitle the employer to relief from a compensation award, where the award was not based on an agreement of the parties but on the defendant's unilateral initiation of payment of compensation and its subsequent failure to contest the claim under this section. Higgins v. Michael Powell Bldrs., 132 N.C. App. 720, 515 S.E.2d 17 (1999).

Plaintiff Must Follow Proper Procedure to Preserve Issues in This Section on Appeal. — Plaintiff's attempt to argue that the Commission erred both in concluding that the defendant insurer's policy did not cover plaintiff's North Carolina injuries, and in failing to assess a 10% late payment penalty against defendant pursuant to this section failed because he did not file a cross-appeal and because neither of his cross-assignments of error, if sustained, would provide an alternative basis for upholding the Commission's order and award, as outlined in N.C.R. App. P., Rule 10(d). Harrison v. Tobacco Transp., Inc., 139 N.C. App. 561, 533 S.E.2d 871, 2000 N.C. App. LEXIS 996 (2000), cert. denied, 353 N.C. 263, 546 S.E.2d 96 (2000).

Waiver of Right to Contest Compensability of Injuries. — Defendants waived their right to contest the compensability of claimant's injuries, and thus, the award of compensation became final; even though the defendants knew that claimant might have been a subcontractor on the day of the accident, they did not investigate the claimant's status within the prescribed time. Higgins v. Michael Powell Bldrs., 132 N.C. App. 720, 515 S.E.2d 17 (1999).

Timeliness of Payment. — The Industrial Commission properly denied the plaintiff's petition for an order requiring the defendant to pay a 10% penalty under this section where defendant's payment was received on the fortieth day after the defendant received the order from the Commission approving the settlement agreement and where the thirty-ninth day was a Sunday. Morris v. L.G. Dewitt Trucking, Inc., 143 N.C. App. 339, 545 S.E.2d 474, 2001 N.C. App. LEXIS 271 (2001).

Sanctions Were Proper. — The Commission did not act arbitrarily or abuse its discretion in imposing sanctions of $2,500 on defendant employer who unilaterally terminated the benefits of plaintiff employee, who was robbed at gunpoint and shot during his shift as a night auditor, where nothing in the record supported defendant's speculation that the assault might have been personally motivated and where the employer filed a Form 63 (paying compensation "without prejudice and without admitting liability"), instead of Form 21 (admitting compensability), and thus avoided the necessity of filing Form 24 and having to seek permission of the Commission to stop weekly compensation payments; if an employer or insurer initially believes that a claim may not be compensable and utilizes the Form 63 procedure, and then discovers after investigation that the claim is clearly compensable, the better practice is to promptly file either Form 21 or Form 60. Shah v. Johnson, 140 N.C. App. 58, 535 S.E.2d 577, 2000 N.C. App. LEXIS 1089 (2000).

Where the Full Commission concluded that an employer's refusal to comply with its order to reinstate temporary partial disability compensation to the employee and the employer's denial of psychological treatment were made without any reasonable basis, Commission's conclusion that the employer's refusals were based on unfounded litigiousness was based on sufficient evidence such that its decision to award reasonable attorney's fees was appropriate. Haley v. ABB, Inc., 174 N.C. App. 469, 621 S.E.2d 180, 2005 N.C. App. LEXIS 2496 (2005).

Sanctions were not proper where nonpayment was excused because defendant could not comply with the Industrial Commission's order that payments be made only to a general guardian. Valles de Portillo v. D.H. Griffin Wrecking Co., 134 N.C. App. 714, 518 S.E.2d 555, 1999 N.C. App. LEXIS 904 (1999), cert. denied, 351 N.C. 186, 541 S.E.2d 727 (1999).

Form 60 does not carry with it the same presumption of continuing disability as Form 21; the burden of proving disability, therefore, remains with the employee. Sims v. Charmes/Arby's Roast Beef, 142 N.C. App. 154, 542 S.E.2d 277, 2001 N.C. App. LEXIS 46 (2001), cert. denied, 353 N.C. 729, 550 S.E.2d 782 (2001).

Failure to Use Form 60. — Where employer's letter, which it claimed was a sufficient substitute for Form 60, was untimely and did not contain the information required by Form 60, and defendants never rescinded their Form 61 denying the employee's claim, the employer failed to admit liability prior to the hearing and thus could not direct the employee's medical treatment. Bailey v. W. Staff Servs., 151 N.C. App. 356, 566 S.E.2d 509, 2002 N.C. App. LEXIS 747 (2002).

Failure to Address Estoppel Issues. — North Carolina Industrial Commission was required to make findings as to specific facts upon which the right to compensation depended, including the issue of estoppel; where the commission failed to address an employee's claim that the employer's failure to contest his claim estopped its later denial of the claim, the case was remanded for further proceedings. Lewis v. Beachview Exxon Serv., 174 N.C. App. 179, 619 S.E.2d 881, 2005 N.C. App. LEXIS 2248 (2005), rev's in part, review improvidently granted, remanded, 360 N.C. 469, 629 S.E.2d 152 (2006) (rev'd as to question of estoppel).

Termination of Benefits Paid Without Prejudice Improper. — Application to terminate temporary total disability benefits paid without prejudice was improperly granted because an employer and its insurer were unable to establish that an employee's refusal to return to a heavy duty job after a severe neck injury was unjustified. Guerrero v. Brodie Contrs., Inc., 158 N.C. App. 678, 582 S.E.2d 346, 2003 N.C. App. LEXIS 1226 (2003).

Termination of Benefits Proper. — Employer's decision to deny a claim for workers' compensation benefits after initially paying was permitted under G.S. 97-18; the reasons given, such as credibility and causation, were sufficient to apprise the employee of the employer's arguments. Singletary v. N.C. Baptist Hosp., 174 N.C. App. 147, 619 S.E.2d 888, 2005 N.C. App. LEXIS 2303 (2005).

Applied in Hyatt v. Waverly Mills, 56 N.C. App. 14, 286 S.E.2d 837 (1982); Forrest v. Pitt County Bd. of Educ., 100 N.C. App. 119, 394 S.E.2d 659 (1990); Hieb v. Howell's Child Care Ctr., Inc., 123 N.C. App. 61, 472 S.E.2d 208 (1996); Kanipe v. Lane Upholstery, 141 N.C. App. 620, 540 S.E.2d 785, 2000 N.C. App. LEXIS 1302 (2000); Bostick v. Kinston-Neuse Corp., 145 N.C. App. 102, 549 S.E.2d 558, 2001 N.C. App. LEXIS 545 (2001); Barbour v. Regis Corp., 167 N.C. App. 449, 606 S.E.2d 119, 2004 N.C. App. LEXIS 2336 (2004); Smith v. Richardson Sports Ltd., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 908 (May 3, 2005).

Cited in Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971); Moretz v. Richards & Assocs., 316 N.C. 539, 342 S.E.2d 844 (1986); Foster v. Western-Electric Co., 320 N.C. 113, 357 S.E.2d 670 (1987); Plummer v. Henderson Storage Co., 118 N.C. App. 727, 456 S.E.2d 886 (1995); Wall v. Macfield/Unifi, 131 N.C. App. 863, 509 S.E.2d 798 (1998); Olivares-Juarez v. Showell Farms, 138 N.C. App. 663, 532 S.E.2d 198, 2000 N.C. App. LEXIS 785 (2000); Watts v. Hemlock Homes of the Highlands, Inc., 141 N.C. App. 725, 544 S.E.2d 1, 2001 N.C. App. LEXIS 22 (2001), cert. denied, 353 N.C. 398, 547 S.E.2d 431 (2001); Devlin v. Apple Gold, Inc., 153 N.C. App. 442, 570 S.E.2d 257, 2002 N.C. App. LEXIS 1187 (2002); Palmer v. Jackson, 157 N.C. App. 625, 579 S.E.2d 901, 2003 N.C. App. LEXIS 930 (2003); Smith v. Richardson Sports Ltd. Partners, 168 N.C. App. 410, 608 S.E.2d 342, 2005 N.C. App. LEXIS 348 (2005); Smith v. Richardson Sports Ltd. Partners, 172 N.C. App. 200, 616 S.E.2d 245, 2005 N.C. App. LEXIS 1440 (2005), cert. denied, 360 N.C. 536, 633 S.E.2d 824 (2006), cert. dismissed, 360 N.C. 536, 633 S.E.2d 824 (2006); Perez v. Am. Airlines/AMR Corp., 174 N.C. App. 128, 620 S.E.2d 288, 2005 N.C. App. LEXIS 2304 (2005); Mayfield v. Parker Hannifin, 174 N.C. App. 386, 621 S.E.2d 243, 2005 N.C. App. LEXIS 2472 (2005).

§ 97-18.1. Termination or suspension of compensation benefits.

(a) Payments of compensation pursuant to an award of the Commission shall continue until the terms of the award have been fully satisfied.

(b) An employer may terminate payment of compensation for total disability being paid pursuant to G.S. 97-29 when the employee has returned to work for the same or a different employer, subject to the provisions of G.S. 97-32.1, or when the employer contests a claim pursuant to G.S. 97-18(d) within the time allowed thereunder. The employer shall promptly notify the Commission and the employee, on a form prescribed by the Commission, of the termination of compensation and the availability of trial return to work and additional compensation due the employee for any partial disability.

(c) An employer seeking to terminate or suspend compensation being paid pursuant to G.S. 97-29 for a reason other than those specified in subsection (b) of this section shall notify the employee and the employee's attorney of record in writing of its intent to do so on a form prescribed by the Commission. A copy of the notice shall be filed with the Commission. This form shall contain the reasons for the proposed termination or suspension of compensation, be supported by available documentation, and inform the employee of the employee's right to contest the termination or suspension by filing an objection in writing with the Commission within 14 days of the date the employer's notice is filed with the Commission or within such additional reasonable time as the Commission may allow.

(d) If the employee fails to object to the employer's notice of proposed termination or suspension within the time provided, the Commission may enter an appropriate order terminating or suspending the compensation if it finds that there is a sufficient basis under this Article for this action. If the employee files a timely objection to the employer's notice, the Commission shall conduct an informal hearing by telephone with the parties or their counsel. If either party objects to conducting the hearing by telephone, the Commission may conduct the hearing in person in Raleigh or at another location selected by the Commission. The parties shall be afforded an opportunity to state their position and to submit documentary evidence at the informal hearing. The employer may waive the right to an informal hearing and proceed to the formal hearing. The informal hearing, whether by telephone or in person, shall be conducted only on the issue of termination or suspension of compensation and shall be conducted within 25 days of the receipt by the Commission of the employer's notice to the employee unless this time is extended by the Commission for good cause. The Commission shall issue a decision on the employer's application for termination of compensation within five days after completion of the informal hearing. The decision shall (i) approve the application, (ii) disapprove the application, or (iii) state that the Commission is unable to reach a decision on the application in an informal hearing, in which event the Commission shall schedule a formal hearing pursuant to G.S. 97-83 on the employer's application for termination of compensation. Compensation may be terminated or suspended by the employer following an informal hearing only if its application is approved. If the Commission was unable to reach a decision in the informal hearing, the employee's compensation shall continue pending a decision by the Commission in the formal hearing. The Commission's decision in the informal hearing is not binding in subsequent hearings.

The employer or the employee may request a formal hearing pursuant to G.S. 97-83 on the Commission's decision approving or denying the employer's application for termination of compensation. A formal hearing under G.S. 97-83 ordered or requested pursuant to this section shall be a hearing de novo on the employer's application for termination or suspension of compensation and may be scheduled by the Commission on a preemptive basis.

(e) At an informal hearing on the issue of termination or suspension of compensation, and at any subsequent hearing, the Commission may address related issues regarding the selection of medical providers or treatment under G.S. 97-25, subject to exhaustion of the dispute resolution procedures of a managed care organization pursuant to G.S. 97-25.2. (1993 (Reg. Sess., 1994), c. 679, ss. 3.6, 10.9.)

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Formal Hearing. — Under this section, the employee may request a formal hearing de novo if benefits are suspended following an informal hearing by telephone. Bryant v. Weyerhaeuser Co., 130 N.C. App. 135, 502 S.E.2d 58, 1998 N.C. App. LEXIS 836 (1998), cert. denied, 349 N.C. 228, 515 S.E.2d 700 (1998).

The employer should file a Form 24 when the employer is uncertain whether the employee has returned to work; a Form 28T is to be used by the employer only when such employer is certain that the employee has returned to work and has conclusive evidence to establish the employment. Lewis v. Sonoco Prods. Co., 137 N.C. App. 61, 526 S.E.2d 671, 2000 N.C. App. LEXIS 257 (2000).

Return to Work Assertion Does Not Necessarily Raise Wage Earning Capacity Issue. — Where defendants did not assert any other reason for termination of plaintiff's benefits besides "return to work" on the Form 28T, the record revealed that the plaintiff denied that she ever attempted a "trial return to work" and that she, therefore, was not required to file a Form 28U, and it was undisputed that defendants did not file a Form 24 seeking to terminate plaintiff's compensation on grounds other than plaintiff's "return to work", the only issue before the Full Commission was whether or not plaintiff had returned to work, warranting termination of benefits pursuant to this section; thus it did not consider the issue of whether or not plaintiff had wage earning capacity and neither would the Court of Appeals. Lewis v. Sonoco Prods. Co., 137 N.C. App. 61, 526 S.E.2d 671, 2000 N.C. App. LEXIS 257 (2000).

Plaintiff employee's benefits should not have been terminated under this section, pursuant to defendants' Form 28T request, where competent evidence supported the finding that while plaintiff engaged in intermittent mowing activities and appeared once before a Board of Adjustment on behalf of her mother, she had not returned to either full or part-time employment. Lewis v. Sonoco Prods. Co., 137 N.C. App. 61, 526 S.E.2d 671, 2000 N.C. App. LEXIS 257 (2000).

§ 97-19. Liability of principal contractors; certificate that subcontractor has complied with law; right to recover compensation of those who would have been liable; order of liability.

Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by a workers' compensation insurance carrier, or a certificate of compliance issued by the Department of Insurance to a self-insured subcontractor, stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable, irrespective of whether such subcontractor has regularly in service fewer than three employees in the same business within this State, to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract. If the principal contractor, intermediate contractor or subcontractor shall obtain such certificate at the time of subletting such contract to subcontractor, he shall not thereafter be held liable to any employee of such subcontractor for compensation or other benefits under this Article.

Any principal contractor, intermediate contractor, or subcontractor paying compensation or other benefits under this Article, under the foregoing provisions of this section, may recover the amount so paid from any person, persons, or corporation who independently of such provision, would have been liable for the payment thereof.

Every claim filed with the Industrial Commission under this section shall be instituted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer.

The principal or owner may insure any or all of his contractors and their employees in a blanket policy, and when so insured such contractor's employees will be entitled to compensation benefits regardless of whether the relationship of employer and employee exists between the principal and the contractor. (1929, c. 120, s. 19; 1941, c. 358, s. 1; 1945, c. 766; 1973, c. 1291, s. 10; 1979, c. 247, s. 2; 1987, c. 729, s. 4; 1989, c. 637; 1991, c. 703, s. 7; 1993 (Reg. Sess., 1994), c. 679, s. 10.6; 1995, c. 517, s. 36; 1995 (Reg. Sess., 1996), c. 555, s. 1.)

Cross References. — For definitions under this article, see G.S. 97-2.

Legal Periodicals. — For note as to rights of employees of subcontractors against owners and principal contractors, see 35 N.C.L. Rev. 569 (1957).

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Editor's Note. — *Many of the annotations under this section were decided prior to the 1987 amendment, which increased the scope of liability under this section.*

Purpose of Section. — The manifest purpose of this section, enacted as an amendment to the original act, is to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on principal contractors, intermediate contractors, or subcontractors, who, presumably being financially responsible, have it within their power, in choosing subcontractors, to pass upon their financial responsibility and insist upon appropriate compensation protection for their workers. It is also the obvious aim of the statute to forestall evasion of the act by those who might be tempted to subdivide their regular operations with the workers, thus relegating them for compensation protection to small subcontractors, who fail to carry, or if small enough may not even be required to carry, compensation insurance. Greene v. Spivey, 236 N.C. 435, 73 S.E.2d 488 (1952).

This section was enacted by the Legislature to deliberately bring specific categories of conceded nonemployees within the coverage of the Act for the purpose of protecting such workers from financially irresponsible sub-contractors who do not carry workmen's compensation insurance, and to prevent principal contractors, intermediate contractors, and sub-contractors from relieving themselves of liability under the Act by doing through sub-contractors what they would otherwise do through the agency of direct employees. Cook v. Norvell-Mackorell Real Estate Co., 99 N.C. App. 307, 392 S.E.2d 758 (1990).

The 1987 amendment clearly extended the class of persons protected by this provision to include not only employees of the subcontractor but also the subcontractor himself. Southerland v. B.V. Hedrick Gravel & Sand Co., 345 N.C. 739, 483 S.E.2d 150 (1997).

Prior to the 1987 amendment, this section was interpreted to protect the employees of a subcontractor, not the subcontractor himself. Boone v. Vinson, 127 N.C. App. 604, 492 S.E.2d 356 (1997), cert. denied, 347 N.C. 573, 498 S.E.2d 377 (1998).

This Section Modifies § 97-2(1). — As a general proposition, the only private employments covered by the act are those "in which five (now three) or more employees are regularly employed in the same business or establishment." See G.S. 97-2(1). But this general rule is subject to the exception created by this section, which was manifestly enacted to protect the employees of financially irresponsible subcontractors who do not carry compensation insurance, and to prevent principal contractors, intermediate contractors, and subcontractors from relieving themselves of liability under the act by doing through subcontractors what they would otherwise do through the agency of direct employees. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

Exclusive Remedy. — Defendant principal contractor was plaintiff's statutory employer and the workers' compensation benefits available to plaintiff through defendant's workers' compensation carrier constituted plaintiff's exclusive remedy against defendant for plaintiff's injuries. Rich v. R.L. Casey, Inc., 118 N.C. App. 156, 454 S.E.2d 666 (1995).

This section protects the employees of a subcontractor, not the subcontractor himself. Doud v. K & G Janitorial Servs., 69 N.C. App. 205, 316 S.E.2d 664, cert. denied, 312 N.C. 492, 322 S.E.2d 554 (1984).

When a principal contractor sublets part of the contract to an independent contractor, that independent contractor's employees are protected by this section if the independent contractor is uninsured. Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

But subcontractor is not entitled to immunity from civil suit merely because principal contractor secured workers' compensation insurance coverage for subcontractor's employees. Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

Jurisdiction Over Claim by Subcontractor Present. — This section (as in effect between August 5, 1987 and June 10, 1996) extends workers' compensation benefits to subcontractors under the same conditions as it extends coverage to employees of subcontractors, thereby giving the Industrial Commission jurisdiction over a claim by plaintiff, a subcontractor, which arose on December 12, 1990. Southerland v. B.V. Hedrick Gravel & Sand Co., 345 N.C. 739, 483 S.E.2d 150 (1997).

General Contractor Liable for Subcontractor's Injuries. — Where, prior to the time of subcontracting the performance of roofing work, the general contractor did not require from the subcontractor, plaintiff, a certificate of insurance, and general contractor did not obtain from the Industrial Commission a certificate stating that plaintiff had complied with G.S. 97-93, the general contractor was liable for plaintiff's injuries pursuant to this section as it existed at the time of plaintiff's accident. Southerland v. B.V. Hedrick Gravel & Sand Co., 345 N.C. 739, 483 S.E.2d 150 (1997).

General Contractor's Liability for Injuries Sustained by Sub-subcontractor's Employee. — General contractor that hired a subcontractor to frame houses was required to pay workers' compensation benefits to an injured employee who worked for a second subcontractor that was hired by the first subcontractor because it did not require the first subcontractor to provide proof that it carried workers' compensation insurance to protect workers who worked at the jobsite where the employee was injured, and neither subcontractor carried workers' compensation insurance that protected the injured employee. Robertson v. Hagood Homes, Inc., 160 N.C. App. 137, 584 S.E.2d 871, 2003 N.C. App. LEXIS 1735 (2003).

Section Is Exception to "Employment" and "Employee" Definitions of § 97-2. — This section, the so-called "statutory employer" or "contractor under" statute, is an exception to the general definitions of "employment" and "employee" set forth at G.S. 97-2. Cook v. Norvell-Mackorell Real Estate Co., 99 N.C. App. 307, 392 S.E.2d 758 (1990).

Scope of Section. — This section is inapplicable to those business relationships between employers and independent contractors. Pinckney v. United States, 671 F. Supp. 405 (E.D.N.C. 1987).

This section is not applicable to an independent contractor as distinguished from a subcontractor of the class designated by the statute. And all the more is it so that the statute does not apply to an independent employer who produces or gets out raw materials of his own, like logs, and sells them in the open market to a processor-purchaser who has no control whatsoever over the operations of the independent employer. Greene v. Spivey, 236 N.C. 435, 73 S.E.2d 488 (1952).

This section imposes liability, under certain specified circumstances, on the principal contractor or employer for injuries and death to employees of his independent contractor or of his subcontractor, but the provisions of this section do not extend to his independent contractor personally or to his subcontractor personally when he is an independent contractor. Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965).

This section is inapplicable to those business relationships between employers and independent contractors. Pinckney v. United States, 671 F. Supp. 405 (E.D.N.C. 1987).

Employer Liable for Injury to Independent Contractor. — Where the employer had no certificate that its independent contractor had workers' compensation insurance and the contractor had not waived workers' compensation coverage in writing for the year in which he was injured, the employer was liable for workers' compensation benefits. Davis v. Taylor-Wilkes Helicopter Serv., Inc., 145 N.C. App. 1, 549 S.E.2d 580, 2001 N.C. App. LEXIS 562 (2001).

This section may apply as between two independent contractors, one of whom is a subcontractor to the other; but it does not apply as between a principal, i.e., an owner, and an independent contractor. Cook v. Norvell-Mackorell Real Estate Co., 99 N.C. App. 307, 392 S.E.2d 758 (1990).

Amended Version of Section Did Not Control. — Since plaintiff's injury occurred on November 25, 1985, and the amended version of G.S. 97-19 became effective upon ratification on August 5, 1987, the amendment was not controlling. Ramey v. Sherwin-Williams Co., 92 N.C. App. 341, 374 S.E.2d 472 (1988).

Number of Persons Regularly Employed by Contractor Is Immaterial. — Where a contractor sublets a part of the contract to a subcontractor without requiring from the subcontractor a certificate that he had procured compensation insurance or had satisfied the Industrial Commission of his financial responsibility as a self-insurer under G.S. 97-93, such contractor is properly held secondarily liable for compensation to an employee of the subcontractor, even though the contractor regularly employs less than five (now three) employees. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949). See § 97-2.

Order of Liability. — The liability of the employer under the award is primary. He, by contract, may secure liability insurance for his protection, but his obligation to the injured employee is unimpaired. Roberts v. City Ice & Coal Co., 210 N.C. 17, 185 S.E. 438 (1936).

Principal Held Not Liable for Failure of Independent Contractor to Insure. — A mill company contracted with one G to paint the mill. The company was to furnish all materials; G was to furnish brushes and skilled labor. G testified that he, and not the mill company, had complete control of the painters employed on the job. It was held that G was not an employee, but an independent contractor within the meaning of the act, and the mill company was not liable for G's failure to insure. McCraw v. Calvine Mills, 233 N.C. 524, 64 S.E.2d 658 (1951).

Employee Not Covered Where General Contractor Was Also Owner. — The Industrial Commission erred when it found that the injured employee was covered under this section where his employer was not a subcontractor, but an independent contractor because the general contractor was also the owner of the property. Purser v. Heatherlin Properties, 137 N.C. App. 332, 527 S.E.2d 689, 2000 N.C. App. LEXIS 319 (2000).

Main Contractor Held Agent of Insurer in Effecting Compensation Insurance for Independent Contractor. See Greene v. Spivey, 236 N.C. 435, 73 S.E.2d 488 (1952).

Lumber Company. — A lumber company which purchased timber on the basis of a stipulated price per thousand feet when processed into lumber by it, and which was given the privilege of going upon the land and cutting and logging the timber to its site, could not be held a contractor of the owners of the timber in the performance of the logging operations, and therefore a person employed by it to conduct logging operations could not be a subcontractor within the meaning of this section; and thus the section had no application in determining the liability for injury to one of the workers employed in the logging operations. Evans v. Tabor City Lumber Co., 232 N.C. 111, 59 S.E.2d 612 (1950).

On an almost identical set of facts, claimant brought an action against lumber company, on the ground that his superior was not an independent contractor or a subcontractor, but was actually an employee of the lumber company. On the evidence there presented, the court held that an award of compensation based on the employee-employer relation should be affirmed. Scott v. Waccamaw Lumber Co., 232 N.C. 162, 59 S.E.2d 425 (1950).

Petroleum Wholesaler. — Petroleum wholesaler that leased a gas station to a workers' compensation claimant's employer was a statutory employer under G.S. 97-19; in the agreements between the wholesaler and the employer, and the wholesaler and an oil company, lay a contract for the employer to perform work the wholesaler was required to do, selling gas to the public. Masood v. Erwin Oil Co., — N.C. App. —, 639 S.E.2d 118, 2007 N.C. App. LEXIS 152 (2007).

Assistant Driver Employed by Owner-Lessor of Truck under Trip-Lease Agreement. — Where the owner of a truck drove same on a trip in interstate commerce for an interstate carrier under a trip-lease agreement providing that the carrier's I.C.C. license plates would be used and that the carrier would retain control and direction over the truck, an assistant driver employed by the owner-lessor was an employee of the carrier within the coverage of the Workers' Compensation Act. Further, if the owner-lessor were considered an independent contractor, but had less than five (now four) employees and no compensation insurance coverage, the carrier would still be liable under this section. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

Section Cannot Apply Absent Contract for Performance of Work. — This section, by its own terms, cannot apply unless there is first a contract for the performance of work which is then for the performance of work which is then sublet. Cook v. Norvell-Mackorell Real Estate Co., 99 N.C. App. 307, 392 S.E.2d 758 (1990).

Jurisdictional Facts Which Commission Finds Are Not Binding on Court of Appeals. — The jurisdictional facts found by the Commission, though supported by competent evidence, are not binding on the Court of Appeals. Instead, it is required to review the evidence of record and make independent findings of jurisdictional facts established by the greater weight of the evidence with regard to plaintiff's employment status. Cook v. Norvell-Mackorell Real Estate Co., 99 N.C. App. 307, 392 S.E.2d 758 (1990).

In order to extend workers' compensation insurance contract between general contractor and its insurance carrier to cover plaintiff subcontractor, action or behavior that demonstrated a desire to extend coverage on behalf of both the general contractor and the insurance carrier had to be shown. Carroll v. Daniels & Daniels Constr. Co., 327 N.C. 616, 398 S.E.2d 325 (1990), decided under prior version of § 97-19.

Rental Management Business Was Not Statutory Employer of Plaintiff Roofer. — Rental management business, which was neither contractually obligated to replace shingles on the roofs of apartment buildings it managed nor permitted to exercise its independent judgment in engaging roofing company to perform this work, was not an independent contractor with the owners with respect to the work performed to repair the roofs, but merely an agent for the owners. Thus rental management business could not be plaintiff roofer's statutory employer within the meaning of this section, notwithstanding rental management business's failure to ascertain roofing company's compliance with the provisions of G.S. 97-93. Cook v. Norvell-Mackorell Real Estate Co., 99 N.C. App. 307, 392 S.E.2d 758 (1990).

Industrial Commission properly found that defendant homebuilding company did not sublet any contract for the performance of work to framers and that defendant was not a "principal contractor" with regard to subdivision under construction but the "owner"; since homebuilding company had not undertaken to do anything for anyone else and thus could not be an "original contractor," this section was inapplicable as to compensation claim filed by employee of framers. Mayhew v. Howell, 102 N.C. App. 269, 401 S.E.2d 831, aff'd, 330 N.C. 113, 408 S.E.2d 853 (1991).

Evidence Insufficient to Support Estoppel of Carrier. — Where Deputy Commissioner found that there was a past course of dealing between the insurance carrier and insured company to cover "people" under workers' compensation insurance, the reviewing court could not conclude that the carrier acquiesced to coverage of "subcontractors" themselves, without additional findings of fact. Carroll v. Daniels & Daniels Constr. Co., 327 N.C. 616, 398 S.E.2d 325 (1990), decided under prior version of § 97-19.

If an insurance carrier accepts workers' compensation insurance premiums for an individual, it cannot deny liability for coverage; however, where there was evidence that company (insured) deducted the premium from plaintiff's (subcontractor's) pay, but no evidence that the carrier accepted payments, and no evidence regarding the carrier's acceptance of premiums for other subcontractors in the past, the Court of Appeals incorrectly stated that "[s]ince carrier routinely accepted premiums from employer for the coverage of subcontractors, it can be assumed that carrier would have followed that practice in this case. The carrier cannot now be allowed to object to the practice in which it had acquiesced." The Court of Appeals erred by making its own findings of fact regarding past dealings between company and carrier.

Carroll v. Daniels & Daniels Constr. Co., 327 N.C. 616, 398 S.E.2d 325 (1990), decided under prior version of § 97-19.

Failure to Consider Doctrine of Estoppel. — The Industrial Commission erred in failing to consider whether defendants, employer and insurance carrier, were estopped from denying insurance liability for the injured employee, who was not eligible under this section because his employer was not a subcontractor, where the plaintiff did not have his own insurance coverage and relied on his employer's promise of insurance before beginning work and where the insurance company did not expressly provide coverage to the plaintiff because it did not know about the plaintiff until after he was injured, and it never actually received the withheld premiums from the general contractor. Purser v. Heatherlin Properties, 137 N.C. App. 332, 527 S.E.2d 689, 2000 N.C. App. LEXIS 319 (2000).

Principal Contractor Not Employee. — Principal contractor was not a statutory employer under this section, and therefore, was not liable for the payment of workers' compensation benefits. Patterson v. Markham & Assocs., 123 N.C. App. 448, 474 S.E.2d 400 (1996).

Carrier Not Liable for Injuries of Independent Contractor's Employee. — Where freight hauling company retained the right of control over the hiring, training and compensation of its employees, and a contract expressly defined it as an independent contractor, the Industrial Commission incorrectly exercised jurisdiction under this section to enter an award against the defendant/carrier that leased the company's trucks. Williams v. ARL, Inc., 133 N.C. App. 625, 516 S.E.2d 187 (1999).

Coverage for Non-Covered Subcontractors. — As an insured business failed to provide proof of workers' compensation coverage for its subcontractors, the insurer for the insured's workers' compensation policies was obligated to provide coverage for them under G.S. 97-19; based on the subcontractors' work in transporting steel materials to job sites in heavy-duty pickup trucks and then putting together garages and carports, the subcontractors were properly classified pursuant to G.S. 58-36-100(k) and (o) as "labor only" workers rather than as "mobile equipment with operators" workers. N.C. Farm Bureau Mut. Ins. Co. v. T-N-T Carports, Inc., — N.C. App. —, 649 S.E.2d 420, 2007 N.C. App. LEXIS 1942 (2007).

Applied in Dalton v. Anvil Knitwear, 119 N.C. App. 275, 458 S.E.2d 251 (1995).

Cited in Sayles v. Loftis, 217 N.C. 674, 9 S.E.2d 393 (1940); Tilghman v. West of New Bern Volunteer Fire Dep't, 32 N.C. App. 767, 233 S.E.2d 598 (1977); Dockery v. McMillan, 85 N.C. App. 469, 355 S.E.2d 153 (1987); Postell v. B & D Constr. Co., 104 N.C. App. 1, 411 S.E.2d 413 (1992); Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992); Christian v. Riddle & Mendenhall Logging, 117 N.C. App. 261, 450 S.E.2d 510 (1994).

§ 97-19.1. Truck, tractor, or truck tractor trailer driver's status as employee or independent contractor.

(a) An individual in the interstate or intrastate carrier industry who operates a truck, tractor, or truck tractor trailer licensed by a governmental motor vehicle regulatory agency may be an employee or an independent contractor under this Article dependent upon the application of the common law test for determining employment status.

Any principal contractor, intermediate contractor, or subcontractor, irrespective of whether such contractor regularly employs three or more employees, who contracts with an individual in the interstate or intrastate carrier industry who operates a truck, tractor, or truck tractor trailer licensed by the United States Department of Transportation and who has not secured the payment of compensation in the manner provided for employers set forth in G.S. 97-93 for himself personally and for his employees and subcontractors, if any, shall be liable as an employer under this Article for the payment of compensation and other benefits on account of the injury or death of the independent contractor and his employees or subcontractors due to an accident arising out of and in the course of the performance of the work covered by such contract.

(b) Notwithstanding subsection (a) of this section, a principal contractor, intermediate contractor, or subcontractor shall not be liable as an employer under this Article for the payment of compensation on account of the injury or death of the independent contractor if the principal contractor, intermediate contractor, or subcontractor (i) contracts with an independent contractor who is an individual licensed by the United States Department of Transportation and (ii) the independent contractor personally is operating the vehicle solely pursuant to that license.

(c) The principal contractor, intermediate contractor, or subcontractor may insure any and all of his independent contractors and their employees or subcontractors in a blanket policy, and when insured, the independent contractors, subcontractors, and employees will be entitled to compensation benefits under the blanket policy.

A principal contractor, intermediate contractor, or subcontractor may include in the governing contract with an independent contractor in the interstate or intrastate carrier industry who operates a truck, tractor, or truck tractor trailer licensed by a governmental motor vehicle regulatory agency an agreement for the independent contractor to reimburse the cost of covering that independent contractor under the principal contractor's, intermediate contractor's, or subcontractor's coverage of his business. (2003-235, s. 1; 2006-26, s. 1; 2006-259, s. 19.)

Editor's Note. — Session Laws 2003-235, s. 2, made this section effective June 19, 2003, and applicable to any claim arising on or after October 1, 2003.

Effect of Amendments. — Session Laws 2006-26, s. 1, effective June 26, 2006, added the subsection designations and added present subsection (b).

Session Laws 2006-259, s. 19, effective August 23, 2006, substituted "the United States Department of Transportation" for "a governmental motor vehicle regulatory agency" in the second paragraph of subsection (a); and in subsection (b), substituted "contractor who is an individual licensed by the United States Department of Transportation" for "contractor that is licensed by a governmental motor vehicle regulatory agency" in clause (i) and inserted "personally" and "solely" in clause (ii).

§ 97-20. Priority of compensation claims against assets of employer.

All rights of compensation granted by this Article shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed by law for any unpaid wages for labor. (1929, c. 120, s. 20.)

§ 97-21. Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation void; unlawful deduction by employer.

No claim for compensation under this Article shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors and from taxes.

No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this Article shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this Article shall be guilty of a Class 3 misdemeanor and upon conviction thereof shall be punished only by a fine of not more than five hundred dollars ($500.00). No agreement by an employee to waive his right to compensation under this Chapter shall be valid. (1929, c. 120, s. 21; 1993, c. 539, s. 677; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For discussion of this section, see 8 N.C.L. Rev. 477 (1930); 15 N.C.L. Rev. 286 (1937).

For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

CASE NOTES

Obligation to support one's children is not a "debt" in the legal sense of the word; thus, a defendant can be required to pay child support out of his workers' compensation benefits. State v. Miller, 77 N.C. App. 436, 335 S.E.2d 187 (1985).

Exemption Lost on Transfer to Another Fund. See Merchants Bank v. Weaver, 213 N.C. 767, 197 S.E. 551 (1938).

Imposition of Constructive Trust in Fraud Case Upheld. — The language of this section declaring that workers' compensation benefits are "exempt from all claims of creditors" did not preclude the trial court from imposing the equitable remedy of a constructive trust in favor of an employer who had been defrauded by employee's unfair and deceptive acts. Sara Lee Corp. v. Carter, 351 N.C. 27, 519 S.E.2d 308 (1999).

Cited in Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983); Patterson v. Markham & Assocs., 123 N.C. App. 448, 474 S.E.2d 400 (1996).

§ 97-22. Notice of accident to employer.

Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Article prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person; but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby. (1929, c. 120, s. 22.)

Cross References. — As to minor dependent without guardian, etc., see G.S. 97-50.

CASE NOTES

Necessity for Giving Notice. — An employee is not entitled to recover unless he can show that he has complied with the provisions of the statute in respect to the giving of notice, or has shown reasonable excuse to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby. Singleton v. Durham Laundry Co., 213 N.C. 32, 195 S.E. 34 (1938).

The purpose of the notice-of-injury requirement is two-fold. It allows the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury. Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

Exceptions to Required Written Notice. — This section clearly requires written notice by an injured employee to his employer within 30 days after the occurrence of the accident or death unless the commission is satisfied of two things: (1) there was reasonable excuse for not giving the written notice, and (2) the employer was not prejudiced thereby. Pierce v. Autoclave Block Corp., 27 N.C. App. 276, 218 S.E.2d 510, cert. denied, 288 N.C. 731, 220 S.E.2d 351 (1975).

North Carolina Industrial Commission did not err in excusing an employee from the written notice requirement of G.S. 97-22 where the employer had actual notice of the employee's injury because an incident report was filed and the employee saw the employer's appointed physician twice within the 30 days following the injury; also, there was no showing of prejudice resulting from any delay in written notification. Lakey v. U.S. Airways, 155 N.C. App. 169, 573 S.E.2d 703, 2002 N.C. App. LEXIS 1596 (2002), cert. denied, 357 N.C. 251, 582 S.E.2d 271 (2003).

Effect of Personal Knowledge of Employer. — The failure of plaintiff faculty member to file a written claim within the time set forth in this section did not bar his claim to compensation where several members of the faculty had personal knowledge of plaintiff's injury the second it happened, and there was evidence that the dean of the school also knew of plaintiff's injury. Chilton v. Bowman Gray School of Medicine, 45 N.C. App. 13, 262 S.E.2d 347 (1980).

Where the employer had actual knowledge of the claimant's injury on the day it occurred, and both the employer and the claimant had assumed the claimant was an independent contractor and not entitled to workers' compensation benefits, the claimant's failure to give the employer written notice within 30 days of his injury was not fatal to his claim, since he filed it within 2 years. Davis v. Taylor-Wilkes Helicopter Serv., Inc., 145 N.C. App. 1, 549 S.E.2d 580, 2001 N.C. App. LEXIS 562 (2001).

Because the employer had actual knowledge of a nursing assistant's accident, after receiving such information from the employee's father the day of the accident and no prejudice was shown by the employer, the employee's failure to give notice within 30 days was excused. Chavis v. TLC Home Health Care, 172 N.C. App. 366, 616 S.E.2d 403, 2005 N.C. App. LEXIS 1770 (2005).

Nurse who injured her arm during her shift at a hospital did not have to provide written notice under G.S. 97-22 because the nurse's shift supervisor accompanied the nurse to the hospital's emergency room; therefore, the hospital had actual notice of the nurse's injury by accident, which obviated the need for the nurse to provide written notice, and the North Carolina Industrial Commission was thus not required to make findings regarding prejudice to the hospital and its insurance carrier. Legette v. Scotland Mem'l Hosp., — N.C. App. —, 640 S.E.2d 744, 2007 N.C. App. LEXIS 361 (2007).

Power of Commission to Find Failure to Give Notice. — The fact that no reference was made to a failure to give written notice of an alleged accident to the employer in compliance with this section by the hearing Commissioner does not preclude such finding by the full Commission. Garmon v. Tridair Indus., Inc., 14 N.C. App. 574, 188 S.E.2d 523 (1972).

Determination of Prejudice. — The burden is on the defendant to show that it was prejudiced, and in determining whether prejudice occurred, the Commission must consider the evidence in light of the dual purpose behind this section. Westbrooks v. Bowes, 130 N.C. App. 517, 503 S.E.2d 409 (1998).

Whether prejudice exists requires an evaluation of the evidence in relationship to the purpose of the statutory notice requirement. The purpose is dual: First, to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury. Jones v. Lowe's Cos., 103 N.C. App. 73, 404 S.E.2d 165 (1991).

Finding That Employer Was Not Prejudiced by Lack of Notice. — A finding by the Commission that the employer has not been prejudiced by the failure of the plaintiff to give notice of the injury within 30 days after the accident suffices to sustain the award from and after such notice, but not for benefits which may have accrued prior thereto. Eller v. Lawrence Leather Co., 222 N.C. 604, 24 S.E.2d 244 (1943); Cross v. Fieldcrest Mills, Inc., 19 N.C. App. 29, 198 S.E.2d 110 (1973).

The Industrial Commission erred in concluding that this section did not bar a widow's claims for death benefits without addressing whether the employer was prejudiced by the plaintiff's failure to give notice. Westbrooks v. Bowes, 130 N.C. App. 517, 503 S.E.2d 409 (1998).

Prejudice May Bar Claim Despite Reasonable Excuse. — Once a claimant has given a reasonable excuse for having failed to give timely notice, the Commission must determine if the employer was prejudiced by the delayed written notice. If prejudice is shown, the claim is barred even though the claimant had a reasonable excuse for not giving notice of the accident within 30 days. On this issue the burden is on the employer to show prejudice. Jones v. Lowe's Cos., 103 N.C. App. 73, 404 S.E.2d 165 (1991).

A claimant's action is barred, despite a reasonable excuse for failing to comply with this section, if prejudice resulted to the defendant. Westbrooks v. Bowes, 130 N.C. App. 517, 503 S.E.2d 409 (1998).

Commission's Findings Conclusive If Supported by Sufficient Evidence. — Where the evidence is sufficient to support the commission's findings that reasonable excuse for not giving the required written notice was shown, and that the employer was not prejudiced by the failure to give written notice, the findings are conclusive on appeal. Key v. Wagner Woodcraft, Inc., 33 N.C. App. 310, 235 S.E.2d 254 (1977).

Whether a plaintiff was injured by accident and had a reasonable excuse for not giving the employer timely notice were factual issues that depended entirely upon her credibility. Since the Commission found, as its prerogative as fact finder permitted, that plaintiff's testimony was not credible, that determination was binding upon the Court of Appeals. Elliot v. A.O. Smith Corp., 103 N.C. App. 523, 405 S.E.2d 799 (1991).

Sufficiency of the Industrial Commission's Findings of Fact. — Decision by the full North Carolina Industrial Commission was remanded for further findings of fact on the issues of whether an employee's claim was barred by his failure to timely notify the employer in writing of his injury under G.S. 97-22, and whether the employee sustained a compensable injury arising out of his employment, because the Commission failed to make adequate findings of fact for the appellate court to review the issues. Watts v. Borg Warner Auto., Inc., 171 N.C. App. 1, 613 S.E.2d 715, 2005 N.C. App. LEXIS 1159 (2005), aff'd, 360 N.C. 169, 622 S.E.2d 492 (2005).

Appeal of Notice Issue. — An employer who fails to raise the issue of notice at the hearing before the compensation board may not raise it on appeal. Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

To allow an employer to raise the issue of notice for the first time on appeal would deprive the claimants of the benefits of that determination and could easily lead to a denial of compensation in a case where the facts would justify a finding of no prejudice. Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

Notice Held Insufficient. — Claimant, after his injury, sent two or three messages to the superintendent, requesting him to come to see him, and the superintendent promised to do so but never did. Also, claimant's sister testified that she told the superintendent, nearly four months after the injury, that claimant had been hurt in the mill. It was held that this did not constitute sufficient notice of injury, nor did it constitute a basis for estoppel against the defendant to plead the provisions of this section. Jacobs v. Safie Mfg. Co., 229 N.C. 660, 50 S.E.2d 738 (1948).

The plaintiff was reasonably excused from not giving written notice due to his limited education, confusion resulting from the initial hospitalization for a possible heart attack, his lack of understanding of the causal relationship between the incident of hitting the truck door latch and the resulting injuries, and his reliance on his wife and his doctor to notify defendant of the work-related injury; additionally, the defendant/employer presented no evidence that it was prejudiced in any way by the plaintiff waiting to file his workers' compensation claim. Peagler v. Tyson Foods, Inc., 138 N.C. App. 593V, 532 S.E.2d 207, 2000 N.C. App. LEXIS 786 (2000).

Failure to Give Written Notice Excused. — There was competent evidence to support the commission's determination that the claimant was reasonably excused from not giving written notice and that the employer was not prejudiced thereby where the evidence indicated that on the date of the injury by accident, about 10 minutes after it occurred, and during plaintiff's hospitalization, the plant manager visited plaintiff, who related the details of the occurrence to him. Key v. Wagner Woodcraft, Inc., 33 N.C. App. 310, 235 S.E.2d 254 (1977).

Where the claimant offered testimony that he did not realize until December 23, 1988, the day his leg became numb and would no longer support his body, the nature and seriousness of his injury, and where the undisputed evidence revealed that, up until that time, the claimant continued to work at his regular job for employer, though he did have some pain which worsened over time, the evidence does not support the finding of the Commission that the claimant "did not have a reasonable excuse for failing to timely give said notice." To the contrary, any reasonable view of this evidence requires a finding that the claimant notified employer of the accident as soon as he was or should have been aware of the "nature, seriousness, and probable compensable character of his injury." Jones v. Lowe's Cos., 103 N.C. App. 73, 404 S.E.2d 165 (1991).

Claim Not Dismissed Where Insurer Had Actual Notice. — Where the defendant insurer had actual notice of the plaintiff employee's injury within 30 days, the defendant could not have been prejudiced by plaintiff's failure to give written notice; thus, there was no error in the Industrial Commission's not finding the plaintiff failed to give timely written notice or in its not dismissing plaintiff's claim for not giving timely written notice. Sanderson v. Northeast Constr. Co., 77 N.C. App. 117, 334 S.E.2d 392 (1985).

Fact That Employer Continued to Pay Employee's Salary After Injury. — Where plaintiff suffered a disabling injury which he failed to report, the fact that defendant continued to pay his salary for a while did not constitute an estoppel in the absence of proof that defendant knew of the injury at the time the payments were made. Lilly v. Belk Bros., 210 N.C. 735, 188 S.E. 319 (1936).

Where employee does not reasonably know of nature, seriousness, or probable compensable character of his injury and delays notification only until he reasonably knows, he has established "reasonable excuse" as that term is used in this section. Lawton v. County of Durham, 85 N.C. App. 589, 355 S.E.2d 158 (1987).

A finding by the Commission that plain-

tiff was not capable of coherent, normal thought at the time of his examination by physicians fell short of a finding that he was prevented from giving written notice of his injury by reason of physical or mental incapacity so as to entitle him to the benefits which might have accrued prior to the giving of such notice. Eller v. Lawrence Leather Co., 222 N.C. 604, 24 S.E.2d 244 (1943).

As to the application of this section in occupational disease cases under § 97-58(b), see Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

Where, although plaintiff's original awareness of hearing loss was precipitated by a single event, medical testimony indicated that the resulting disability was caused by repeated exposure to heightened levels of noise prior to 1974, the claim did not need to meet the requirements of this section which is for injury by accident claims; plaintiff's claim was one for compensation for occupational disease and plaintiff had met the necessary filing requirements set forth in G.S. 97-58. Sellers v. Lithium Corp., 94 N.C. App. 575, 380 S.E.2d 526 (1989), cert. denied, 325 N.C. 547, 385 S.E.2d 501 (1989).

With reference to occupational diseases, time within which an employee must give notice or file claim begins to run when the employee is first informed by competent medical authority of the nature and work-related cause of the disease. McKee v. Crescent Spinning Co., 54 N.C. App. 558, 284 S.E.2d 175 (1981), cert. denied, 305 N.C. 301, 291 S.E.2d 150 (1982).

Pleadings. — Unless the notice of accident required by this section and G.S. 97-23 is so considered, the act makes no mention of pleadings. Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

Applied in Hill v. Bio-Gro Sys., 73 N.C. App. 112, 326 S.E.2d 72 (1985).

Cited in Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501; Wilson v. E.H. Clement Co., 207 N.C. 541, 177 S.E. 797 (1935); Hanks v. Southern Pub. Utils. Co., 210 N.C. 312, 186 S.E. 252 (1936); Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1948); Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951); Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953); Hinson v. Creech, 286 N.C. 156, 209 S.E.2d 471 (1974); Taylor v. J.P. Stevens & Co., 300 N.C. 94, 265 S.E.2d 144 (1980); Hogan v. Cone Mills Corp., 63 N.C. App. 439, 305 S.E.2d 213 (1983); Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985); Causby v. Bernhardt Furn. Co., 83 N.C. App. 650, 351 S.E.2d 106 (1986); Terrell v. Terminix Servs., 142 N.C. App. 305, 542 S.E.2d 332, 2001 N.C. App. LEXIS 91 (2001); Tilly v. High Point Sprinkler, 143 N.C. App. 142, 546 S.E.2d 404, 2001 N.C. App. LEXIS 229 (2001), review denied, 353 N.C. 734, 552 S.E.2d 636 (2001).

§ 97-23. What notice is to contain; defects no bar; notice personally or by registered letter or certified mail.

The notice provided in the foregoing section [G.S. 97-22] shall state in ordinary language the name and address of the employee, the time, place, nature, and cause of the accident, and of the resulting injury or death; and shall be signed by the employee or by a person on his behalf, or, in the event of his death, by any one or more of his dependents, or by a person in their behalf.

No defect or inaccuracy in the notice shall be a bar to compensation unless the employer shall prove that his interest was prejudiced thereby, and then only to such extent as the prejudice.

Said notice shall be given personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State, or may be sent by registered letter or certified mail addressed to the employer at his last known residence or place of business. (1929, c. 120, s. 23; 1959, c. 863, s. 1.)

CASE NOTES

Pleadings. — Unless the notice of accident required by this section and G.S. 97-22 is so considered, the act makes no mention of pleadings. Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

Applied in Lilly v. Belk Bros., 210 N.C. 735, 188 S.E. 319 (1936).

Cited in Wilson v. E.H. Clement Co., 207 N.C. 541, 177 S.E. 797 (1935); Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1948); Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953); McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957); Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985).

§ 97-24. Right to compensation barred after two years; destruction of records.

(a) The right to compensation under this Article shall be forever barred unless (i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article. The provisions of this subsection shall not limit the time otherwise allowed for the filing of a claim for compensation for occupational disease in G.S. 97-58, but in no event shall the time for filing a claim for compensation for occupational disease be less than the times provided herein for filing a claim for an injury by accident.

(b) If any claim for compensation is hereafter made upon the theory that such claim or the injury upon which said claim is based is within the jurisdiction of the Industrial Commission under the provisions of this Article, and if the Commission, or the appellate courts on appeal, shall adjudge that such claim is not within the Article, the claimant, or if he dies, his personal representative, shall have one year after the rendition of a final judgment in the case within which to commence an action at law.

(c) When all claims and reports required by this Article have been filed, and the cases and records of which they are a part have been closed by proper reports, receipts, awards or orders, these records, may after five years in the discretion of the Commission, with and by the authorization and approval of the Department of Cultural Resources, be destroyed by burning or otherwise. (1929, c. 120, s. 24; 1933, c. 449, s. 2; 1945, c. 766; 1955, c. 1026, s. 12; 1973, c. 476, s. 48; c. 1060, s. 1; 1991, c. 703, s. 8; 1993 (Reg. Sess., 1994), c. 679, s. 3.4.)

Cross References. — As to corresponding limitations in cases of occupational diseases, see G.S. 97-58. As to certain State law-enforcement officers, see G.S. 143-166.16.

Legal Periodicals. — For note on the range of compensable consequences of a work-related injury, see 49 N.C.L. Rev. 583 (1971).

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

For note on occupational disease under workers' compensation statute, see 16 Wake Forest L. Rev. 288 (1980).

For a survey of 1996 developments in the law regarding prisoner rights, see 75 N.C.L. Rev. 2428 (1997).

CASE NOTES

Section 97-6.1 Compared. — Section 97-6.1 is a wrongful discharge statute while this section deals solely with worker's compensation. Whitt v. Roxboro Dyeing Co., 91 N.C. App. 636, 372 S.E.2d 731 (1988).

Limited Jurisdiction of the Industrial Commission. — The Industrial Commission has a special or limited jurisdiction created by statute, and is confined to its terms. Viewed as a court, it is one of limited jurisdiction, and it is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel. Barham v. Kayser-Roth Hosiery Co., 15 N.C. App. 519, 190 S.E.2d 306 (1972); Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985).

Timely Filing is Jurisdictional. — Dismissal of a claim is proper where there is an absence of evidence that the Industrial Commission acquired jurisdiction by the timely filing of a claim or by the submission of a voluntary settlement agreement to the Commission. Ordinarily, consent by the parties, waiver or estoppel are insufficient to overcome a jurisdictional bar. Reinhardt v. Women's Pavilion, Inc., 102 N.C. App. 83, 401 S.E.2d 138 (1991).

The timely filing of a claim for compensation is a condition precedent to the right to receive compensation and failure to file timely is a jurisdictional bar for the Industrial Commission. Reinhardt v. Women's Pavilion, Inc., 102 N.C. App. 83, 401 S.E.2d 138 (1991).

The requirement of filing a claim within two years of the accident is not a statute of limitation, but a condition precedent to the right to compensation. Reinhardt v. Women's Pavilion, Inc., 102 N.C. App. 83, 401 S.E.2d 138 (1991).

The requirement that a claim be filed within a certain time is a condition precedent to the right to compensation, and not a statute of limitation. For this reason, where a claim for compensation under the provisions of the Workers' Compensation Act has not been filed with the Industrial Commission within the statutory period after the date of the accident which resulted in the injury for which compensation is claimed, or where the Industrial Commission has not acquired jurisdiction of such claim within the statutory period, the right to compensation is barred. Winslow v. Carolina Conference Ass'n, 211 N.C. 571, 191 S.E. 403 (1937). See also Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948).

The requirement that a claim be filed in accord with the provisions of this section constitutes a condition precedent to the right to compensation and not a statute of limitations. Montgomery v. Horneytown Fire Dep't, 265 N.C. 553, 144 S.E.2d 586 (1965); Barham v. Kayser-Roth Hosiery Co., 15 N.C. App. 519, 190 S.E.2d 306 (1972); Perdue v. Daniel Int'l, Inc., 59 N.C. App. 517, 296 S.E.2d 845 (1982), cert. denied, 307 N.C. 577, 299 S.E.2d 647 (1983); Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985).

And Is of the Essence of the Right to Recover. — The plaintiff's inchoate right to compensation arose by operation of law on the date of the accident. But his substantive right to compensation was not fixed by the simple fact of injury arising out of and in the course of his employment. The requirement of filing a claim within the time limited by this section was a condition precedent to his right to compensation. Necessarily, then, the element of filing a claim within the time limited was of the very essence of the plaintiff's right to recover compensation. McCrater v. Stone & Webster Eng'g Corp., 248 N.C. 707, 104 S.E.2d 858 (1958).

Timely Filing of Claim or Submission of Settlement Agreement Is Jurisdictional. — Where there was no evidence that the Industrial Commission acquired jurisdiction either by the timely filing of a claim or by the submission of a voluntary settlement agreement to the Commission for approval, the Industrial Commission properly dismissed plaintiff's claim for lack of jurisdiction. Barham v. Kayser-Roth Hosiery Co., 15 N.C. App. 519, 190 S.E.2d 306 (1972).

Timely filing of a claim for compensation is a condition precedent to the right to compensation. Under this construction, failure to file a claim in a timely fashion works a jurisdictional bar to the right to receive compensation. The general rule is that a jurisdictional bar cannot be overcome by consent of the parties, waiver or estoppel. Weston v. Sears Roebuck & Co., 65 N.C. App. 309, 309 S.E.2d 273 (1983), cert. denied, 311 N.C. 407, 319 S.E.2d 281 (1984).

The Industrial Commission lacked jurisdiction over a workers' compensation claim filed more than two years after the claimant's injury; thus, the Commission could not reach the issue of whether the defendants waived their right to contest the compensability of and their liability for the claim. Wall v. Macfield/Unifi, 131 N.C. App. 863, 509 S.E.2d 798 (1998).

Time Limit in Effect on Date of Accident Controls. — The time limit fixed by this section as it existed on the date of the accident, being a part of the plaintiff's substantive right of recovery, could not be enlarged by subsequent statute, i.e., the 1955 amendment changing the limit from one year to two years. To do so would be to deprive the defendants of a vested right. McCrater v. Stone & Webster Eng'g Corp., 248 N.C. 707, 104 S.E.2d 858 (1958).

Party may be equitably estopped from asserting time limitation in this section as a bar to jurisdiction. Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985).

Medical Expenses Paid Within Two Years of Filing Claim. — Worker's compensation claim was timely filed under G.S. 97-24 where the employer admitted to paying medical expenses within two years of the claim being filed. There was no restriction under the definition of medical compensation in G.S. 97-2(19) that such medical payments had to be made in the state to qualify as medical payments. McGhee v. Bank of Am. Corp., 173 N.C. App. 422, 618 S.E.2d 833, 2005 N.C. App. LEXIS 2016 (2005).

Report of Accident and Claim of Employee Filed by Employer. — When the employer has filed with the Commission a report of the accident and claim of the injured employee, the claim is filed with the Commission within the meaning of this section. Hardison v. W.H. Hampton & Son, 203 N.C. 187, 165 S.E. 355 (1932), distinguished in Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948).

There is no provision in the North Carolina act requiring an injured employee to file a claim for compensation for his injury with the North Carolina Industrial Commission. When the employer has filed with the Commission a report of the accident and claim of the injured employee, the Commission has jurisdiction of the matter, and the claim is filed with the Commission within the meaning of this section. Smith v. Allied Exterminators, Inc., 11 N.C. App. 76, 180 S.E.2d 390, rev'd on other grounds, 279 N.C. 583, 184 S.E.2d 296 (1971); Hardison v. W.H.

Hampton & Son, 203 N.C. 187, 165 S.E. 355 (1932).

Report Filed by Employer on Verbal Information. — Where an employer files a report with the Commission within the prescribed time upon verbal information given by the representative of the employee, the representative not being able to read or write, and the employer admits liability, the report has been properly filed with the Industrial Commission as a claim and the Commission acquires jurisdiction. Hanks v. Southern Pub. Utils. Co., 210 N.C. 312, 186 S.E. 252 (1936), noted with proposal for amendment in 15 N.C.L. Rev. 85 (1937).

Notice to Commission Insufficient to Toll Statute. — The Industrial Commission erred by exercising jurisdiction over and hearing plaintiff's claim arising from a second accident where plaintiff did not file a claim for the accident until after the two-year filing period mandated by this section had elapsed; his earlier actions only informed the Commission that he was involved in an accident but did not amount to a filing. Tilly v. High Point Sprinkler, 143 N.C. App. 142, 546 S.E.2d 404, 2001 N.C. App. LEXIS 229 (2001), review denied, 353 N.C. 734, 552 S.E.2d 636 (2001).

Letter Held Sufficient Filing of Claim. — A letter which was written to the Commission within two years of the alleged accident and injury to plaintiff and which specifically requested a hearing upon the alleged injury constituted sufficient filing of claim and compliance with this section to vest jurisdiction of the accident in the Commission. Cross v. Fieldcrest Mills, Inc., 19 N.C. App. 29, 198 S.E.2d 110 (1973).

When Informal Letter Insufficient. — An informal letter may not serve as the filing of a claim for compensation for statute of limitations purposes where it contains no request for a hearing and fails to assert in any way that the plaintiff is demanding compensation or that action by the Industrial Commission is necessary to settle the question. Gantt v. Edmos Corp., 56 N.C. App. 408, 289 S.E.2d 75 (1982).

Claim Need Not Be Filed Before Bringing Action. — Subsection (b) of this section does not require plaintiff to file a claim with the Industrial Commission, as a court of first instance, before bringing an action in the superior court. The subsection was intended to defer the time in which action in the proper court might be brought when mistaken resort to the Commission has been made. Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943).

Payment of Medical Expenses by Defendant Carrier Does Not Constitute Waiver of Limitation. — The voluntary payment of a medical bill by defendant carrier is not an admission of liability and does not dispense with the necessity of filing a claim with the Industrial Commission within two years of the date of the accident. Barham v. Kayser-Roth Hosiery Co., 15 N.C. App. 519, 190 S.E.2d 306 (1972).

Report Filed by Employer and Award for Medical Expenses. — The employer gave notice to the Commission of an accident to its employee. Subsequently an award for medical expenses was made by the Commission on application of the doctor, but no hearing before the Commission was ever asked by employer or employee. In a suit by the employee against the alleged negligent third party, the period of limitation prescribed in this section having passed, the court observed that the period for filing plaintiff's claim had elapsed and "no other right of action could now accrue for the benefit of the employer, or its insurance carrier." Thompson v. Virginia & C.S.R.R., 216 N.C. 554, 6 S.E.2d 38 (1939).

Claims Not Filed Within Time Prescribed. — Where an employee did not file a claim until more than the prescribed time after injury, and the employer did not file a report of the accident because it did not have knowledge thereof, although it delivered claimant's wages to him after the disability resulting from the injury, but thought the disability was due to a prior injury, had no knowledge of the subsequent injury, and made no representations that the wages delivered to the claimant were in lieu of compensation, the evidence supported a finding that the claim was not filed within the time prescribed by this section. Lilly v. Belk Bros., 210 N.C. 735, 188 S.E. 319 (1936).

Claimant was injured by accident arising out of and in the course of his employment. He reported the accident to the employer, who, on the day of the accident, reported it to the Industrial Commission as required by G.S. 97-92. Subsequently, bills for medical services rendered claimant as a result of the injury were approved for payment by the Commission. No claim for compensation was filed by the employee, the employer or the insurance carrier. After the expiration of the period of limitation, the employee first discovered the serious effects of the accident and requested a hearing before the Industrial Commission. It was held that no claim for compensation having been filed within the statutory period from the date of the accident and no request for hearing having been made within that time, and no payment of bills for medical treatment having been made within the statutory period prior to the request for a hearing, the claim was barred by this section. Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948), distinguishing Hardison v. W.H. Hampton & Son, 203 N.C. 187, 165 S.E. 355 (1932), and Hanks v. Southern Pub. Utils. Co., 210 N.C. 312, 186 S.E. 252 (1936).

Commission's finding that the employee did not file his claim within the period of limitation, and that claim was therefore barred, was affirmed on appeal. Coats v. B. & R. Wilson, Inc., 244 N.C. 76, 92 S.E.2d 446 (1956).

Limitation Tolled as to Employee Under 18 and Without Guardian. — The limitation of time provided by this section as against an employee under 18 years of age, who is without a guardian or other legal representative, is tolled until he arrives at the age of 18. Lineberry v. Town of Mebane, 219 N.C. 257, 13 S.E.2d 429 (1941).

Prosecuting Common-Law Action and Failing to File Application for Hearing Held Not Abandonment of Filed Claim. — The prosecution of a suit at common law and the failure to file application for a hearing when requested did not amount to an abandonment of claim for compensation, and no final award having been made at the time of the filing of a formal petition for an award, the matter was pending at that time before the Commission, and it was error to deny compensation on the ground that claimant was barred by failure to file a claim within the time prescribed after the death of the deceased employee. Hanks v. Southern Pub. Utils. Co., 210 N.C. 312, 186 S.E. 252 (1936), noted in 15 N.C.L. Rev. 85 (1937).

Implied Agreement Not to Plead Statute. — Where the injured party was led to believe that his wages were accruing to his benefit, and he delayed filing his claim for more than the time prescribed, it was held that the facts did not bring the case within the principle of equitable estoppel, there being no request by defendant that claimant delay the pursuit of his rights, nor an express or implied agreement not to plead the statute. Wilson v. E.H. Clement Co., 207 N.C. 541, 177 S.E. 797 (1935).

Evidence held not to show any representation by the employer that the accident had been reported, or any agreement, express or implied, that the bar of the statute of limitations in this section would not be pleaded, and therefore the employer was not estopped from setting up the defense of the bar of the statute. Jacobs v. Safie Mfg. Co., 229 N.C. 660, 50 S.E.2d 738 (1948).

Prolonged Reliance on Employer's Promise to Take Care of Injury. — While plaintiff's reliance on defendant's promise to "take care of [his injury]" may have been reasonable in light of the circumstances at the time, the reasonableness of this reliance became suspect after nine years from the time when the promise was made with no indication that the promise would be honored. This alone would be enough to dissipate the effect of the alleged misrepresentation by defendant. These facts did not support the conclusion that defendant was equitably estopped from challenging the commission's jurisdiction to hear plaintiff's claim. Weston v. Sears Roebuck & Co., 65 N.C. App. 309, 309 S.E.2d 273 (1983), cert. denied, 311 N.C. 407, 319 S.E.2d 281 (1984).

Equitable Estoppel Not Found. — The employer and insurer were not equitably estopped from asserting the jurisdictional bar of this section, where the employer did not lull claimant into a false sense of security by promising to take care of her, but rather, told her that any claim she filed would be denied. Wall v. Macfield/Unifi, 131 N.C. App. 863, 509 S.E.2d 798 (1998).

Effect of Dismissal on Rights of Dependents. — Where the claim of an employee under the Workers' Compensation Act was dismissed because it was not filed within the period prescribed by this section, and pending appeal the employee died as a result of the accidental injury, his dependents' claim for compensation for his death brought one month after his death was not barred, the dependents not being parties in interest in the prior proceeding, and their claim being an original right enforceable only after his death. Wray v. Carolina Cotton & Woolen Mills Co., 205 N.C. 782, 172 S.E. 487 (1934), decided prior to the 1933 amendment.

Award Protecting Employee Against Possible Future Loss of Rights. — Where claimant suffered a general partial disability, but continued to receive the same wages, which amounted to more than the assessable amount of compensation for his injury, he could not receive additional compensation. To protect the employee against the possibility that the employer might, after the expiration of the period of limitation, discontinue the employment and thus defeat the rights of the employee, the Commission, after finding the existence of the disability, directed that an award issue subject to specified limitations. It directed compensation at the statutory rate "at any time it is shown that the claimant is earning less," etc., during the statutory period of 300 weeks. By this order the Commission, in effect, retained jurisdiction for future adjustments. In so doing it did not exceed its authority. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

Letter Held Not to Constitute Demand. — Where plaintiff's letter made no demand for compensation nor requested a hearing on the matter, and letter merely inquired as to claimant's physical progress and medical charges, such letter did not satisfy statutory requirement that a "claim" be filed within two years of accident. Reinhardt v. Women's Pavilion, Inc., 102 N.C. App. 83, 401 S.E.2d 138 (1991).

Prerequisites to Equitable Estoppel. — Although defendant furniture company may have thought plaintiff's injuries would be covered by another insurer, neither bad faith, fraud nor intent to deceive is necessary before the doctrine of equitable estoppel can be applied. Craver v. Dixie Furn. Co., 115 N.C. App. 570, 447 S.E.2d 789 (1994).

The basis for effecting equitable estoppel is the inconsistent position subsequently taken, rather than in the original conduct and where plaintiff was misled to her detriment, it was under such circumstances that application of the doctrine of equitable estoppel was appropriate. Craver v. Dixie Furn. Co., 115 N.C. App. 570, 447 S.E.2d 789 (1994).

Egregious Circumstances May Cause Estoppel. — Where the circumstances are deemed egregious, the doctrine of estoppel will be employed and will prevent a party from raising the time limitation of G.S. 97-24. Reinhardt v. Women's Pavilion, Inc., 102 N.C. App. 83, 401 S.E.2d 138 (1991).

Employer's Payment of Injured Employee's Medical Bills Did Not Establish Estoppel. — Employer's payment of injured employee's medical bills did not estop employer from opposing the acceptance of employee's claim filed more than two years after employee's accident, as voluntarily paying an employee's medical bills is not enough to establish an estoppel. Abels v. Renfro Corp., 100 N.C. App. 186, 394 S.E.2d 658 (1990).

Defendants Were Equitably Estopped from Pleading Time Limitation. — Defendants were equitably estopped from pleading the two year time limit for filing under subsection (a) of this section as a bar to jurisdiction where that plaintiff detrimentally relied as a matter of law on statements of defendant's agent. Parker v. Thompson-Arthur Paving Co., 100 N.C. App. 367, 396 S.E.2d 626 (1990).

Section 97-58 Compared. — An accident claim must be filed within two years of the accident, not within two years after the claimant becomes aware of his disorder, as is the case under G.S. 97-58. Perdue v. Daniel Int'l, Inc., 59 N.C. App. 517, 296 S.E.2d 845 (1982), cert. denied, 307 N.C. 577, 299 S.E.2d 647 (1983).

Form Sufficient for Claim Despite Incorrect Date. — While the case law interpreting the specific traumatic incident provision of G.S. 97-2(6) requires the plaintiff to prove an injury at a cognizable time, this does not compel the plaintiff to allege the specific hour or day of the injury; where a Form 18 specifically described the accident causing an employee's injury as a tire changing incident, this was sufficient to constitute a claim arising out of that incident, despite the fact that the form listed the date of a later truck exiting incident as the date of the accident. Crane v. Berry's Clean-Up & Landscaping, Inc., 169 N.C. App. 323, 610 S.E.2d 464, 2005 N.C. App. LEXIS 614 (2005).

Applied in Clodfelter v. United Furn. Co., 38 N.C. App. 45, 247 S.E.2d 263 (1978).

Cited in Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1948); Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951); Harris v. Asheville Contracting Co., 240 N.C. 715, 83 S.E.2d 802 (1954); McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957); Shelton v. Spic & Span Dry Cleaners, 2 N.C. App. 528, 163 S.E.2d 288 (1968); Hinson v. Creech, 286 N.C. 156, 209 S.E.2d 471 (1974); Taylor v. J.P. Stevens & Co., 300 N.C. 94, 265 S.E.2d 144 (1980); C.W. Matthews Contracting Co. v. State, 75 N.C. App. 317, 330 S.E.2d 630 (1985); Lawton v. County of Durham, 85 N.C. App. 589, 355 S.E.2d 158 (1987); Griffey v. Town of Hot Springs, 87 N.C. App. 290, 360 S.E.2d 457 (1987); Felmet v. Duke Power Co., 131 N.C. App. 87, 504 S.E.2d 815 (1998).

§ 97-25. Medical treatment and supplies.

Medical compensation shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.

The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case, the Industrial Commission may order a change in the medical or hospital service.

If in an emergency on account of the employer's failure to provide the medical or other care as herein specified a physician other than provided by the employer is called to treat the injured employee, the reasonable cost of such service shall be paid by the employer if so ordered by the Industrial Commission.

Provided, however, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission. (1929, c. 120, s. 25; 1931, c. 274, s. 4; 1933, c. 506; 1955, c. 1026, s. 2; 1973, c. 520, s. 1; 1991, c. 703, s. 3; 1997-308, s. 1; 1999-150, s. 1; 2005-448, s. 6.2.)

Cross References. — As to independent suit by physician against employee to recover for medical services, see note to G.S. 97-90.

Legal Periodicals. — See 9 N.C.L. Rev. 405 (1931).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1032 (1981).

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For 1997 legislative survey, see 20 Campbell L. Rev. 487.

CASE NOTES

I. In General.
II. What Treatment Must Be Provided.
III. Refusal to Accept Treatment.
IV. Emergency.
V. Selection of Physician by Employee.

I. IN GENERAL.

Application of 1973 Amendment. — The 1973 amendment to this section, which eliminated the 10-week limitation for the recovery of medical expenses for an employee's treatments which are necessary "to effect a cure or give relief," will not be applied retroactively to a case in which the claimant arose out of an accident occurring prior to the effective date of the amendment. Peeler v. State Hwy. Comm'n, 302 N.C. 183, 273 S.E.2d 705 (1981).

Effect of 1991 amendment. — Although the North Carolina Industrial Commission had previously been required to find that a plaintiff's chosen physician was reasonably required to effect a cure or give relief in order for the care to be compensable, the 1991 amendment to G.S. 97-25 deleted the language supporting such a requirement; a finding that medical care by a plaintiff's chosen physician was reasonably required to effect a cure or give relief was not necessarily required in cases post-dating the 1991 amendment. Craven v. VF Corp., 167 N.C. App. 612, 606 S.E.2d 160, 2004 N.C. App. LEXIS 2376 (2004), cert. denied, 359 N.C. 320, 611 S.E.2d 172 (2005).

The legislature intended (1) that medical compensation, including hospital services provided by the employer, ordered by the Industrial Commission, provided pursuant to emergencies, or chosen by the employee, subject to the approval of the Commission, be limited by the terms and conditions contained in this section; (2) that such medical compensation be reasonably required to effect a cure or give relief or tend to lessen the period of disability; and (3) that the employer not be charged more than his employee would have been had the employee paid for the services. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

The legislature intended that the Industrial Commission's authority under this section be limited to review and approval of hospital charges to ensure, first, that the employer is charged only for those reasonably required services, and, second, that the employer is not charged more for such services than the prevailing charge for the same or similar hospital service in the same community. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

Implicit in the authority accorded the Commission to order additional compensation under this section and further medical treatment is the requirement that the supplemental compensation and future treatment be directly related to the original compensable injury. Peeler v. Piedmont Elastic, Inc., 132 N.C. App. 713, 514 S.E.2d 108 (1999).

Findings Required. — Where the order of the Commission lacked any finding as to the reasonableness of the time frame within which plaintiff requested approval for his medical treatment, the case was remanded. Larramore v. Richardson Sports Ltd. Partners, 141 N.C. App. 250, 540 S.E.2d 768, 2000 N.C. App. LEXIS 1305 (2000), aff'd, 353 N.C. 520, 546 S.E.2d 87 (2001).

No "Change of Condition" Requirement. — Nothing in the language of this section implies that the "change of condition" requirement of G.S. 97-47 applies to any request by an employee for the payment of his medical expenses by his employer. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

The complete absence of an express or implied reference in this section to any "change of condition" requirement, in addition to this section's clear language permitting the Industrial Commission to review medical treatment an employee is receiving and order further treatment at any time if an employee requests such a review, indicated that the legislature did not intend for an injured employee to make any showing of a change in condition before his employer would be required to pay for further medical services or treatment needed as a result of his compensable injury. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

The provisions of this section are in pari materia and must be construed together as a whole. Schofield v. Great Atl. & Pac. Tea Co., 299 N.C. 582, 264 S.E.2d 56 (1980).

Section 97-10.2 Construed In Pari Materia. — Section 97-10.2 and this section relate to the same subject matter and must be construed in pari materia. Roberts v. ABR Assocs., 101 N.C. App. 135, 398 S.E.2d 917 (1990).

Construction with § 97-47. — Because "compensation" does not include the payment of medical expenses, the provisions of § 97-47 do not affect the Commission's grant or denial of an employee's request for payments of those expenses. The Commission's authority for requiring an employer to pay the medical expenses of an injured employee is established by the terms of this section. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

Where employee's refusal to cooperate with employer's physician resulted in litigation, the plaintiff's claim for further compensation, filed 2 years after her last compensation check, was not time-barred because her claim was not a change-of-condition case under G.S. 97-47, but a case still pending under this section, and defendants' filing of a Form 28B had no effect on employee's right to further compensation. Scurlock v. Durham County Gen. Hosp., 136 N.C. App. 144, 523 S.E.2d 439, 1999 N.C. App. LEXIS 1299 (1999).

Construction with G.S. 97-2(19). — Inherent in a North Carolina Industrial Commission's award granted pursuant to G.S. 97-25 (1999) is that the compensation will incorporate the parameters of G.S. 97-2(19). Johnson v. S. Tire Sales & Serv., 152 N.C. App. 323, 567 S.E.2d 773, 2002 N.C. App. LEXIS 920 (2002), cert. denied, 356 N.C. 437, 572 S.E.2d 784 (2002).

Jurisdiction of Industrial Commission. — An employee brought action against the insurance carrier and its agent, alleging that after his injury the agent, on behalf of the insurer, induced him to dispense with the services of his physician and to consult physicians selected by insurer, and that the insurer promised to provide hospitalization and surgical service recommended by insurer's physicians, but failed to do so to plaintiff's permanent injury. It was held that the insurer's obligation to furnish medical attention necessary to plaintiff's complete recovery was founded on this section, and that the Industrial Commission had exclusive jurisdiction of plaintiff's claim. Hedgepeth v. Lumbermen's Mut. Cas. Co., 209 N.C. 45, 182 S.E. 704 (1935).

Appeal of Award Does Not Suspend Jurisdiction of Commission. — An appeal of an award of the Industrial Commission does not suspend that agency's authority to accept notification of an employee's decision to select his own doctor; neither does an appeal deprive the Commission of its jurisdiction to accept the submission of a claim. It may well be that the determination of the particular claim will be delayed until the outcome of the appeal. Nevertheless, the Commission has jurisdiction to receive the claim and is, in fact, the only agency vested with that jurisdiction. Schofield v. Great Atl. & Pac. Tea Co., 299 N.C. 582, 264 S.E.2d 56 (1980).

Employer's Motion to Designate Treating Physician. — The fact that this section expressly grants employees the power to request a change in their treating physician, but does not make a similar grant to employers, does not mean that employers cannot make motions to designate a treating physician. Matthews v. Charlotte-Mecklenburg Hosp. Auth., 132 N.C. App. 11, 510 S.E.2d 388 (1999).

Medical, etc., expenses are not included in the maximum amount recoverable for one injury. See Morris v. Laughlin Chevrolet Co., 217 N.C. 428, 8 S.E.2d 484 (1940).

Payment of Medical Expenses Does Not Constitute Admission or Waiver by Employer. — The Workers' Compensation Act, by this section, requires or permits an employer to pay bills for medical and other treatment of an employee, and the payment of such bills, approved by the Commission, even without formal denial of liability, cannot have the effect of an admission of liability by the employer or constitute a waiver of the requirement of filing a timely claim by the employee as provided in G.S. 97-24. Such facts are insufficient to invoke the doctrine of estoppel. Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953).

Payment of Full Wages Does Not Determine Liability for Treatment. — The act of an employer in paying an injured employee's wages in full from the date of the injury should not be determinative of the employee's disability and thereby relieve the employer or insurance carrier from liability for hospital and medical care designed to improve his capacity to earn wages. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

The rule that denies compensation to an injured employee who has lost no wages is necessarily applied in some cases growing out of G.S. 97-30 in order to determine the amount of compensation due, but it is not applicable to medical, surgical, hospital, and nursing services under this section, as medical and hospital expenses are not a part of, and are not included in, determining recoverable compensation. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Employer's Failure to Rebut Evidence of Causal Connection. — Employee was entitled to additional medical compensation under G.S. 97-25 where the employer offered no evidence to rebut the employee's evidence showing that the herniated disc was directly related to the compensable injury she suffered when she slipped and fell while working as a flight attendant for the employer. Perez v. Am. Airlines/AMR Corp., 174 N.C. App. 128, 620 S.E.2d 288, 2005 N.C. App. LEXIS 2304 (2005).

Relaxation of Rule as to Fees for Practical Nursing. — Industrial Commission was not entitled to relax its rule that fees for practical nursing would not be allowed unless written authority was obtained from Commission in advance, so as to award mother of injured employee an amount for practical nursing services rendered to injured employee, where record showed that Commission never gave its written or oral permission for rendition of services. Hatchett v. Hitchcock Corp., 240 N.C. 591, 83 S.E.2d 539 (1954).

Cost of Treatment of Veteran. — The Administrator of Veterans Affairs may recover from the employer and its insurance carrier the cost of treatment in a veterans hospital for compensable injuries received by an indigent ex-serviceman in the course of his employment. Marshall v. Robert's Poultry Ranch & Egg Sales, 268 N.C. 223, 150 S.E.2d 423 (1966).

Appeal from Approval of Medical Bills. — When the Commission approves claimant's medical, etc., bills, defendant then has a right on appeal to challenge the action of the Commission in respect to the bills approved by it, in whole or in part, if it deems it advisable to do so. Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962).

Controlling Effect of § 97-59 in Cases Involving Occupational Disease. — Section 97-59, which is a more recent and specific statute dealing with awards of medical benefits in cases involving occupational disease, controls over this section in such cases. Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982).

Where insurance company agreed to pay all necessary medical expenses incurred by plaintiff through May 31, 1983, while plaintiff waived any and all rights to reopen a claim for further compensation, and insurer was notified on May 16, 1983, that plaintiff urgently needed medical attention relating to his industrial injury, but took no action and did not authorize the urgently needed hospitalization, defendant breached its duty of good faith and fair dealing by acting to delay the treatment until after May 31, 1983, and the case would be remanded to determine how soon after notification the insurance company could have reasonably granted the authorization and to determine what portion of the costs would have then occurred prior to May 31, 1983, for which defendant was liable. Gallimore v. Daniels Constr. Co., 78 N.C. App. 747, 338 S.E.2d 317 (1986).

Refusal of Insurers to Provide Chiropractic Treatment as Workers' Compensation Coverage. — Plaintiff chiropractors alleging that defendant insurance companies had interfered with their contractual rights by refusing to honor employers' choices of chiropractors as providers of health care treatment to employees under the Workers' Compensation Act, that defendants had misrepresented to employer insureds that their workers' compensation policies did not provide coverage for chiropractic treatment, that said misrepresentations were unfair and deceptive trade practices in violation of G.S. 75-1.1, and that defendants had conspired among themselves and with members of the medical profession to deprive plaintiffs of business opportunities by refusing to pay for chiropractic services provided in compliance with the act, an illegal restraint of trade in violation of G.S. 75-1 and 15 U.S.C. § 1, could not maintain their action in superior court without first seeking relief from the Industrial Commission. North Carolina Chiropractic Ass'n v. Aetna Cas. & Sur. Co., 89 N.C. App. 1, 365 S.E.2d 312 (1988), remanding case to the trial court for entry of an order staying plaintiffs' action pending a determination of the underlying workers' compensation issues by the Commission.

Chronic Fatigue Syndrome. — Evidence that an employee of a waste company whose job was to collect and dispose of raw sewage developed chronic fatigue syndrome and other ailments after being accidentally sprayed with raw sewage and that the employee's illnesses were most probably the result of the accident supported a ruling of the North Carolina Industrial Commission awarding the employee permanent workers' compensation disability benefits. Norton v. Waste Mgt., Inc., 146 N.C. App. 409, 552 S.E.2d 702, 2001 N.C. App. LEXIS 938 (2001).

Reimbursement Under § 97-10.2 (f)(1)(c). — The party claiming a right to reimbursement under G.S. 97-10.2 (f)(1)(c), i.e., the employer or its insurance carrier, must show, pursuant to this section, (1) that the treatment provided was in the form of medical treatment, surgical treatment, hospital treatment, nursing services, medicines, sick travel, rehabilitation services, or other treatment including medical and surgical supplies, and (2) that the treatment provided was reasonably required for at least one of three purposes, namely, to effect a cure, give relief, or lessen the period of the plaintiff's disability. Roberts v. ABR Assocs., 101 N.C. App. 135, 398 S.E.2d 917 (1990).

Reimbursement for Rehabilitation Services. — Insurance carrier did not need the Commission's approval for the charges connected with rehabilitation services in order to obtain reimbursement for those expenses because G.S. 97-90(a) does not require approval of the Commission for rehabilitation services. Roberts v. ABR Assocs., 101 N.C. App. 135, 398 S.E.2d 917 (1990).

Since G.S. 97-25 required the state industrial commission to find as fact that services were rehabilitative in nature and were reasonably required to effect a cure or give relief in order to find that a workers' compensation carrier was entitled to a lien against payments made for rehabilitative services, those services were not a benefit as a matter of law to an injured motorist who received worker's compensation benefits from an auto accident that occurred during the course of employment; since a specific determination was required as to whether the services conferred a benefit to the motorist, and since an underinsured motorist carrier did not provide any proof of such a benefit, a credit to the carrier for payments made through workers' compensation to a rehabilitative center were properly excluded from the calculation of how much credit the carrier was entitled to against the underinsured motorist benefits that the motorist was entitled to. Walker v. Penn Nat'l Sec. Ins. Co., 168 N.C. App. 555, 608 S.E.2d 107, 2005 N.C. App. LEXIS 349 (2005).

Employee Not Required to Undergo Rehabilitation When Not Beneficial. — Competent evidence in the form of testimony by doctors and psychologists supported the Commission's decision that an employee who suffered psychological disorders as a result of encephalitis from surgery to correct a back injury from work did not have to undergo rehabilitation, because he would not be able to become employable again in spite of the rehabilitation. Shoemaker v. Creative Builders, 150 N.C. App. 523, 563 S.E.2d 622, 2002 N.C. App. LEXIS 588 (2002).

Return to College for Vocational Rehabilitation. — The Commission did not err in approving of employee's return to college as a proper form of vocational rehabilitation under G.S. 97-25 where the evidence showed that further schooling was the employee's only hope of securing wages comparable to the employee's pre-injury flight attendant wages. Foster v. U.S. Airways, Inc., 149 N.C. App. 913, 563 S.E.2d 235, 2002 N.C. App. LEXIS 406 (2002), cert. denied, 356 N.C. 299, 570 S.E.2d 505 (2002).

Burden of Proof. — The Industrial Commission committed legal error by placing the burden on plaintiff/employee to prove causation of her headaches where she met this burden in prior proceeding. Parsons v. Pantry, Inc., 126 N.C. App. 540, 485 S.E.2d 867 (1997).

The Commission erroneously placed on the plaintiff the burden of proving the medical treatment he sought was causally related to a past compensable injury, and the case was remanded for a new determination of causation. Reinninger v. Prestige Fabricators, Inc., 136 N.C. App. 255, 523 S.E.2d 720, 1999 N.C. App. LEXIS 1374 (1999).

The Commission's failure to make sufficient findings to support its denial of a seamstress's claim, based her refusal to see an authorized physician under this section or because she was not due any compensation for the first seven days of her injury under G.S. 97-28, resulted in remand. Kanipe v. Lane Upholstery, 141 N.C. App. 620, 540 S.E.2d 785, 2000 N.C. App. LEXIS 1302 (2000).

Exclusion of Evidence. — Exclusion of written response from a treating physician, which was in response to a facsimile sent by defense counsel that detailed three questions regarding causation of an employee's alleged work-related injury and subsequent disability, was proper since the communication was ex parte and consisted of interrogatories to a nonparty, which were not authorized by any caselaw precedent nor any rule of evidence. Mayfield v. Parker Hannifin, 174 N.C. App. 386, 621 S.E.2d 243, 2005 N.C. App. LEXIS 2472 (2005).

The Industrial Commission was required to state reasons for its denial of authorization of the medical treatment related to plaintiff's stomach reduction procedure, sought pursuant to this section. Clark v. Sanger Clinic, P.A., 142 N.C. App. 350, 542 S.E.2d 668, 2001 N.C. App. LEXIS 97, cert. denied, 353 N.C. 450, 548 S.E.2d 524 (2001).

Further Injury While En Route to Doctor's Appointment. — Where employee sustained an injury to his back as a direct result of a specific traumatic incident arising out of and in the course of employment, a subsequent car accident while en route to a doctor's appointment was not an intervening cause that precluded compensation for aggravation of the employee's work-related injury since the accident was not the fault of the employee. Cannon v. Goodyear Tire & Rubber Co., 171 N.C. App. 254, 614 S.E.2d 440, 2005 N.C. App. LEXIS 1254 (2005).

Applied in Godwin v. Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967); Schofield v. Great Atl. & Pac. Tea Co., 32 N.C. App. 508, 232 S.E.2d 874 (1977); Perkins v. Broughton Hosp., 71 N.C. App. 275, 321 S.E.2d 495 (1984); Haponski v. Constructor's, Inc., 71 N.C. App. 786, 323 S.E.2d 46 (1984); Braswell v. Pitt County Mem. Hosp., 106 N.C. App. 1, 415 S.E.2d 86 (1992); Maynor v. Sayles Biltmore Bleacheries, 116 N.C. App. 485, 448 S.E.2d 382 (1994); Brown v. Family Dollar Distribution Ctr., 129 N.C. App. 361, 499 S.E.2d 197 (1998); Ruggery v. North Carolina Dep't of Cors., 135 N.C. App. 270, 520 S.E.2d 77 (1999); Arnold v. Wal-Mart Stores, Inc., 154 N.C. App. 482, 571 S.E.2d 888, 2002 N.C. App. LEXIS 1461 (2002).

Cited in Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994); Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1948); Morgan v. Thomasville Furn. Indus., Inc., 2 N.C. App. 126, 162 S.E.2d 619 (1968); Gantt v. Hickory Motor Sales, Inc., 8 N.C. App. 559, 174 S.E.2d 624 (1970); Shuler v. Talon Div. of Textron, 30 N.C. App. 570, 227 S.E.2d 627 (1976); Robinson v. J.P. Stevens & Co., 57 N.C. App. 619, 292 S.E.2d 144 (1982); McDonald v. Brunswick Elec. Membership Corp., 77 N.C. App. 753, 336 S.E.2d 407 (1985); Sawyer v. Ferebee & Son, 78 N.C. App. 212, 336 S.E.2d 643 (1985); Derebery v. Pitt County Fire Marshall, 318 N.C. 192, 347 S.E.2d 814 (1986); Turner v. CECO Corp., 98 N.C. App. 366, 390 S.E.2d 685 (1990); Bowden v. Boling Co., 110 N.C. App. 226, 429 S.E.2d 394 (1993); Setzer v. Boise Cascade Corp., 123 N.C. App. 441, 473 S.E.2d 431 (1996); Swain v. C & N Evans Trucking Co., 126 N.C. App. 332, 484 S.E.2d 845 (1997); Cummings v. Burroughs Wellcome Co., 130 N.C. App. 88, 502 S.E.2d 26 (1998), cert. denied, 349 N.C. 355, 517 S.E.2d 890 (1998); Davis v. Weyerhaeuser Co., 132 N.C. App. 771, 514 S.E.2d 91 (1999); Pomeroy v. Tanner Masonry, 151 N.C. App. 171, 565 S.E.2d 209, 2002 N.C. App. LEXIS 709 (2002); Skillin v. Magna Corporation/Greene's Tree Serv., Inc., 152 N.C. App. 41, 566 S.E.2d 717, 2002 N.C. App. LEXIS 877 (2002); Gordon v. City of Durham, 153 N.C. App. 782, 571 S.E.2d 48, 2002 N.C. App. LEXIS 1257 (2002); Cialino v. Wal-Mart Stores, 156 N.C. App. 463, 577 S.E.2d 345, 2003 N.C. App. LEXIS 203 (2003); Taylor v. Bridgestone/Firestone, Inc., 157 N.C. App. 453, 579 S.E.2d 413, 2003 N.C. App. LEXIS 737 (2003); Dial v. Cozy Corner Rest., Inc., 161 N.C. App. 694, 589 S.E.2d 146, 2003 N.C. App. LEXIS 2261 (2003); Ward v. Floors Perfect, — N.C. App. —, 645 S.E.2d 109, 2007 N.C. App. LEXIS 1179 (2007).

II. WHAT TREATMENT MUST BE PROVIDED.

The legislature's obvious intent in amending this section in 1973 by deleting the 10 week limitation with respect to medical treatments required to effect or cure or give relief was to compel employers to provide medical treatments reasonably required to "effect a cure or give relief" more than 10 weeks after the date of injury. Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

Exclusive Jurisdiction of Commission. — What treatment is appropriate for a particular employee is a matter within the exclusive jurisdiction of the Industrial Commission. North Carolina Chiropractic Ass'n v. Aetna Cas. & Sur. Co., 89 N.C. App. 1, 365 S.E.2d 312 (1988).

Under this section, the Industrial Commission may order treatment or rehabilitative procedures that the Commission determines in its discretion to be reasonably necessary to effect a cure or give relief for an injured employee. Neal v. Carolina Mgt., 130 N.C. App. 220, 502 S.E.2d 424 (1998), rev'd on other grounds, 350 N.C. 63, 510 S.E.2d 375 (1999).

Findings of Fact by the Industrial Commission are Conclusive on Appeal if Supported by Any Competent Evidence. — Thus, on appeal, a reviewing court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding. Timmons v. North Carolina DOT, 351 N.C. 177, 522 S.E.2d 62 (1999).

Preparation of a life care plan is not necessary in all workers' compensation cases, but the subject record contained some competent evidence to support the Industrial Commission's finding requiring the employer to pay plaintiff's doctor for the cost of preparing his life care plan. Timmons v. North Carolina DOT, 351 N.C. 177, 522 S.E.2d 62 (1999).

Future Medical Expenses Not Limited to Those Lessening Period of Disability. — This section does not limit an employer's obligation to pay future medical expenses to those cases in which such expenses will lessen the period of disability. The statute also requires employers to pay the expenses of future medical treatments even if they will not lessen the period of disability, as long as they are reasonably required to (1) effect a cure, or (2) give relief. Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

Subsequent Treatment of Compensable Injury. — To require plaintiff to re-prove causation each time she seeks treatment for the very injury that the Industrial Commission has previously determined to be the result of a compensable accident is unjust and violates the duty to interpret the Worker's Compensation Act in the favor of injured employees. Parsons v. Pantry, Inc., 126 N.C. App. 540, 485 S.E.2d 867 (1997).

The Industrial Commission committed legal error by placing the burden on plaintiff to prove causation for further medical treatment after she already proved causation at the initial hearing. Parsons v. Pantry, Inc., 126 N.C. App. 540, 485 S.E.2d 867 (1997).

"Relief". — "Relief" embraces not only an affirmative improvement towards an injured employee's health, but also the prevention or mitigation of further decline in that health due to the compensable injury. Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

Relief from pain is a legitimate aspect of the "relief" anticipated by future medical treatment under this section. Simon v. Triangle Materials, Inc., 106 N.C. App. 39, 415 S.E.2d 105, cert. denied, 332 N.C. 347, 421 S.E.2d 154 (1992).

Relief from pain constituted "relief" as that term was used in this section prior to 1991 amendment. Radica v. Carolina Mills, 113 N.C. App. 440, 439 S.E.2d 185 (1994).

The phrase "lessen the period of disability," as used in this section means "lessen the period of time of diminution in earnings." Peeler v. State Hwy. Comm'n, 48 N.C. App. 1, 269 S.E.2d 153 (1980), aff'd, 302 N.C. 183, 273 S.E.2d 705 (1981).

Treatment to Prevent Further Decline. — As a result of the 1973 amendment to this section, employers must provide treatments reasonably required more than 10 weeks after an injury to prevent an employee's health from further declining. Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

Pre-existing Condition. — Where a North Carolina Industrial Commission finding that plaintiff's worsening lumbar spine condition was directly related to his original back condition and not caused by a work related accident was supported by competent evidence, the Commission did not err in denying plaintiff's claim for additional compensation and medical treatment. Pittman v. Thomas & Howard, 122 N.C. App. 124, 468 S.E.2d 283 (1996).

Additional Medical Treatment to Lessen Period of Disability. — The provision of this section that the employer should be liable for additional medical treatment to effect a cure or give relief is limited by the provision of this section to cases in which such additional medical treatment would tend to lessen the period of the employee's disability, and the discretionary power to award such additional medical treatment is also subject to this limitation; nor may liability for medical attention be extended upon the ground that public policy demands that the care of a permanently disabled employee should not be cast upon the State, the extent of liability under the act being definitely prescribed by its provisions. Millwood v. Firestone Cotton Mills, 215 N.C. 519, 2 S.E.2d 560 (1939), superseded by Dereby v. Pitt County Fire Marshall, 318 N.C. 192, 347 S.E.2d 814 (1986) (decided under prior laws).

The provision of this section that the employer should be liable for medical and nursing services for such time as such services will tend to lessen the period of disability does not preclude such payments when the disability is permanent, provided such services will tend to lessen the degree of disability. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967) (decided under prior laws).

Future expenses incurred to monitor an employee's medical condition are reasonably required to give relief if there is a substantial risk that the employee's condition may take a turn for the worse. Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

Future Medical Expenses for Procedure to Relieve Pain. — Defendants were required to pay for plaintiff's back surgery and related medical expenses as long as the surgery would give plaintiff relief, regardless of whether such surgery would lessen the period of disability or effect a cure for his injury, where, plaintiff contended the surgery would relieve a substantial portion of the pain he was suffering. Simon v. Triangle Materials, Inc., 106 N.C. App. 39, 415 S.E.2d 105, cert. denied, 332 N.C. 347, 421 S.E.2d 154 (1992).

Permanently Disabled Employee Entitled to Medical Expenses for Life. — In a workers' compensation case, there was no merit to defendant's argument that medical expenses should be compensated only to the extent they would tend to lessen the period of disability, since, if a plaintiff is found to be totally and permanently disabled, he will be entitled to medical expenses for life, dating from the time he became totally disabled, subject only to the requirements of G.S. 97-29 that the expenses be "reasonable and necessary." Smith v. American & Efird Mills, 51 N.C. App. 480, 277 S.E.2d 83, cert. denied and appeal dismissed, 304 N.C. 197, 285 S.E.2d 101 (1981), aff'd, 305 N.C. 507, 290 S.E.2d 634 (1982).

Life Care Plan Costs. — The Industrial Commission did not have authority to order the employer to pay for every item and service mentioned in a life care plan prepared by an expert, where the plan was prepared by an expert appointed by the Commission for an employee who had been rendered a paraplegic in a compensable workplace injury, but the plan included costs for items that the law would not require the defendant to pay, and the expert testified that she prepared the plan without regard to what medical benefits the defendant would be required by law to provide the plaintiff. Timmons v. North Carolina DOT, 130 N.C. App. 745, 504 S.E.2d 567 (1998), reaff'd on recons., 132 N.C. App. 377, 511 S.E.2d 659 (1999), rev'd on other grounds, 351 N.C. 177, 522 S.E.2d 62 (1999).

Incurable Injury. — Plaintiff suffered a head injury and developed dementia praecox, which physicians pronounced incurable. She required constant medical attention. The order requiring defendant to continue treatment was reversed. While the plaintiff might be made more comfortable by further treatment, the evidence showed that the period of disability would not be lessened. But see § 97-29 Millwood v. Firestone Cotton Mills, 215 N.C. 519, 2 S.E.2d 560 (1939), superseded by Dereby v. Pitt County Fire Marshall, 318 N.C. 192, 347 S.E.2d 814 (1986).

Handicapped Accessible Housing. — An employer's duty to provide other treatment or care is sufficiently broad to include the duty to provide handicapped accessible housing. Timmons v. North Carolina DOT, 123 N.C. App. 456, 473 S.E.2d 356 (1996), aff'd, 346 N.C. 173, 484 S.E.2d 551 (1997).

Reasonableness is determined by whether the surgery is of serious magnitude and risk, and whether the surgery involves much pain and suffering and is of uncertain benefit. Watkins v. City of Asheville, 99 N.C. App. 302, 392 S.E.2d 754 (1990).

Award of Expenses for Medical Treatment Held Appropriate. — North Carolina Industrial Commission's finding that a claimant's compensable post-traumatic stress disorder aggravated his diabetes, thereby obliging the employer to pay for his diabetes treatment, was supported by the evidence; the Commission was entitled to find the testimony of the claimant's treating physicians more credible than that of the employer's experts. Lewis v. N.C. Dep't of Corr., 167 N.C. App. 560, 606 S.E.2d 199, 2004 N.C. App. LEXIS 2385 (2004).

Award of Future Medical Expenses Appropriate. — The Industrial Commission's award of future medical expenses was appropriate, where four physicians testified that worker suffered from ongoing psychological disorders caused by her electrical shock injury, that these disorders in turn decreased her ability to use her right hand, and that plaintiff suffered a mild cognitive impairment. Cooke v. P.H. Glatfelter/Ecusta, 130 N.C. App. 220, 502 S.E.2d 419 (1998).

III. REFUSAL TO ACCEPT TREATMENT.

Refusal Defined. — "Refusal", as used in this section, connotes a willful or intentional act. Johnson v. Jones Group, Inc., 123 N.C. App. 219, 472 S.E.2d 587 (1996).

Findings Regarding Willingness to Cooperate. — Where full Commission focused only on defendants' non-compliance and made no finding as to plaintiff's own compliance, or lack thereof, the case had to be remanded for a determination of whether plaintiff affirmatively established her present willingness to cooperate with her employer's offers of medical treatment and rehabilitative services with her authorized physician. Scurlock v. Durham County Gen. Hosp., 136 N.C. App. 144, 523 S.E.2d 439, 1999 N.C. App. LEXIS 1299 (1999).

For case upholding Commission's decision that the back surgery recommended by plaintiff's physician had a high probability of significantly reducing the period of plaintiff's disability and would be sought by a similarly situated reasonable man, and that required plaintiff to undergo that surgery or lose his right to compensation, see Watkins v. City of Asheville, 99 N.C. App. 302, 392 S.E.2d 754 (1990).

The failure of the employer to seek relief from the Commission precludes the employer from raising the refusal to submit to an operation in opposition to the employee's claim for compensation. Crawley v. Southern Devices, Inc., 31 N.C. App. 284, 229 S.E.2d 325 (1976), cert. denied, 292 N.C. 467, 234 S.E.2d 2 (1977).

Brain Damaged Worker Incapable of Refusal. — Where the injury to the worker included brain damage to the extent that he became incapable of cooperating with rehabilitation efforts, the policy of liberality of the Workers' Compensation Act in favor of that injured worker precluded denial of benefits based upon his failure to accept, as opposed to willful refusal of, treatment. Johnson v. Jones Group, Inc., 123 N.C. App. 219, 472 S.E.2d 587 (1996).

Reasonableness of a refusal to accept treatment by an employee is measured by whether a reasonable person who is motivated to improve his health would accept the proffered treatment. Johnson v. Jones Group, Inc., 123 N.C. App. 219, 472 S.E.2d 587 (1996).

Reasonable Person Standard. — In cases where the ability of a claimant to make rational decisions regarding his welfare is at issue, the commission must make findings regarding the claimant's ability to act as a "reasonable person" in weighing medical options and making treatment decisions before denying benefits based on his refusal of treatment. Johnson v. Jones Group, Inc., 123 N.C. App. 219, 472 S.E.2d 587 (1996).

Attorney Involvement Does Not Constitute Refusal to Cooperate. — A letter from the claimant's attorney to her rehabilitation specialist requesting that the specialist contact the attorney directly did not constitute refusal to cooperate with rehabilitation procedure, where there was no evidence that the claimant had refused any rehabilitative procedure ordered by the Industrial Commission. Deskins v. Ithaca Indus., Inc., 131 N.C. App. 826, 509 S.E.2d 232 (1998).

Proof of Compliance with Treatment. — An unverified application and written motion, otherwise unsupported by the record, are not competent evidence on which the Industrial Commission may base a finding that the claimant kept an appointment with the designated physician, which would then support an order reinstating claimant's right to compensation. Matthews v. Charlotte-Mecklenburg Hosp. Auth., 132 N.C. App. 11, 510 S.E.2d 388 (1999).

Refusal to Undergo Surgery with Employer-Selected Physician. — An employee was not justified in choosing to undergo surgery with her own physician where the employer had already accepted liability orally and in writing and was therefore entitled to direct the medical treatment, where she failed to request authorization from the Commission within a reasonable period of time, and where she did not have good cause to refuse the treatment by the employer's physician. Kanipe v. Lane Upholstery, 141 N.C. App. 620, 540 S.E.2d 785, 2000 N.C. App. LEXIS 1302 (2000).

IV. EMERGENCY.

"Emergency" as Function of Circumstances. — This section does not define an emergency. What may be an emergency under one set of circumstances may not qualify as such under another. Schofield v. Great Atl. & Pac. Tea Co., 43 N.C. App. 567, 259 S.E.2d 338 (1979), vacated on other grounds, 299 N.C. 582, 264 S.E.2d 56 (1980).

Emergency Treatment. — Treatment received by a plaintiff employee in a workers' compensation case could be of an emergency nature even though it extended over a 17-month period of time. Schofield v. Great Atl. & Pac. Tea Co., 43 N.C. App. 567, 259 S.E.2d 338 (1979), vacated on other grounds, 299 N.C. 582, 264 S.E.2d 56 (1980).

North Carolina Industrial Commission properly affirmed a decision awarding a therapist medical treatment pursuant to G.S. 97-25 because the treatment was an emergency, as the therapist still reported pain after a physician determined that maximum medical improvement had been reached, and the therapist had already sought authorization from the Commission prior to obtaining the care on his own. Cash v. Lincare Holdings, — N.C. App. —, 639 S.E.2d 9, 2007 N.C. App. LEXIS 92 (2007).

"Failure to Provide Services." — An employee is justified under this section in seeking another physician in an emergency where the employer's "failure to provide" medical services amounts merely to an inability to provide those services. Schofield v. Great Atl. & Pac. Tea Co., 299 N.C. 582, 264 S.E.2d 56 (1980).

V. SELECTION OF PHYSICIAN BY EMPLOYEE.

Proviso Relates to Entire Section. — The proviso at the end of this section, relating to choice of personal physician, constitutes a proviso to the entire section, and not solely to the emergency provision. Schofield v. Great Atl. & Pac. Tea Co., 299 N.C. 582, 264 S.E.2d 56 (1980).

Employee May Choose Physician Even in Absence of Emergency. — The proviso to this section, relating to choice of personal physician, constitutes a proviso to the entire section, and not solely to the emergency provision. Construed in this light, the proviso clearly states that an injured employee has the right to procure, even in the absence of an emergency, a physician of his own choosing, subject to the approval of the Commission. Schofield v. Great Atl. & Pac. Tea Co., 299 N.C. 582, 264 S.E.2d 56 (1980).

Employer was required to pay medical expenses for treatment at a hospital of an injured employee with psychological disorders, where the employee without prior authorization admitted himself to the hospital, as an emergency was not required and the hospitalization was necessary to treat the employee's depression and suicidal feelings. Shoemaker v. Creative Builders, 150 N.C. App. 523, 563 S.E.2d 622, 2002 N.C. App. LEXIS 588 (2002).

There is no limitation on the number of physicians an employee may choose. — The only requirements are that each physician be approved by the Commission, and that treatment facilitate recovery and rehabilitation. Lucas v. Thomas Built Buses, Inc., 88 N.C. App. 587, 364 S.E.2d 147 (1988).

Same Terms Apply to Treatment Whether Chosen by Employee or Employer. — Fairness requires that medical treatment provided by the employee's own doctor be subject to the same limitations, terms and conditions as apply to medical treatment provided by the employer. Schofield v. Great Atl. & Pac. Tea Co., 299 N.C. 582, 264 S.E.2d 56 (1980).

Approval of Physician Chosen by Employee. — An employee is required to obtain approval of the Commission within a reasonable time after he has selected a physician of his own choosing to assume treatment. Schofield v. Great Atl. & Pac. Tea Co., 299 N.C. 582, 264 S.E.2d 56 (1980).

Claimant must obtain Industrial Commission approval for a physician selected by claimant, within a reasonable time after procuring the services of the physician, and if approval is sought within a reasonable time, if the commission approves a plaintiff's choice and if the treatment sought is to effectuate a cure or rehabilitation, then the employer has a statutory duty under this section to pay for the treatment. Forrest v. Pitt County Bd. of Educ., 100 N.C. App. 119, 394 S.E.2d 659 (1990).

The unambiguous language of this statute leaves the approval of a physician within the discretion of the Industrial Commission and the Commission's determination may only be reversed upon a finding of a manifest abuse of discretion. Franklin v. Broyhill Furn. Indus., 123 N.C. App. 200, 472 S.E.2d 382 (1996).

Pursuant to G.S. 97-2(18) and G.S. 97-25, an employee was entitled to payment of medical expenses for treatment to relieve substantial and continual back pain arising from an accident where she fell and injured her back in the course of her employment, where the record reflected that she had obtained authorization from the Industrial Commission for such future treatment; however, there was no indication in the record of the necessary authorization in order to allow reimbursement for past medical treatments, and accordingly, an award rendered for that was vacated and further consideration had to be made on the issue of whether the proper authorization was obtained prior to such treatment or within a reasonable time thereafter. Whitfield v. Lab. Corp., 158 N.C. App. 341, 581 S.E.2d 778, 2003 N.C. App. LEXIS 1192 (2003).

The treatment of the physician was authorized and the physician was permitted to testify before the Industrial Commission on the injured employee's claim where: (1) employee moved for authorization to allow psychological treatment and to have a physician's treatment approved by the North Carolina Industrial Commission within a reasonable time; (2) the employer's carrier recommended but never actually denied the request; and (3) the Industrial Commission denied request, but told the employee that the employee could request a hearing on the matter if the employee continued to believe that psychological treatment was necessary. Terry v. PPG Indus., 156 N.C. App. 512, 577 S.E.2d 326, 2003 N.C. App. LEXIS 199 (2003), cert. denied, 357 N.C. 256, 583 S.E.2d 290 (2003).

Approval Must Be Within Reasonable Time and Not Necessarily Prior to Services. — The Industrial Commission does not have to preclude payments for a physician's services solely because approval for those services was not previously requested; under this section, a plaintiff must only seek approval within a reasonable time not necessarily prior to the services or surgery rendered by the physician. Forrest v. Pitt County Bd. of Educ., 100 N.C. App. 119, 394 S.E.2d 659 (1990).

North Carolina Industrial Commission did not abuse its discretion in finding that a four-month delay before the employee sought authorization for a psychiatrist as a treating physician was reasonable. Dicamillo v. Arvin Meritor, Inc., — N.C. App. —, 644 S.E.2d 647, 2007 N.C. App. LEXIS 1155 (2007).

Unilateral Change of Physician Authorized. — The claimant's unilateral decision to change treating physicians was authorized under this section, and thus, was not adequate to support a finding that she unjustifiably refused to cooperate with vocational rehabilitation, where she continued to suffer pain from carpal tunnel syndrome after being released to return to work by her previous physician. Deskins v. Ithaca Indus., Inc., 131 N.C. App. 826, 509 S.E.2d 232 (1998).

Where an employee was released by the employer's authorized physician while the employee continued to suffer from back and leg pain, the North Carolina Industrial Commission did not abuse its discretion in approving treatment subsequently provided by physicians chosen by the employee. Lakey v. U.S. Airways, 155 N.C. App. 169, 573 S.E.2d 703, 2002 N.C. App. LEXIS 1596 (2002), cert. denied, 357 N.C. 251, 582 S.E.2d 271 (2003).

Failure to obtain approval for payments of medical expenses does not raise an estoppel claim. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Failure to Timely File Motion to Approve Choice of Osteopath. — Where an employee appealing a decision of the North Carolina Industrial Commission did not assign as error the commission's finding that her motion to approve an osteopath's treatment was "not timely filed," that finding was binding on appeal; since the employee failed to obtain the commission's approval of the osteopath within a reasonable time, the employer was not required to pay for her treatments. Thompson v. Fed. Express Ground, 175 N.C. App. 564, 623 S.E.2d 811, 2006 N.C. App. LEXIS 184 (2006).

Findings Required to Support Approval of Claim for Treatment by Employee's Physician. — Upon submission of a claim for approval for medical treatment rendered by the employee's own physician, there must be findings based upon competent evidence that the treatment was "required to effect a cure or give relief," or where additional time is involved, that it has "tend[ed] to lessen the period of disability." There should also be findings that the condition treated is, or was, caused by, or was otherwise traceable to or related to the injury giving rise to the compensable claim. Schofield v. Great Atl. & Pac. Tea Co., 299 N.C. 582, 264 S.E.2d 56 (1980).

Since an employee who procures his own doctor must obtain approval by the Commission within a reasonable time after such procurement, the Commission must make findings relative to whether such approval was sought within a reasonable time. Schofield v. Great Atl. & Pac. Tea Co., 299 N.C. 582, 264 S.E.2d 56 (1980).

Implicit in determining whether the cost of emergency treatment is reasonable is a determination of how long the emergency lasted. Before approving the cost of emergency treatment rendered by "a physician other than provided by the employer," the Industrial Commission must make findings, based upon competent evidence, relative to the duration of the emergency. Schofield v. Great Atl. & Pac. Tea Co., 299 N.C. 582, 264 S.E.2d 56 (1980).

The Industrial Commission must make appropriate findings relative to whether approval of an employee's procurement of his or her own physician was sought within a reasonable time. Hudson v. Mastercraft Div., 86 N.C. App. 411, 358 S.E.2d 134, cert. denied, 320 N.C. 792, 361 S.E.2d 77 (1987).

The full Commission made insufficient findings to support its approval of employee's request where employee waited three years to request authorization to use her own physician after she and the employer-approved physician discontinued their relationship. Scurlock v. Durham County Gen. Hosp., 136 N.C. App. 144, 523 S.E.2d 439, 1999 N.C. App. LEXIS 1299 (1999).

Employer did not have the right to select or limit an employee's physicians or treatment where the self-employed employer and its insurance administrator did not accept the employee's claim as compensable, but rather denied the alleged accident and injury; therefore, the North Carolina Industrial Commission did not err in not finding as a fact that the employee failed to offer evidence that the medical treatment rendered by certain physicians and treatment centers was necessary to effect a cure, to give relief, or to lessen the employee's period of disability. Craven v. VF Corp., 167 N.C. App. 612, 606 S.E.2d 160, 2004 N.C. App. LEXIS 2376 (2004), cert. denied, 359 N.C. 320, 611 S.E.2d 172 (2005).

§ 97-25.1. Limitation of duration of medical compensation.

The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation. If the Commission determines that there is a substantial risk of the necessity of future medical compensation, the Commission shall provide by order for payment of future necessary medical compensation. (1993 (Reg. Sess., 1994), c. 679, s. 2.5.)

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

CASE NOTES

Claim Not Barred For Injury Prior to Ratification. — Where worker's compensable back injury occurred prior to the ratification of G.S. 97-25.1, the worker was not barred from recovering benefits for new or additional medical expenses for admittedly compensable injury, even if there had been no material change in the worker's condition or in the available medical treatments. McAllister v. Wellman, Inc., 162 N.C. App. 146, 590 S.E.2d 311, 2004 N.C. App. LEXIS 58 (2004).

Illustrative Cases. — North Carolina Industrial Commission's order that employer was obligated to pay "for all related medical expenses incurred" was overly broad because it did not set a time limit on payments. Johnson v. S. Tire Sales & Serv., 152 N.C. App. 323, 567 S.E.2d 773, 2002 N.C. App. LEXIS 920 (2002), cert. denied, 356 N.C. 437, 572 S.E.2d 784 (2002).

Industrial commission wrongly declined to leave a workers' compensation claim open for future medical treatment pursuant to G.S. 97-25.1; the commission improperly placed the burden of proof on an employee to show that future treatment was related to an original injury. Taylor v. Bridgestone/Firestone, Inc., 157 N.C. App. 453, 579 S.E.2d 413, 2003 N.C. App. LEXIS 737 (2003).

Award providing that an employer and its insurer were required to pay medical benefits was not overly broad, despite the fact that it failed to delineate the two-year time limitation set forth in G.S. 97-25.1. Guerrero v. Brodie Contrs., Inc., 158 N.C. App. 678, 582 S.E.2d 346, 2003 N.C. App. LEXIS 1226 (2003).

Period of limitations provided by G.S. 97-25.1 was inherent in the Full Commission's award that an employer and a carrier pay for medical compensation incurred by an employee as a result of the injuries the employee sustained when she fell at work and subsequently at home, as the award was based upon the Full Commission's prior conclusion of law, in which the Full Commission cited G.S. 97-25 and G.S. 97-25.1. Brown v. Kroger Co., 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005).

North Carolina industrial commission had sufficient evidence in two doctors' depositions to support the findings of fact and to conclude that there was a substantial likelihood that an injured employee would need additional treatment for an injured knee in the future, regardless of what that treatment might entail. Adams v. Frit Car, Inc., — N.C. App. —, 649 S.E.2d 651, 2007 N.C. App. LEXIS 1946 (2007).

Cited in Pomeroy v. Tanner Masonry, 151 N.C. App. 171, 565 S.E.2d 209, 2002 N.C. App. LEXIS 709 (2002); Devlin v. Apple Gold, Inc., 153 N.C. App. 442, 570 S.E.2d 257, 2002 N.C. App. LEXIS 1187 (2002); Gordon v. City of Durham, 153 N.C. App. 782, 571 S.E.2d 48, 2002 N.C. App. LEXIS 1257 (2002); Ward v. Floors Perfect, — N.C. App. —, 645 S.E.2d 109, 2007 N.C. App. LEXIS 1179 (2007).

§ 97-25.2. Managed care organizations.

The requirements of G.S. 97-25 may be satisfied by contracting with a managed care organization. Notwithstanding any other provision of this Article, if an employer or carrier contracts with a managed care organization for medical services pursuant to this Article, those employees who are covered by the contract with the managed care organization shall receive medical services for a condition for which the employer has accepted liability or authorized treatment under this Article in the manner prescribed by the contract and in accordance with the managed care organization's certificate of authority; provided that the contract complies with rules adopted by the Commission, consistent with this Article, governing managed care organizations. An employee must exhaust all dispute resolution procedures of a managed care organization before applying to the Commission for review of any issue related to medical services compensable under this Article. Once application to the Commission has been made, the employee shall be entitled to an examination by a duly qualified physician or surgeon in the same manner as provided by G.S. 97-27.

If an employee's medical services are provided through a managed care organization pursuant to this section, subject to the rules of the managed care organization, the employee shall select the attending physician from those physicians who are members of the managed care organization's panel, and may subsequently change attending physicians once within the group of physicians who are members of the managed care organization's panel without approval from the employer or insurer. Additional changes in the attending physician or any change to a physician or examination by a physician not a member of the insurer's managed care organization's panel shall only be made pursuant to the organization's contract or upon reasonable grounds by order of the Commission. (1993 (Reg. Sess., 1994), c. 679, s. 2.1.)

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For comment, "Managed Care Organizations in North Carolina: Tort Liability Theories and Defenses," see 23 N.C. Cent. L.J. 58 (1997).

§ 97-25.3. Preauthorization.

(a) An insurer may require preauthorization for inpatient admission to a hospital, inpatient admission to a treatment center, and inpatient or outpatient surgery. The insurer's preauthorization requirement must adhere to the following standards:

(1) The insurer may require no more than 10 days advance notice of the inpatient admission or surgery.

(2) The insurer must respond to a request for preauthorization within two business days of the request.

(3) The insurer shall review the need for the inpatient admission or surgery and may require the employee to submit to an independent medical examination as provided in G.S. 97-27(a). This examination must be completed and the insurer must make its determination on the request for preauthorization within seven days of the date of the request unless this time is extended by the Commission for good cause.

(4) The insurer shall document its review findings and determination in writing and shall provide a copy of the findings and determination to the employee and the employee's attending physician, and, if applicable, to the hospital or treatment center.

(5) The insurer shall authorize the inpatient admission or surgery when it requires the employee to submit to a medical examination as provided in G.S. 97-27(a) and the examining physician concurs with the original recommendation for the inpatient admission or surgery. The insurer shall also authorize the inpatient admission or surgery when the employee obtains a second opinion from a physician approved by the insurer or the Commission, and the second physician concurs with the original recommendation for the inpatient admission or surgery. However, the insurer shall not be required by this subdivision to authorize the inpatient admission or surgery if it denies liability under this Article for the particular medical condition for which the services are sought.

(6) Except as provided in subsection (c) of this section, the insurer may reduce its reimbursement of the provider's eligible charges under this Article by up to fifty percent (50%) if the insurer has notified the provider in writing of its preauthorization requirement and the provider failed to timely obtain preauthorization. The employee shall not be liable for the balance of the charges.

(7) The insurer shall adhere to all other procedures for preauthorization prescribed by the Commission.

(b) An insurer may not impose a preauthorization requirement for the following:

(1) Emergency services;

(2) Services rendered in the diagnosis or treatment of an injury or illness for which the insurer has not admitted liability or authorized payment for treatment pursuant to this Article; and

(3) Services rendered in the diagnosis and treatment of a specific medical condition for which the insurer has not admitted liability or authorized payment for treatment although the insurer admits the employee has suffered a compensable injury or illness.

(c) The Commission may, upon reasonable grounds, upon the request of the employee or provider, authorize treatment for which preauthorization is otherwise required by this section but was not obtained if the Commission determines that the treatment is or was reasonably required to effect a cure or give relief.

(d) The Commission may adopt procedures governing the use of preauthorization requirements and expeditious review of preauthorization denials.

(e) A managed care organization may impose preauthorization requirements consistent with the provisions of Chapter 58 of the General Statutes.

(f) A provider that refuses to treat an employee for other than an emergency medical condition because preauthorization has not been obtained shall be immune from liability in any civil action for the refusal to treat the employee because of lack of preauthorization. (1993 (Reg. Sess., 1994), c. 679, s. 2.2.)

§ 97-25.4. Utilization guidelines for medical treatment.

(a) The Commission may adopt utilization rules and guidelines, consistent with this Article, for medical care and medical rehabilitation services, other than those services provided by managed care organizations pursuant to G.S. 97-25.2, including, but not limited to, necessary palliative care, physical therapy treatment, psychological therapy, chiropractic services, medical rehabilitation services, and attendant care. The Commission's rules and guidelines shall ensure that injured employees are provided the services and care intended by this Article and that medical costs are adequately contained. In developing the rules and guidelines, the Commission may consider, among other factors, the practice guidelines adopted by the boards and associations representing medical and rehabilitation professionals.

(b) Palliative care rules or guidelines adopted by the Commission may require that the provider (i) supply to the employer a treatment plan, including a schedule of measurable objectives, a projected termination date for treatment, and an estimated cost of services, and (ii) obtain preauthorization from the employer, not inconsistent with the provisions of G.S. 97-25.3. (1993 (Reg. Sess., 1994), c. 679, s. 2.4.)

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

§ 97-25.5. Utilization guidelines for vocational and other rehabilitation.

The Commission may adopt utilization rules and guidelines, consistent with this Article, for vocational rehabilitation services and other types of rehabilitation services. In developing the rules and guidelines, the Commission may consider, among other factors, the practice and treatment guidelines adopted by professional rehabilitation associations and organizations. (1993 (Reg. Sess., 1994), c. 679, s. 2.4.)

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

§ 97-25.6. Reasonable access to medical information.

Notwithstanding the provisions of G.S. 8-53, any law relating to the privacy of medical records or information, and the prohibition against ex parte communications at common law, an employer or insurer paying medical compensation to a provider rendering treatment under this Article may obtain records of the treatment without the express authorization of the employee. In addition, with written notice to the employee, the employer or insurer may obtain directly from a medical provider medical records of evaluation or treatment restricted to a current injury or current condition for which an employee is claiming compensation from that employer under this Article.

Any medical records or reports, restricted to conditions related to the injury or illness for which the employee is seeking compensation, in the possession of the employee shall be furnished by the employee to the employer when requested in writing by the employer.

An employer or insurer paying compensation for an admitted claim or paying without prejudice pursuant to G.S. 97-18(d) may communicate with an employee's medical provider in writing, limited to specific questions promulgated by the Commission, to determine, among other information, the diagnosis for the employee's condition, the reasonable and necessary treatment, the anticipated time that the employee will be out of work, the relationship, if any, of the employee's condition to the employment, the restrictions from the condition, the kind of work for which the employee may be eligible, the anticipated time the employee will be restricted, and the permanent impairment, if any, as a result of the condition. When these questions are used, a copy of the written communication shall be provided to the employee at the same time and by the same means as the communication is provided to the provider.

Other forms of communication with a medical provider may be authorized by (i) a valid written authorization voluntarily given and signed by the employee, (ii) by agreement of the parties, or (iii) by order of the Commission issued upon a showing that the information sought is necessary for the administration of the employee's claim and is not otherwise reasonably obtainable under this section or through other provisions for discovery authorized by the Commission's rules. In adopting rules or authorizing employer communications with medical providers, the Commission shall protect the employee's right to a confidential physician-patient relationship while facilitating the release of information necessary to the administration of the employee's claim.

Upon motion by an employee or provider from whom medical records or reports are sought or upon its own motion, for good cause shown, the Commission may make any order which justice requires to protect an employee or other person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense. (2005-448, s. 6.1.)

Editor's Note. — Session Laws 2005-448, s. 10, made this section effective September 29, 2005, and applicable to claims pending and filed on or after that date.

§ 97-26. Fees allowed for medical treatment; malpractice of physician.

(a) (**Effective until July 1, 2008**) Fee Schedule. — The Commission shall adopt a schedule of maximum fees for medical compensation, except as provided in subsection (b) of this section, and shall periodically review the schedule and make revisions pursuant to the provisions of this Article.

The fees adopted by the Commission in its schedule shall be adequate to ensure that (i) injured workers are provided the standard of services and care intended by this Chapter, (ii) providers are reimbursed reasonable fees for providing these services, and (iii) medical costs are adequately contained.

Prior to adoption of a fee schedule, the Commission shall publish notice of its intent to adopt the schedule in the North Carolina Register and hold a public hearing. The published notice shall include the location, date and time of the public hearing, the proposed effective date of the fee schedule, the period of time during which the Commission will receive written comments on the proposed schedule, and the person to whom comments and questions should be directed. In addition to publication in the North Carolina Register, the notice may be mailed to parties who have requested notice of the fee schedule hearing. The public hearing shall be held no earlier than 15 days after the publication of the notice. The Commission shall receive written comments for at least 30 days or until the date of the public hearing, whichever is later, after which the Commission may adopt the fee schedule.

The Commission may consider any and all reimbursement systems and plans in establishing its fee schedule, including, but not limited to, the

G.S. 97-26(a) is set out twice. See notes.

Teachers' and State Employees' Comprehensive Major Medical Plan (hereinafter, "State Plan"), Blue Cross and Blue Shield, and any other private or governmental plans. The Commission may also consider any and all reimbursement methodologies, including, but not limited to, the use of current procedural terminology ("CPT") codes, diagnostic-related groupings ("DRGs"), per diem rates, capitated payments, and resource-based relative-value system ("RBRVS") payments. The Commission may consider statewide fee averages, geographical and community variations in provider costs, and any other factors affecting provider costs.

An appeal from a decision of the Commission establishing a fee schedule, by any party aggrieved thereby, shall be to the North Carolina Court of Appeals. The decision of the Commission shall be affirmed if supported by substantial evidence. For the purposes of the appeal, the Commission is a party.

(a) (**Effective July 1, 2008**) Fee Schedule. — The Commission shall adopt a schedule of maximum fees for medical compensation, except as provided in subsection (b) of this section, and shall periodically review the schedule and make revisions pursuant to the provisions of this Article.

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The Commission may consider any and all reimbursement systems and plans in establishing its fee schedule, including, but not limited to, the State Health Plan for Teachers and State Employees (hereinafter, "State Plan"), Blue Cross and Blue Shield, and any other private or governmental plans. The Commission may also consider any and all reimbursement methodologies, including, but not limited to, the use of current procedural terminology ("CPT") codes, diagnostic-related groupings ("DRGs"), per diem rates, capitated payments, and resource-based relative-value system ("RBRVS") payments. The Commission may consider statewide fee averages, geographical and community variations in provider costs, and any other factors affecting provider costs.

An appeal from a decision of the Commission establishing a fee schedule, by any party aggrieved thereby, shall be to the North Carolina Court of Appeals. The decision of the Commission shall be affirmed if supported by substantial evidence. For the purposes of the appeal, the Commission is a party.

(b) Hospital Fees. — Each hospital subject to the provisions of this subsection shall be reimbursed the amount provided for in this subsection unless it has agreed under contract with the insurer, managed care organization, employer (or other payor obligated to reimburse for inpatient hospital services rendered under this Chapter) to accept a different amount or reimbursement methodology.

Except as otherwise provided herein, payment for medical treatment and services rendered to workers' compensation patients by a hospital shall be a reasonable fee determined by the Commission. Effective September 16, 2001, through June 30, 2002, the fee shall be the following amount unless the Commission adopts a different fee schedule in accordance with the provisions of this section:

(1) For inpatient hospital services, the amount that the hospital would have received for those services as of June 30, 2001. The payment shall not be more than a maximum of one hundred percent (100%) of the hospital's itemized charges as shown on the UB-92 claim form nor less than the minimum percentage for payment of inpatient DRG claims that was in effect as of June 30, 2001.
(2) For outpatient hospital services and any other services that were reimbursed as a discount off of charges under the State Plan as of June 30, 2001, the amount calculated by the Commission as a percentage of the hospital charges for such services. The percentage applicable to each hospital shall be the percentage used by the Commission to determine outpatient rates for each hospital as of June 30, 2001.
(3) For any other services, a reasonable fee as determined by the Industrial Commission.

Notwithstanding any other provisions of law, the Commission's determination of payment rates under this subsection shall:

(1) Comply with the procedures for adoption of a fee schedule established in G.S. 97-26(a);
(2) Include publication of the proposed payment rate, and a summary of the data and calculations on which the rate is based at least 90 days before the proposed effective date;
(3) Be subject to the declaratory ruling provisions of G.S. 150B-4; and
(4) Be deemed to constitute a final permanent rule under Article 2A of Chapter 150B for purposes of judicial review under Article 4 of that Chapter.

A hospital's itemized charges on the UB-92 claim form for workers' compensation services shall be the same as itemized charges for like services for all other payers.

(c) Maximum Reimbursement for Providers Under Subsection (a). — Each health care provider subject to the provisions of subsection (a) of this section shall be reimbursed the amount specified under the fee schedule unless the provider has agreed under contract with the insurer or managed care organization to accept a different amount or reimbursement methodology. In any instance in which neither the fee schedule nor a contractual fee applies, the maximum reimbursement to which a provider under subsection (a) is entitled under this Article is the usual, customary, and reasonable charge for the service or treatment rendered. In no event shall a provider under subsection (a) charge more than its usual fee for the service or treatment rendered.

(d) Information to Commission. — Each health care provider seeking reimbursement for medical compensation under this Article shall provide the Commission information requested by the Commission for the development of fee schedules and the determination of appropriate reimbursement.

(e) When Charges Submitted. — Health care providers shall submit charges to the insurer or managed care organization within 30 days of treatment, within 30 days after the end of the month during which multiple treatments were provided, or within such other reasonable period of time as allowed by the Commission. If an insurer or managed care organization disputes a portion of a health care provider's bill, it shall pay the uncontested portion of the bill and shall resolve disputes regarding the balance of the charges in accordance with this Article or its contractual arrangement.

(f) Repeating Diagnostic Tests. — A health care provider shall not authorize a diagnostic test previously conducted by another provider, unless the health care provider has reasonable grounds to believe a change in patient condition may have occurred or the quality of the prior test is doubted. The Commission may adopt rules establishing reasonable requirements for reports and records to be made available to other health care providers to prevent unnecessary duplication of tests and examinations. A health care provider that violates this subsection shall not be reimbursed for the costs associated with administering or analyzing the test.

(g) Direct Reimbursement. — The Commission may adopt rules to allow insurers and managed care organizations to review and reimburse charges for medical compensation without submitting the charges to the Commission for review and approval.

(h) Malpractice. — The employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of this section, but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident, and shall be compensated for as such.

(i) Resolution of Dispute. — The employee or health care provider may apply to the Commission by motion or for a hearing to resolve any dispute regarding the payment of charges for medical compensation in accordance with this Article. (1929, c. 120, s. 26; 1955, c. 1026, s. 3; 1993 (Reg. Sess., 1994), c. 679, s. 2.3; 1995 (Reg. Sess., 1996), c. 548, s. 1; 1997-145, s. 1; 2001-410, s. 3; 2001-413, s. 8.2(a); 2005-448, s. 5; 2007-323, s. 28.22A(o); 2007-345, s. 12.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until July 1, 2008. The second version of subsection (a) set out above is effective July 1, 2008.

Editor's Note. — Session Laws 2001-253, s. 2, as amended by Session Laws 2001-322, s. 3, and 2001-395, s. 9, provides: "Notwithstanding G.S. 97-26, payment for medical treatment and services rendered to workers' compensation patients by a hospital on or after July 1, 2001, and before September 15, 2001, shall be equal to the payment the hospital would have received for such treatment and services on June 30, 2001."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 28.22A(o), as amended by Session Laws 2007-345, s. 12, effective July 1, 2008, substituted "State Health Plan for Teachers and State Employees" for "Teachers' and State Employees' Comprehensive Major Medical Plan" in the fourth paragraph of subsection (a).

Legal Periodicals. — For note, "Houses and Wages: An Increase in Workers' Compensation Recovery," see 65 N.C.L. Rev. 1499 (1987).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

CASE NOTES

This section contains the correct measure of employer liability for hospital charges. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

The legislature intended (1) that medical compensation, including hospital services provided by the employer, ordered by the Industrial Commission, provided pursuant to emergencies, or chosen by the employee, subject to the approval of the Commission, be limited by the terms and conditions contained in G.S. 97-25; (2) that such medical compensation be reasonably required to effect a cure or give relief or tend to lessen the period of disability; and (3) that the employer not be charged more than his employee would have been had the employee paid for the services. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

The legislature intended that the Industrial Commission's authority under G.S. 97-25 be limited to review and approval of hospital charges to ensure, first, that the employer is charged only for those reasonably required services, and, second, that the employer is not charged more for such services than the prevailing charge for the same or similar hospital service in the same community. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

Employer's Liability for Medical Expense Not Preempted by Federal Law. — The obligation of an employer to pay claimant's reasonable and necessary medical expenses, and the ability of health-care providers to accept such payment, was not controlled or preempted by federal Medicaid statutes or regulations. Pearson v. C.P. Buckner Steel Erection Co., 348 N.C. 239, 498 S.E.2d 818 (1998).

Determination of Payment Amount. — An employer who denied liability but was ordered to pay medical expenses under the Workers' Compensation Act was required to pay health-care providers the difference between the amount covered by Medicaid and the full amount authorized by the Commission's fee schedule. Pearson v. C.P. Buckner Steel Erection Co., 348 N.C. 239, 498 S.E.2d 818 (1998).

Liability of Physician or Surgeon Is Not Affected by This Section. — The purpose of this section is to treat the consequences of malpractice by a physician or surgeon as part of the consequences of the original injury as between the employee and the employer, and so, the employer's insurance carrier. Thus, the employee's right to benefit under the act on account of the consequences of such malpractice does not depend upon the employer's negligence. Conversely, the employer's liability for such consequences of malpractice by a physician or surgeon is limited to those benefits provided under the act. It was not the purpose of this section to affect in any way the liability of the physician or surgeon. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

This section relates to the right of the employee to recover damages or benefits under the act from the employer, and so from the insurance carrier of the employer. It does not impose liability upon the physician or surgeon or relieve him thereof. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966); Bryant v. Dougherty, 270 N.C. 748, 155 S.E.2d 181 (1967).

Act Does Not Deprive Employee of Right of Action Against Physician or Surgeon. — The act does not deprive an employee of the right to maintain an action at common law for malpractice against the physician or surgeon selected by the employer to treat his injuries received in the course of his employment, when the physician is not a full-time employee of the employer. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Provided Physician Carries on Independent Practice. — Where a physician is carrying on an independent practice of medicine or surgery, he is not "conducting the business" of an industrial corporation merely because the manager of the plant sends to him, for examination and treatment, those who, from time to time, sustain injuries in the plant. Under these circumstances, G.S. 97-9 does not deprive the employee of his common-law right to a physician or surgeon who, in the course of such examination or treatment, is negligent and thereby aggravates the original injury. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Nor Confer Jurisdiction on Commission to Determine Such Action. — The act does not abrogate the employee's common-law right of action against the attending physician or surgeon, and does not confer upon the Industrial Commission jurisdiction to hear and determine such action. Bryant v. Dougherty, 270 N.C. 748, 155 S.E.2d 181 (1967).

The act does not confer upon the Industrial Commission jurisdiction to hear and determine an action brought by an injured employee against a physician or surgeon to recover damages for injury due to the negligence of the latter in the performance of his professional services to the employee. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966); Bryant v. Dougherty, 270 N.C. 748, 155 S.E.2d 181 (1967).

Superior Court Has Jurisdiction of Malpractice Action. — Since the act does not abrogate the employee's common-law right of action against the attending physician or surgeon and does not confer upon the Industrial Commission jurisdiction to hear and determine such action, the superior court has jurisdiction to do so. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Malpractice Not Grounds for Action Against Employer or Carrier. — The malpractice of the physician or surgeon selected by the employer or carrier is not grounds for an independent action against the employer or the carrier, but is, as to them, one of the consequences of the original injury, and is to be compensated as such in accordance with the provision of the Workers' Compensation Act. Hence, a cross-action for contribution on the theory that the carrier and the physician were joint tortfeasors would not lie. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Injury or suffering sustained by employee in consequence of malpractice of a physician or surgeon furnished by the employer or carrier is not ground for an independent action; under this section it is a constituent element of the employee's injury, for which he is entitled to compensation. In such event, the employer and the carrier are primarily liable, and the question of secondary liability is eliminated. Hoover v. Globe Indem. Co., 202 N.C. 655, 163 S.E. 758 (1932).

The physician and carrier are not joint tortfeasors within the meaning of former G.S. 1-240. Hoover v. Globe Indem. Co., 202 N.C. 655, 163 S.E. 758 (1932), following Brown v. Southern Ry., 202 N.C. 256, 162 S.E. 613 (1932).

Approval of Bills Where Liability for Medical Care Is Voluntarily Incurred by Employer. — When liability for the medical care of an employee who has suffered an accident is voluntarily incurred by the employer, the bills therefor must be approved by the Commission before the employer can demand reimbursement from its insurance carrier. In this manner, such expenditures are kept within the schedule of fees and charges adopted by the Commission. Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953).

Applied in Godwin v. Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967); Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

Cited in Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1948); Hatchett v. Hitchcock Corp., 240 N.C. 591, 83 S.E.2d 539 (1954); Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962); Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832 (1986); Palmer v. Jackson, 157 N.C. App. 625, 579 S.E.2d 901, 2003 N.C. App. LEXIS 930 (2003).

§ 97-26.1. Fees for medical records and reports; expert witnesses.

The Commission may establish maximum fees for the following when related to a claim under this Article: (i) the searching, handling, copying, and mailing of medical records, (ii) the preparation of medical reports and narratives, and (iii) the presentation of expert testimony in a Commission proceeding. (1993 (Reg. Sess., 1994), c. 679, s. 5.6.)

§ 97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.

(a) After an injury, and so long as he claims compensation, the employee, if so requested by his employer or ordered by the Industrial Commission, shall, subject to the provisions of subsection (b), submit himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the Industrial Commission. The employee shall have the right to have present at such examination any duly qualified physician or surgeon provided and paid by him. Notwithstanding the provisions of G.S. 8-53, no fact communicated to or otherwise learned by any physician or surgeon or hospital or hospital employee who may have attended or examined the employee, or who may have been present at any examination, shall be privileged in any workers' compensation case with respect to a claim pending for hearing before the Industrial Commission. If the employee refuses to submit himself to or in any way obstructs such examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute any proceedings under this Article shall be suspended until such refusal or objection ceases, and no compensation shall at any time be payable for the period of obstruction, unless in the opinion of the Industrial Commission the circumstances justify the refusal or obstruction. The employer, or the Industrial Commission, shall have the right in any case of death to require an autopsy at the expense of the party requesting the same.

(b) In those cases arising under this Article in which there is a question as to the percentage of permanent disability suffered by an employee, if any employee, required to submit to a physical examination under the provisions of subsection (a) is dissatisfied with such examination or the report thereof, he shall be entitled to have another examination by a duly qualified physician or surgeon licensed and practicing in North Carolina or by a duly qualified physician or surgeon licensed to practice in South Carolina, Georgia, Virginia and Tennessee provided said nonresident physician or surgeon shall have been approved by the North Carolina Industrial Commission and his name placed on the Commission's list of approved nonresident physicians and surgeons, designated by him and paid by the employer or the Industrial Commission in the same manner as physicians designated by the employer or the Industrial Commission are paid. Provided, however, that all travel expenses incurred in obtaining said examination shall be paid by said employee. The employer shall have the right to have present at such examination a duly qualified physician or surgeon provided and paid by him. No fact communicated to or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in hearings provided for by this Article or any action at law. (1929, c. 120, s. 27; 1959, c. 732; 1969, c. 135; 1973, c. 520, s. 2; 1977, c. 511; 1991, c. 636, s. 3.)

Cross References. — As to application of this section to certain state law-enforcement officers, see G.S. 143-166.15.

Editor's Note. — Session Laws 2001-410, s. 3, purported to amend subsection (b) of this section but was corrected to amend G.S. 96-26(b) by Session Laws 2001-413, s. 8.2(a).

Legal Periodicals. — For comment on release of medical records by North Carolina hospitals, see 7 N.C. Cent. L.J. 299 (1976).

For article, "Primary Issues in Compensation Litigation," see 17 Campbell L. Rev. 443 (1995).

CASE NOTES

The language of this section is mandatory as to the employee. The employee "shall" submit himself to an examination if it is requested by his employer or ordered by the Industrial Commission. The language of this section, however, imposes no mandatory obligation on the Industrial Commission to order an examination. Taylor v. M.L. Hatcher Pick-Up & Delivery Serv., 45 N.C. App. 682, 263 S.E.2d 788, cert. denied, 300 N.C. 379, 267 S.E.2d 684 (1980).

Commission Approval of Request for Examination Is Discretionary. — When an employer requests the Commission to order an employee to submit to an examination, whether the Commission grants or denies the employer's request is within the discretion of the Commission. Taylor v. M.L. Hatcher Pick-Up & Delivery Serv., 45 N.C. App. 682, 263 S.E.2d 788, cert. denied, 300 N.C. 379, 267 S.E.2d 684 (1980).

Where employer chose the treating doctor who gave employee the disability rating for his right leg, and the employer failed to show any abuse of discretion by the Deputy Commissioner in finding that the employer was not entitled to an independent medical evaluation for the employee's leg injury, the Full Commission did not err in affirming the Deputy Commissioner's findings and awarding the employee compensation for his leg injuries. Haley v. ABB, Inc., 174 N.C. App. 469, 621 S.E.2d 180, 2005 N.C. App. LEXIS 2496 (2005).

Refusal to Undergo Diagnostic Tests. — Under subsection (a) of this section, employee was required to undergo the diagnostic tests requested by the physician designated by his employer or, in the alternative, request the Commission to find such test to be not reasonable, in which case the Commission would be required to decide the matter. Where he did neither, but simply unilaterally refused the tests, employee would not be entitled to compensation until that time when he submitted to further examination by the physician. Hooks v. Eastway Mills, Inc., 74 N.C. App. 432, 328 S.E.2d 602, rev'd on other grounds, 314 N.C. 657, 335 S.E.2d 898 (1985).

The Workers' Compensation Statute does not compel the employer, nor the Industrial Commission, to rely upon one source of medical information, that provided by the injured plaintiff. The statute specifically suspends an injured employee's right to compensation should he or she refuse to submit to examination by a physician designated and paid for by the employer. Blankley v. White Swan Uniform Rentals, 107 N.C. App. 751, 421 S.E.2d 603 (1992), cert. denied, 333 N.C. 461, 427 S.E.2d 618 (1993).

Refusal to Undergo Surgery with Employer-Selected Physician. — An employee was not justified in choosing to undergo surgery with her own physician where the employer had already accepted liability orally and in writing and was therefore entitled to direct the medical treatment, where she failed to request authorization from the Commission within a reasonable period of time, and where she did not have good cause to refuse the treatment by the employer's physician. Kanipe v. Lane Upholstery, 141 N.C. App. 620, 540 S.E.2d 785, 2000 N.C. App. LEXIS 1302 (2000).

Remand Where Findings Fail to Determine Justification for Refusal. — Where the findings of fact of the Industrial Commission fail to determine whether the circumstances justified the plaintiff's refusal to submit to medical procedures, the case must be remanded to the Industrial Commission for determination of whether the plaintiff's refusal to undergo the procedures was reasonable under the circumstances. Hooks v. Eastway Mills, Inc. & Affiliates, 314 N.C. 657, 335 S.E.2d 898 (1985).

Analysis of Blood Taken from Body After Death. — The percentage of alcohol in the bloodstream of a deceased employee, determined by chemical analysis of a sample of blood taken from his body shortly after death, was competent evidence on the question of intoxication. Osborne v. Colonial Ice Co., 249 N.C. 387, 106 S.E.2d 573 (1959).

Autopsy after Burial. — One month after deceased's burial, defendant requested that the body be disinterred and a postmortem examination be made to determine the cause of his death. It was held that plaintiff's consent was rightfully refused. There is a distinction between the right to have an autopsy before and after burial. The latter will not be granted except in cases of extreme emergency. Cabe v. Parker-Graham-Sexton, Inc., 202 N.C. 176, 162 S.E. 223 (1932).

The Commission erred by admitting the deposition testimony of plaintiff's surgeon in light of the non-consensual ex parte contact between defendant and plaintiff's surgeon. Salaam v. North Carolina DOT, 122 N.C. App. 83, 468 S.E.2d 536 (1996), review denied, 345 N.C. 494, 480 S.E.2d 51 (1997).

Applied in Clark v. Burlington Indus., 49 N.C. App. 269, 271 S.E.2d 101 (1980).

Cited in Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992); Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993); Timmons v. North Carolina DOT, 130 N.C. App. 745, 504 S.E.2d 567 (1998), reaff'd on recons., 132 N.C. App. 377, 511 S.E.2d 659 (1999), rev'd on other grounds, 351 N.C. 177, 522 S.E.2d 62 (1999); Jenkins v. Public Serv. Co. of N.C., 134 N.C. App. 405, 518 S.E.2d 6, 1999 N.C. App. LEXIS 805 (1999), cert. granted, 351 N.C. 106, 541 S.E.2d 147 (1999); Skillin v. Magna Corporation/Greene's Tree Serv., Inc., 152 N.C. App. 41, 566 S.E.2d 717, 2002 N.C. App. LEXIS 877 (2002).

§ 97-28. Seven-day waiting period; exceptions.

No compensation, as defined in G.S. 97-2(11), shall be allowed for the first seven calendar days of disability resulting from an injury, except the benefits provided for in G.S. 97-25. Provided however, that in the case the injury results in disability of more than 21 days, the compensation shall be allowed from the date of the disability. Nothing in this section shall prevent an employer from allowing an employee to use paid sick leave, vacation or annual leave, or disability benefits provided directly by the employer during the first seven calendar days of disability. (1929, c. 120, s. 28; 1983, c. 599; 1987, c. 729, s. 5.)

CASE NOTES

The Commission's failure to make sufficient findings to support its denial of a seamstress's claim, based on her refusal to see an authorized physician under this section or because she was not due any compensation for the first seven days of her injury under G.S. 97-28, resulted in remand. Kanipe v. Lane Upholstery, 141 N.C. App. 620, 540 S.E.2d 785, 2000 N.C. App. LEXIS 1302 (2000).

Cited in Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943); Tucker v. Lowdermilk, 233 N.C. 185, 63 S.E.2d 109 (1951); Kanipe v. Lane Upholstery, 151 N.C. App. 478, 566 S.E.2d 167, 2002 N.C. App. LEXIS 755 (2002), cert. denied, 356 N.C. 303, 570 S.E.2d 724 (2002), cert. dismissed, 356 N.C. 303, 570 S.E.2d 725 (2002).

§ 97-29. Compensation rates for total incapacity.

Except as hereinafter otherwise provided, where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of his average weekly wages, but not more than the amount established annually to be effective October 1 as provided herein, nor less than thirty dollars ($30.00) per week.

In cases of total and permanent disability, compensation, including medical compensation, shall be paid for by the employer during the lifetime of the injured employee. If death results from the injury then the employer shall pay compensation in accordance with the provisions of G.S. 97-38.

The weekly compensation payment for members of the North Carolina national guard and the North Carolina State Defense Militia shall be the maximum amount established annually in accordance with the last paragraph of this section per week as fixed herein. The weekly compensation payment for deputy sheriffs, or those acting in the capacity of deputy sheriffs, who serve upon a fee basis, shall be thirty dollars ($30.00) a week as fixed herein.

An officer or member of the State Highway Patrol shall not be awarded any weekly compensation under the provisions of this section for the first two years of any incapacity resulting from an injury by accident arising out of and in the course of the performance by him of his official duties if, during such incapacity, he continues to be an officer or member of the State Highway Patrol, but he shall be awarded any other benefits to which he may be entitled under the provisions of this Article.

Notwithstanding any other provision of this Article, on July 1 of each year, a maximum weekly benefit amount shall be computed. The amount of this maximum weekly benefit shall be derived by obtaining the average weekly insured wage in accordance with G.S. 96-8(22), by multiplying such average weekly insured wage by 1.10, and by rounding such figure to its nearest multiple of two dollars ($2.00), and this said maximum weekly benefit shall be applicable to all injuries and claims arising on and after January 1 following such computation. Such maximum weekly benefit shall apply to all provisions of this Chapter and shall be adjusted July 1 and effective January 1 of each year as herein provided. (1929, c. 120, s. 29; 1939, c. 277, s. 1; 1943, c. 502, s. 3; c. 543; c. 672, s. 2; 1945, c. 766; 1947, c. 823; 1949, c. 1017; 1951, c. 70, s. 1; 1953, c. 1135, s. 1; c. 1195, s. 2; 1955, c. 1026, s. 5; 1957, c. 1217; 1963, c. 604, s. 1; 1967, c. 84, s. 1; 1969, c. 143, s. 1; 1971, c. 281, s. 1; c. 321, s. 1; 1973, c. 515, s. 1; c. 759, s. 1; c. 1103, s. 1; c. 1308, ss. 1, 2; 1975, c. 284, s. 4; 1979, c. 244; 1981, c. 276, s. 2; c. 378, s. 1; c. 421, s. 3; c. 521, s. 2; c. 920, s. 1; 1987, c. 729, s. 6; 1991, c. 703, s. 4; 1999-456, s. 33(d).)

Cross References. — As to certain state law-enforcement officers, see G.S. 143-166.16.

Legal Periodicals. — For a discussion of this section, see 8 N.C.L. Rev. 427 (1930).

For comment on the 1943 amendments, see 21 N.C.L. Rev. 384 (1943).

As to the 1949 amendment, see 27 N.C.L. Rev. 495 (1949).

For a discussion of the increase in allowable recovery by the 1951 amendment, see 29 N.C.L. Rev. 428 (1951).

For note on average weekly wage and combination of wages, see 44 N.C.L. Rev. 1177 (1966).

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For note discussing the use of age, education, and work experience in determining disability in workers' compensation cases, see 15 Wake Forest L. Rev. 570 (1979).

For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

For comment on Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981), see 4 Campbell L. Rev. 107 (1981).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

CASE NOTES

I. In General.
II. Permanent and Total Disability.
III. Maximum Weekly Benefit.

I. IN GENERAL.

Legislative Intent. — The legislature's expansion of this section in 1973 reflects an obvious intent to address the plight of a worker who suffers an injury permanently abrogating his earning ability. Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986).

This section is not constitutionally infirm; its application bears a rational relationship to a legitimate state interest. Clark v. Sanger Clinic, P.A., 142 N.C. App. 350, 542 S.E.2d 668, 2001 N.C. App. LEXIS 97, cert. denied, 353 N.C. 450, 548 S.E.2d 524 (2001).

The North Carolina Industrial Commission is the sole judge of the weight and credibility of the evidence in an industrial injury matter. Hensley v. Indus. Maint. Overflow, 166 N.C. App. 413, 601 S.E.2d 893, 2004 N.C. App. LEXIS 1729 (2004), cert. denied, 359 N.C. 631, 613 S.E.2d 690 (2005), cert. dismissed, 359 N.C. 631, — S.E.2d — (2005).

Findings Must Support Award and Commission, Not Court of Appeals, Must Make Findings. — While the Court of Appeals was correct that no finding of fact supported the Industrial Commission's conclusion that plaintiff was totally disabled under this section because his business was not "employment" and his earnings were not "wages," the Court of Appeals erred when it usurped the Commission's fact-finding role and determined that plaintiff's management skills were marketable in the labor market and that plaintiff was "actively involved in the personal management of [his] business." Lanning v. Fieldcrest-Cannon, Inc., 352 N.C. 98, 530 S.E.2d 54, 2000 N.C. LEXIS 434 (2000).

Judicial Review. — If there is competent evidence to support the North Carolina Industrial Commission's findings of fact, those findings must stand, even if there is evidence to the contrary and a reviewing court must affirm an opinion and award. Hensley v. Indus. Maint. Overflow, 166 N.C. App. 413, 601 S.E.2d 893, 2004 N.C. App. LEXIS 1729 (2004), cert. denied, 359 N.C. 631, 613 S.E.2d 690 (2005), cert. dismissed, 359 N.C. 631, — S.E.2d — (2005).

Cost-effectiveness is not the sole goal of the Workers' Compensation Act. Grantham v. Cherry Hosp., 98 N.C. App. 34, 389 S.E.2d 822, cert. denied, 327 N.C. 138, 394 S.E.2d 454 (1990).

For discussion of the two lines of case law relating to the concept of Maximum Medical Improvement and its applicability to G.S. 97-29, 97-30 and 97-31, see Effingham v. Kroger Co., 149 N.C. App. 105, 561 S.E.2d 287, 2002 N.C. App. LEXIS 141 (2002).

Concept of Maximum Medical Improvement Is Not Applicable to § 97-29 or § 97-30. — While G.S. 97-31 contemplates a "healing period" followed by a statutory period of time corresponding to the specific physical injury, and allows an employee to receive scheduled benefits for a specific physical impairment only once "the healing period" ends, neither G.S. 97-29 nor G.S. 97-30 contemplates a framework similar to that established by G.S. 97-31. Under G.S. 97-29 or G.S. 97-30, an employee may receive compensation once the employee has established a total or partial loss of wage-earning capacity, and the employee may receive such compensation for as long as the loss of wage-earning capacity continues, for a maximum of 300 weeks in cases of partial loss of wage-earning capacity. Hence, the primary significance of the concept of Maximum Medical Improvement (MMI) is to delineate a crucial point in time only within the context of a claim for scheduled benefits under G.S. 97-31; the concept of MMI does not have any direct bearing upon an employee's right to continue to receive temporary disability benefits once the employee has established a loss of wage-earning capacity pursuant to G.S. 97-29 or G.S. 97-30. Knight v. Wal-Mart Stores, Inc., 149 N.C. App. 1, 562 S.E.2d 434, 2002 N.C. App. LEXIS 140 (2002), cert. denied, 355 N.C. 749, 565 S.E.2d 667 (2002), aff'd, 357 N.C. 44, 577 S.E.2d 620 (2003).

Maximum Medical Improvement as Prerequisite to Permanent Disability. — An employee may seek a determination of her entitlement to permanent disability under G.S. 97-29, 97-30, or 97-31 only after reaching maximum medical improvement. Effingham v. Kroger Co., 149 N.C. App. 105, 561 S.E.2d 287, 2002 N.C. App. LEXIS 141 (2002).

This section and § 97-30 are mutually exclusive. A claimant cannot simultaneously be both totally and partially incapacitated. Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

When an employee suffers a diminution of the power or capacity to earn, he or she is entitled to benefits under G.S. 97-30; when the power or capacity to earn is totally obliterated, he or she is entitled to benefits under this section. Gupton v. Builders Transp., 320 N.C. 38, 357 S.E.2d 674 (1987).

Award of benefits by the North Carolina Industrial Commission was remanded to allow an employer and its insurer a credit for an award of permanent partial disability because an employee was unable to recover simultaneous benefits under G.S. 97-29 or G.S. 97-30 and G.S. 97-31. Guerrero v. Brodie Contrs., Inc., 158 N.C. App. 678, 582 S.E.2d 346, 2003 N.C. App. LEXIS 1226 (2003).

Construction with § 97-31. — This section should be construed in pari materia with G.S. 97-31, allowing compensation for the loss of members, and so construed it is held that where an employee has suffered an injury to his hand arising out of and in the course of his employment, and the injury causes him total temporary disability in the course of its healing, and renders it necessary to amputate certain parts of certain fingers of the hand, he is entitled to receive compensation under this section for total temporary disability, and in addition thereto compensation for the loss of the parts of his fingers under G.S. 97-31, there being no provision in the act that the latter should preclude the former, compensation for the latter to begin upon expiration of the compensation for the former. Rice v. Denny Roll & Panel Co., 199 N.C. 154, 154 S.E. 69 (1930); Whitley v. Columbia Lumber Mfg. Co., 78 N.C. App. 217, 336 S.E.2d 642 (1985).

Same — Award Under This Section More Favorable. — In many instances, an award under this section better fulfills the policy of the Workers' Compensation Act than an award under G.S. 97-31, because it is a more favorable remedy and is more directly related to compensating inability to work. West v. Bladenboro Cotton Mills, Inc., 62 N.C. App. 267, 302 S.E.2d 645 (1983).

Same — Award When All Injuries Not Covered Under § 97-31. — When all of a worker's injuries are not covered by the schedule contained in G.S. 97-31 and the worker's earning capacity has been totally and permanently impaired, he is entitled to an award for permanent and total disability under the provisions of this section. Jones v. Murdoch Center, 74 N.C. App. 128, 327 S.E.2d 294 (1985).

Where all of a worker's injuries are compensable under G.S. 97-31, the compensation provided for under that section is in lieu of all other compensation. When, however, an employee cannot be fully compensated under G.S. 97-31 and is permanently incapacitated, he or she is entitled to compensation under this section for total incapacity or under G.S. 97-30 for partial incapacity. Kendrick v. City of Greensboro, 80 N.C. App. 183, 341 S.E.2d 122, cert. denied, 317 N.C. 335, 346 S.E.2d 500 (1986).

An employee who suffers an injury scheduled in G.S. 97-31 may recover compensation under this section instead of G.S. 97-31 if he is totally and permanently disabled. Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986).

When all of an employee's injuries are included in the schedule set out in G.S. 97-31, the employee's entitlement to compensation is exclusively under that section. However, if an employee receives an injury which is compensable and the injury causes him to become so emotionally disturbed that he is unable to work, he is entitled to compensation for total incapacity under this section. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1 (1986), aff'd in part, rev'd in part, 319 N.C. 167, 353 S.E.2d 392 (1987).

An employee may be compensated for both a scheduled compensable injury under G.S. 97-31 and total incapacity for work under this section when the total incapacity is caused by a psychiatric disorder brought on by the scheduled injury. Hill v. Hanes Corp., 319 N.C. 167, 353 S.E.2d 392 (1987).

If a claimant is totally and permanently disabled within the meaning of this section, then he is not limited to a recovery under the schedule of compensation of G.S. 97-31. Mitchell v. Fieldcrest Mills, Inc., 84 N.C. App. 661, 353 S.E.2d 638 (1987).

Where claimant is totally disabled as a result of injuries not included in G.S. 97-31 schedule, claimant is entitled to an award for total disability under this section. Weaver v. Swedish Imports Maintenance, Inc., 319 N.C. 243, 354 S.E.2d 477 (1987).

Same — Award When § 97-31 Covers All Injuries. — When all of a worker's injuries are included in the schedule set out in G.S. 97-31 his compensation is limited to that provided for in the statutory schedule without regard to his ability or inability to earn wages. Jones v. Murdoch Center, 74 N.C. App. 128, 327 S.E.2d 294 (1985).

Same — Disablement Presumed Under § 97-31. — In all cases in which compensation is sought under this section or G.S. 97-30, total or partial disablement must be shown; however, if compensation is sought in the alternative under G.S. 97-31, disablement is presumed from the injury and compensation is accordingly based on the schedule. Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Same — Illustrative Cases. — Plaintiff, who suffered a fall causing a permanent partial impairment to his back of 20% and whom the Commission found unable to work at his previous job as a nurse or at any other employment, was totally and permanently disabled and was entitled to recover under this section, and was not limited to recovery under G.S. 97-31. Taylor v. Margaret R. Pardee Mem. Hosp., 83 N.C. App. 385, 350 S.E.2d 148 (1986), cert. denied, 319 N.C. 410, 354 S.E.2d 729 (1987).

The "in lieu of" clause in § 97-31 does

not prevent a worker who qualifies from recovering lifetime benefits under this section. Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986), overruling Perry v. Hibriten Furn. Co., 296 N.C. 88, 249 S.E.2d 397 (1978).

The interpretation of Perry v. Hibriten Furn. Co., 296 N.C. 88, 249 S.E.2d 397 (1978), that when all of a plaintiff's disability resulting from an injury is covered by G.S. 97-31, an employee is entitled to no compensation for permanent total disability, was overruled in Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986), which held that the "in lieu of" clause of G.S. 97-31 does not prevent a worker who qualifies from recovering lifetime benefits under this section. Harrington v. Pait Logging Company/Georgia Pac., 86 N.C. App. 77, 356 S.E.2d 365 (1987).

This section is an alternate source of compensation for an employee who suffers an injury which is also included under the schedule under G.S. 97-31; the injured worker is allowed to select the more favorable remedy, but he or she cannot recover compensation under both sections, because G.S. 97-31 is "in lieu of all other compensation." Harrington v. Pait Logging Company/Georgia Pac., 86 N.C. App. 77, 356 S.E.2d 365 (1987); McKenzie v. McCarter Elec. Co., 86 N.C. App. 619, 359 S.E.2d 249 (1987).

Often an award under this section, and by implication G.S. 97-30, better fulfills the policy of the Workers' Compensation Act than an award under G.S. 97-31(24). Strickland v. Burlington Indus., Inc., 87 N.C. App. 507, 361 S.E.2d 394 (1987).

Right to Elect Coverage Under This Section. — Even if all injuries are covered under G.S. 97-31, the scheduled injury section, an employee may nevertheless elect to claim under this section if this section is more favorable, but he may not recover under both sections. Hill v. Hanes Corp., 319 N.C. 167, 353 S.E.2d 392 (1987).

Construction with G.S. 97-47. — North Carolina Industrial Commission erred by awarding a workers' compensation claimant additional disability compensation as the claimant did not prove the claimant had sustained a change of condition under G.S. 97-47, and the only way an award could be modified under G.S. 97-29 was if the claimant showed a change in condition. Ward v. Floors Perfect, — N.C. App. —, 645 S.E.2d 109, 2007 N.C. App. LEXIS 1179 (2007).

Additional Recovery for Concurrent Symptoms Not Available. — Where an employee has received compensation for a brain injury under the total disability provisions of this section, additional recovery is not available for concurrent symptoms caused by that injury. Dishmond v. International Paper Co., 132 N.C. App. 576, 512 S.E.2d 771 (1999).

The Industrial Commission is required to conduct a full investigation and a determination that a Form 26 compensation agreement is fair and just, in order to assure that the settlement is in accord with the intent and purpose of the Workers' Compensation Act that an injured employee receive the disability benefits to which he is entitled, and, particularly, that an employee qualifying for disability compensation under both this section and G.S. 97-31 have the benefit of the more favorable remedy. Vernon v. Steven L. Mabe Bldrs., 336 N.C. 425, 444 S.E.2d 191 (1994).

Failure of Commission to Determine Fairness of Agreement. — Where plaintiff may have been entitled to permanent total disability benefits under this section, as well as permanent partial disability benefits under G.S. 97-31, but under this section plaintiff would receive such benefits for as long as he remained totally disabled rather than 45 weeks, and claims employee assumed, rather than determined, that plaintiff was knowledgeable about workers' compensation benefits and his rights, in approving the Form 26 compensation agreement between plaintiff and defendants, the Industrial Commission did not, as the statute requires, act in a judicial capacity to determine the fairness of the agreement. Vernon v. Steven L. Mabe Bldrs., 336 N.C. 425, 444 S.E.2d 191 (1994).

Worker May Select More Favorable Remedy. — This section is an alternative source of compensation for an employee who suffers an injury which is also included in the schedule, and the worker may select the more favorable remedy. Wilder v. Barbour Boat Works, 84 N.C. App. 188, 352 S.E.2d 690 (1987).

This section and G.S. 97-31 are alternate sources of compensation for an employee who suffers a disabling injury which is also included as a scheduled injury. The injured worker is allowed to select the more favorable remedy, but he cannot recover compensation under both sections. Cockman v. PPG Indus., 84 N.C. App. 101, 351 S.E.2d 771 (1987); Dishmond v. International Paper Co., 132 N.C. App. 576, 512 S.E.2d 771 (1999).

Commission Erred by Not Assessing Most Munificent Remedy. — The Industrial Commission erred when it awarded permanent disability compensation solely for plaintiff's scheduled hand injury under G.S. 97-31 without assessing whether this section or G.S. 97-30 would provide him a more munificent remedy. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

Version of Statute in Effect for Determining Compensation. — Plaintiff, who became partially disabled in 1973 and was compensated pursuant to the laws in effect at that time, was entitled to compensation for total disability (arising out of the same injury) under the laws in effect in 1981, when he became totally disabled. Peace v. J.P. Stevens Co., 95 N.C. App. 129, 381 S.E.2d 798 (1989).

Calculation of Average Weekly Wage and Compensation Rate. — North Carolina Industrial Commission's findings, under G.S. 97-29, as to an injured city employee's average weekly wage and compensation rate was supported by competent evidence based on the employee's total yearly earnings, longevity bonus, and overtime adjustment for longevity, which were then divided by the number of weeks the employee worked in the year. Cox v. City of Winston-Salem, 171 N.C. App. 112, 613 S.E.2d 746, 2005 N.C. App. LEXIS 1161 (2005).

North Carolina Industrial Commission's finding that an employee retained only minimal earning capacity was supported by the medical and record evidence and accorded to the appellate court's mandate in an earlier remand; the commission properly took judicial notice of the federal minimum wage to conclude that the employee was entitled to $14,181 more under G.S. 97-30 than he was under the Form 26 agreement, and to set the agreement aside and award the employee $14,181. Lewis v. Craven Reg'l Med. Ctr., 174 N.C. App. 561, 621 S.E.2d 259, 2005 N.C. App. LEXIS 2473 (2005), cert. denied, — N.C. —, 629 S.E.2d 853 (2006).

Payment of Employee's Consumer Debts as Rehabilitative Service Not Authorized. — The Workers' Compensation Act does not authorize the Commission to order an employer to pay an employee's common consumer debts as a rehabilitative service. Grantham v. Cherry Hosp., 98 N.C. App. 34, 389 S.E.2d 822 (1990).

It is not a reasonable interpretation of the Workers' Compensation Act to classify the payment of consumer debt as a rehabilitative service. Grantham v. Cherry Hosp., 98 N.C. App. 34, 389 S.E.2d 822 (1990).

Where an employee is properly determined to be totally and permanently disabled under this section, § 97-32 has no application. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

Inability to Obtain Future Employment. — Where an employee's effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist. Lackey v. R.L. Stowe Mills, Inc., 106 N.C. App. 658, 418 S.E.2d 517, cert. denied, 332 N.C. 345, 421 S.E.2d 150 (1992).

This section is not subject to the limitation imposed by the proviso of § 97-37. Inman v. Meares, 247 N.C. 661, 101 S.E.2d 692 (1958).

Where an employee filed a claim for total temporary disability under this section and thereafter recovered from his disabling injury and returned to his employment and was fatally injured in a compensable accident unconnected with the prior claim, the claim for disability did not come within the proviso of G.S. 97-37 and the right to payments accrued at the time of the employee's death had vested and survived to his personal representative. Inman v. Meares, 247 N.C. 661, 101 S.E.2d 692 (1958).

Self-Employment. — Questions regarding whether a claimant's self-employment involves marketable skills and whether a claimant's active involvement in the day-to-day operation of a business are questions of fact. Hensley v. Indus. Maint. Overflow, 166 N.C. App. 413, 601 S.E.2d 893, 2004 N.C. App. LEXIS 1729 (2004), cert. denied, 359 N.C. 631, 613 S.E.2d 690 (2005), cert. dismissed, 359 N.C. 631, — S.E.2d — (2005).

Termination Date of Temporary Total Disability Benefits Not Required. — This section does not require a finding nor a conclusion regarding the termination date of temporary total disability benefits. Such a requirement would be illogical since a case of temporary total disability is one in which the duration of the disability is uncertain. Kennedy v. Duke Univ. Medical Center, 101 N.C. App. 24, 398 S.E.2d 677 (1990).

Claimant Unable to Earn Wages in Any Job for Which Qualified Was Totally, Not Partially, Disabled. — The Commission erred as a matter of law by awarding claimant compensation for partial disability when it found as fact that plaintiff was incapable of earning wages in any employment for which plaintiff was qualified. Based on the Commission's findings, plaintiff was totally disabled within the meaning of this section. Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

Accrued Unpaid Compensation Is Asset of Deceased Worker's Estate. — Compensation which accrues under this section during the lifetime of an injured worker, but is unpaid at his death, becomes an asset of his estate. McCulloch v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966).

Disability, as used in the act, means impairment of wage earning capacity rather than physical impairment. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

A person may be wholly incapable of working and earning wages even though her ability to carry out normal life functions has not been wholly destroyed and even though she has not lost 100 percent use of her nervous system. Little v. Anson County Schools Food Serv., 295 N.C. 527, 246 S.E.2d 743 (1978).

In order to support a conclusion of disability, the Industrial Commission must find that after the injury, the plaintiff was incapable of earning the same wages he or she earned before the injury in the same or any other employment and that the plaintiff's incapacity to earn was caused or significantly contributed to by the injury. Harrington v. Pait Logging Company/Georgia Pac., 86 N.C. App. 77, 356 S.E.2d 365 (1987); Strickland v. Burlington Indus., Inc., 86 N.C. App. 598, 359 S.E.2d 19, modified and aff'd on rehearing, 87 N.C. App. 507, 361 S.E.2d 394 (1987).

In order to prove disability the burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury. Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 425 S.E.2d 454 (1993).

Agreement Affects Consequent Burden of Proof. — The Commission erred in concluding that as a matter of law because defendants had the burden of proof to present evidence sufficient to rebut a presumption of continued total disability raised by Form 21 agreement, and defendants had not met that burden, plaintiff was entitled to a continuing presumption of total disability; plaintiff employee's later Form 26 agreement with its specific duration superseded the earlier Form 21 agreement which covered her total disability for an indefinite period, and consequently, she had the burden of rebutting the existing presumption of partial disability through the presentation of evidence supporting total disability. Dancy v. Abbott Labs., 139 N.C. App. 553, 534 S.E.2d 601, 2000 N.C. App. LEXIS 982 (2000), review dismissed, 353 N.C. 370 (2001), aff'd, 353 N.C. 446, 545 S.E.2d 211 (2001).

The relevant inquiry under this section is not whether all or some persons with plaintiff's degree of injury are capable of working and earning wages, but whether plaintiff herself has such capacity. Little v. Anson County Schools Food Serv., 295 N.C. 527, 246 S.E.2d 743 (1978); Allen v. Standard Mineral Co., 71 N.C. App. 597, 322 S.E.2d 644 (1984), cert. denied, 313 N.C. 327, 329 S.E.2d 384 (1985).

If preexisting conditions such as the employee's age, education and work experience are such that an injury causes the employee a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the actual incapacity he or she suffers, and not for the degree of disability which would be suffered by someone who is younger or who possesses superior education or work experience. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

Under the traditional four-way classification of disabilities, a total disability under this section must be either permanent or temporary. Gamble v. Borden, Inc., 45 N.C. App. 506, 263 S.E.2d 280, cert. denied, 300 N.C. 372, 267 S.E.2d 675 (1980).

Occupational Disease Is Not Compensable Until It Causes Incapacity to Work. — An occupational disease does not become compensable under this section (relating to total incapacity) or G.S. 97-30 (relating to partial incapacity) until it causes incapacity for work. This incapacity is the basic "loss" for which the worker receives compensation. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

In determining the extent of a particular employee's capacity for work, the Commission may consider such factors as the individual's degree of pain and the individual's age, education and work experience. Niple v. Seawell Realty & Indus. Co., 88 N.C. App. 136, 362 S.E.2d 572 (1987).

Fact that plaintiff can perform sedentary work does not in itself preclude the Commission from making an award for total disability if it finds upon supporting evidence that plaintiff, because of other preexisting limitations, is not qualified to perform the kind of sedentary jobs that might be available in the marketplace. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

Where occupational lung disease incapacitates an employee from all but sedentary employment, and because of the employee's age, limited education or work experience no sedentary employment for which the employee is qualified exists, the employee is entitled to compensation for total disability. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

Disability Related to Asbestosis. — The claimant could not recover compensation for total or partial incapacity to earn wages, both of which require a showing of disablement, where his prior award of 104-weeks' compensation for asbestosis did not establish his disablement, but he was entitled to compensation for permanent injury to his lungs. Davis v. Weyerhaeuser Co., 132 N.C. App. 771, 514 S.E.2d 91 (1999).

When an injury to the back causes referred pain to the extremities of the body and this pain impairs the use of the extremities, then the award of workers' compensation must take into account such impairment. Harmon v. Public Serv. of N.C., Inc., 81 N.C. App.

482, 344 S.E.2d 285, cert. denied, 318 N.C. 415, 349 S.E.2d 595 (1986).

When an injury to the back causes referred pain to the extremities of the body, and this pain impairs the use of the extremities, then the award of workers' compensation must take into account such impairment; furthermore, a disabled plaintiff suffering from "chronic back and leg pain" as a result of a work-related injury to the back cannot be fully compensated under G.S. 97-31(23) and is entitled to compensation under this section. Therefore, the Industrial Commission's failure to make findings as to disability to the plaintiff's legs caused by the arachnoiditis was error and required a remand to the Commission for appropriate findings. McKenzie v. McCarter Elec. Co., 86 N.C. App. 619, 359 S.E.2d 249 (1987).

Remand for Findings as to Other Employment for Which Qualified. — Where the Commission found that plaintiff had chronic obstructive pulmonary disease caused in part by her exposure to respirable cotton dust during her employment, but that her impairment was not sufficient to render plaintiff incapable of performing types of employment which did not require very strenuous activity or exposure to cotton dust, but the Commission's findings did not address evidence that due to plaintiff's education, age and experience she was probably not capable of earning wages in any employment which did not require substantial physical exertion, the case was remanded for appropriate findings and conclusions of plaintiff's capacity to earn wages in employment for which she might be qualified. Webb v. Pauline Knitting Indus., 78 N.C. App. 184, 336 S.E.2d 645 (1985).

Remand for Findings as to Wage Earning Capacity. — Where plaintiff suffered a permanent disability to her lungs, the Industrial Commission committed error in compensating her under G.S. 97-31, but failing to consider or make findings of fact as to whether her disability affected her wage earning capacity under either this section, or G.S. 97-30, as this prevented plaintiff from electing to recover under either this section or G.S. 97-30, if she was so entitled. Strickland v. Burlington Indus., Inc., 87 N.C. App. 507, 361 S.E.2d 394 (1987).

Presumption of Duration of Disability. — The Supreme Court has held that "if an award is made, payable during disability, and there is a presumption that disability lasts until the employee returns to work, there is likewise a presumption that disability ended when the employee returned to work." Tucker v. Lowdermilk, 233 N.C. 185, 63 S.E.2d 109 (1951).

Wheelchair Accessible Residence. — The employer's obligation to furnish "other treatment or care" may include the duty to furnish alternate, wheelchair accessible housing. Derebery v. Pitt County Fire Marshall, 318 N.C. 192, 347 S.E.2d 814 (1986).

Evidence that plaintiff's present rented home had not been modified to accommodate his wheelchair, that the owners would not permit such modification, and that plaintiff could not enter the bathroom or kitchen and thus could not use the bath or toilet facilities or prepare meals for himself supported the Commission's finding of fact that plaintiff's present residence was not satisfactory and its award for wheelchair accessible housing. Derebery v. Pitt County Fire Marshall, 318 N.C. 192, 347 S.E.2d 814 (1986).

Handicapped Accessible Housing. — An employer's duty to provide other treatment or care is sufficiently broad to include the duty to provide handicapped accessible housing. Timmons v. North Carolina DOT, 123 N.C. App. 456, 473 S.E.2d 356 (1996), aff'd, 346 N.C. 173, 484 S.E.2d 551 (1997).

Specially Equipped Van. — Neither the phrase "other treatment or care" nor the term "rehabilitative services" in this section can reasonably be interpreted to include a specially equipped van. McDonald v. Brunswick Elec. Membership Corp., 77 N.C. App. 753, 336 S.E.2d 407 (1985), affirming the Commission's opinion and award, however, to the extent that it required defendants to reimburse plaintiff for the cost of special adaptive equipment in his specially equipped van.

Psychological injuries are compensable, if at all, under this section or G.S. 97-31 and wage-earning capacity is critical to the assessment of a plaintiff's entitlement to benefits under these sections. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

Evidence Held Sufficient to Show That Injurious Exposure Occurred During Course of Employment. — Where the record disclosed that plaintiff did not continue earning wages after 1969, her unsuccessful attempts to work during the years 1969 to 1980, when considered in conjunction with the medical evidence, merely demonstrated her total incapacity to earn wages; thus the commission's determination that plaintiff's last injurious exposure to the hazards of her occupational disease occurred while she was employed in 1968, and its order that employer and its carrier in 1968 pay her an award under the provisions of this section in effect on October 1, 1968, would be affirmed. Gregory v. Sadie Cotton Mills, Inc., 90 N.C. App. 433, 368 S.E.2d 650, cert. denied, 322 N.C. 835, 371 S.E.2d 277 (1988).

Testimony of two doctors and a vocational rehabilitation counselor was amply competent to support the Commission's finding that employee had no capacity to earn wages in either the same or any other employment up to the date of a hearing before a deputy commissioner.

Kennedy v. Duke Univ. Medical Center, 101 N.C. App. 24, 398 S.E.2d 677 (1990).

Where an employee, who was a traveling nursing assistant, had traveled to a patient's home, left on a personal errand, and was injured in an automobile accident on her return to the patient's home, the full North Carolina Industrial Commission's award of temporary total disability benefits was upheld on appeal, because the personal errand had been completed and the employee had resumed her business travel route when the accident occurred; thus, the accident was properly determined to have occurred in the course of employment, making the injury compensable. Chavis v. TLC Home Health Care, 172 N.C. App. 366, 616 S.E.2d 403, 2005 N.C. App. LEXIS 1770 (2005).

Employee Bore Burden of Rebutting Presumption That She Was Temporarily Partially Disabled. — The plaintiff bore the burden of proving total disability at the hearing before the Commission where—after entering into a Form 21 agreement which did not specifically note the type of disability for which plaintiff was being compensated but in which the weekly compensation rate was fixed at a level equivalent to the amount payable for total disability under this section—she entered a Form 26 agreement which created the presumption that plaintiff was temporarily partially disabled, and not totally disabled. Saunders v. Edenton Ob/Gyn Ctr., 352 N.C. 136, 530 S.E.2d 62, 2000 N.C. LEXIS 439 (2000).

Burden of Proof. — A claimant who asserts that he is entitled to compensation under this section has the burden of proving that he is, as a result of the injury arising out of and in the course of his employment, totally unable to earn wages which in the same or any other employment. Burwell v. Winn-Dixie Raleigh, Inc., 114 N.C. App. 69, 441 S.E.2d 145 (1994).

Industrial Commission's findings that an employee had not unjustifiably refused suitable employment, after having received temporary disability benefits due to a slip and fall during her employment, was supported by the evidence which indicated that she had called in sick daily, as directed by her supervisor; accordingly, her discharge a week later for her failure to report to work was not credible as a refusal to work and the Commission's award of continuing benefits was upheld due to the failure of the employer to meet its burden pursuant to G.S. 97-29 and 97-30. Whitfield v. Lab. Corp., 158 N.C. App. 341, 581 S.E.2d 778, 2003 N.C. App. LEXIS 1192 (2003).

Defendants Held Not Entitled to Credit for Scheduled Award. — Where temporary total disability payments for stress-induced depression resulting from injury were to begin approximately six months after the final payment on the scheduled award for permanent partial disability, the defendants would not be given credit on the compensation awarded for temporary total disability for compensation previously awarded under G.S. 97-31(15). Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1 (1986), aff'd in part, rev'd in part, 319 N.C. 167, 353 S.E.2d 392 (1987).

Findings Implying Temporary Total Disability Held Sufficient. — Commission's findings implying that plaintiff's disability was a temporary total one were sufficiently definite to determine the rights of the parties, even though the Commission failed to make specific findings regarding both the extent and the permanency of the plaintiff's injury. Kennedy v. Duke Univ. Medical Center, 101 N.C. App. 24, 398 S.E.2d 677 (1990).

Evidence Sufficient to Support Temporary Total Disability Rating. — Evidence held sufficient to support the Commission's award of compensation for temporary total disability based on stress-induced depression resulting from injury. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1 (1986), aff'd in part, rev'd in part, 319 N.C. 167, 353 S.E.2d 392 (1987).

Where plaintiff testified that his arm was "no good;" that he had worked as a roofer in the United States, although he had no green card and was not a citizen, since 1995; that he was in continuous pain and had been unable to work since he fell from a forklift; and that his doctor assigned him a 10% impairment rating for his left wrist, the Industrial Commission did not err in assigning plaintiff a rating of temporary total disability under this section. Rivera v. Trapp, 135 N.C. App. 296, 519 S.E.2d 777 (1999).

Evidence Sufficient to Show Permanent Total Incapacity. — Where physician testified that plaintiff suffered continuous pain in his back, both hips, and legs and continuous numbness of the right foot, and that he was 100% disabled, and opined that plaintiff's pain was caused by the use of his back in coordination with his hips and legs, the Commission could determine that plaintiff would not be totally compensated for his injuries under G.S. 97-31 and that, as a result, he was entitled to compensation for permanent total incapacity under this section. Kendrick v. City of Greensboro, 80 N.C. App. 183, 341 S.E.2d 122, cert. denied, 317 N.C. 335, 346 S.E.2d 500 (1986).

Evidence Sufficient to Award Permanent Partial Disability. — Plaintiff, who received temporary total disability benefits under this section for a compensable heart attack in April, 1979, was properly awarded permanent partial disability under G.S. 97-30 on his application under G.S. 97-47 for modification of the prior award following three additional heart attacks, where the Commission found that he had been permanently and totally disabled since June, 1981, partially as a result of his compensable heart attack in 1979. Weaver v.

Swedish Imports Maintenance, Inc., 80 N.C. App. 432, 343 S.E.2d 205 (1986), modified, 319 N.C. 243, 354 S.E.2d 477 (1987).

No Change in Condition Found. — North Carolina Industrial Commission properly found that a workers' compensation claimant was not entitled to benefits under G.S. 97-29 as the only method by which a change in the award could be made was that provided by G.S. 97-47; the claimant's award could not be modified as the claimant failed to prove a change of condition under G.S. 97-47. Ward v. Floors Perfect, — N.C. App. —, 645 S.E.2d 109, 2007 N.C. App. LEXIS 1179 (2007).

Evidence of an employer's refusal to allow an employee to return to work because there was no "light" work available supports a finding that the employee is not capable of earning wages in the same employment. Moore v. Davis Auto Serv., 118 N.C. App. 624, 456 S.E.2d 847 (1995).

Return to Work Assertion Does Not Necessarily Raise Wage Earning Capacity Issue. — Where defendants did not assert any other reason for termination of plaintiff's benefits besides "return to work" on the Form 28T, the record revealed that the plaintiff denied that she ever attempted a "trial return to work" and that she, therefore, was not required to file a Form 28U, and it was undisputed that defendants did not file a Form 24 seeking to terminate plaintiff's compensation on grounds other than plaintiff's "return to work", the only issue before the Full Commission was whether or not plaintiff had returned to work, warranting termination of benefits pursuant to N.C. Gen. Stat. G.S. 97-18.1(b); thus it did not consider the issue of whether or not plaintiff had wage earning capacity and neither would the Court of Appeals. Lewis v. Sonoco Prods. Co., 137 N.C. App. 61, 526 S.E.2d 671, 2000 N.C. App. LEXIS 257 (2000).

No Benefits for Unjustifiable Refusal of Employment. — If an employer shows that an employee has unjustifiably refused employment procured for the employee that is suitable to the employee's capacity and the evidence is accepted by the Industrial Commission, the employee is not entitled to any benefits pursuant to this section or G.S. 97-30. Franklin v. Broyhill Furn. Indus., 123 N.C. App. 200, 472 S.E.2d 382 (1996).

As to construction of section prior to its early amendment, see Smith v. Carolina Power & Light Co., 198 N.C. 614, 152 S.E. 805 (1930).

Effect of Litigation of Earning Capacity on Review of Form 26 Agreement. — Where plaintiff's earning capacity was actually litigated and necessary to the outcome of his G.S. 97-47 hearing, the Industrial Commission was bound by that finding in determining if a Form 26 agreement was fair and just; therefore, its finding that the agreement was "improvidently approved" on the grounds that plaintiff had no earning capacity, thus qualifying him for benefits under this section, had to be reversed. Lewis v. Craven Reg'l Med. Ctr., 134 N.C. App. 438, 518 S.E.2d 1 (1999).

Concept of Maximum Medical Improvement Is Not Applicable to Temporary Disability Payments. — Employee's reaching of maximum medical improvement (MMI) did not affect the employee's right to continue to receive temporary disability workers' compensation benefits and MMI did not represent the point in time at which a loss of wage-earning capacity automatically converted from temporary to permanent. Hooker v. Stokes-Reynolds Hospital/North Carolina Baptist Hosp. Inc., 161 N.C. App. 111, 587 S.E.2d 440, 2003 N.C. App. LEXIS 1975 (2003).

Applied in Aldridge v. Foil Motor Co., 262 N.C. 248, 136 S.E.2d 591 (1964); Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966); Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969); Starr v. Charlotte Paper Co., 8 N.C. App. 604, 175 S.E.2d 342 (1970); Blalock v. Roberts Co., 12 N.C. App. 499, 183 S.E.2d 827 (1971); Gaddy v. Kern, 17 N.C. App. 680, 195 S.E.2d 141 (1973); Lewallen v. National Upholstery Co., 27 N.C. App. 652, 219 S.E.2d 798 (1975); Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981); McKee v. Crescent Spinning Co., 54 N.C. App. 558, 284 S.E.2d 175 (1981); Roper v. J.P. Stevens & Co., 65 N.C. App. 69, 308 S.E.2d 485 (1983); Ballenger v. Burris Indus., Inc., 66 N.C. App. 556, 311 S.E.2d 881 (1984); Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985); Vandiford v. Stewart Equip. Co., 98 N.C. App. 458, 391 S.E.2d 193 (1990); Cratt v. Perdue Farms, Inc., 102 N.C. App. 336, 401 S.E.2d 771 (1991); Gilliam v. Perdue Farms, 112 N.C. App. 535, 435 S.E.2d 780 (1993); Brown v. Family Dollar Distribution Ctr., 129 N.C. App. 361, 499 S.E.2d 197 (1998); Trivette v. Mid-South Mgmt., 154 N.C. App. 140, 571 S.E.2d 692, 2002 N.C. App. LEXIS 1408 (2002).

Cited in Murray v. Nebel Knitting Co., 214 N.C. 437, 199 S.E. 609 (1938); Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942); Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943); Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951); Brinkley v. United Feldspar & Minerals Corp., 246 N.C. 17, 97 S.E.2d 419 (1957); McDowell v. Town of Kure Beach, 251 N.C. 818, 112 S.E.2d 390 (1960); Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962); Morgan v. Thomasville Furn. Indus., Inc., 2 N.C. App. 126, 162 S.E.2d 619 (1968); Dudley v. Downtowner Motor Inn, 13 N.C. App. 474, 186 S.E.2d 188 (1972); Schofield v. Great Atl. & Pac. Tea Co., 32

N.C. App. 508, 232 S.E.2d 874 (1977); Baldwin v. North Carolina Mem. Hosp., 32 N.C. App. 779, 233 S.E.2d 600 (1977); Hogan v. Johnson Motor Lines, 38 N.C. App. 288, 248 S.E.2d 61 (1978); Sebastian v. Mona Watkins Hair Styling, 40 N.C. App. 30, 251 S.E.2d 872 (1979); In re Annexation Ordinance, 300 N.C. 337, 266 S.E.2d 661 (1980); Morrison v. Burlington Indus., 301 N.C. 226, 271 S.E.2d 364 (1980); Gasperson v. Buncombe County Pub. Schools, 52 N.C. App. 154, 277 S.E.2d 872 (1981); Peeler v. State Hwy. Comm., 302 N.C. 183, 273 S.E.2d 705 (1981); Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983); Cook v. Bladenboro Cotton Mills, Inc., 61 N.C. App. 562, 300 S.E.2d 852 (1983); Hogan v. Cone Mills Corp., 63 N.C. App. 439, 305 S.E.2d 213 (1983); Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983); Fleming v. K-Mart Corp., 67 N.C. App. 669, 313 S.E.2d 890 (1984); Peoples v. Cone Mills Corp., 69 N.C. App. 263, 317 S.E.2d 120 (1984); Frady v. Groves Thread/General Accident Ins. Co., 312 N.C. 316, 321 S.E.2d 835 (1984); Lumley v. Dancy Constr. Co., 79 N.C. App. 114, 339 S.E.2d 9 (1986); Moretz v. Richards & Assocs., 316 N.C. 539, 342 S.E.2d 844 (1986); Costner v. A.A. Ramsey & Sons, 81 N.C. App. 121, 343 S.E.2d 607 (1986); Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986); Gupton v. Builders Transp., 83 N.C. App. 1, 348 S.E.2d 601 (1986); Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986); Haponski v. Constructor's Inc., 87 N.C. App. 95, 360 S.E.2d 109 (1987); Estes v. North Carolina State Univ., 89 N.C. App. 55, 365 S.E.2d 160 (1988); Thomas v. Hanes Printables, 91 N.C. App. 45, 370 S.E.2d 419 (1988); Gaddy v. Anson Wood Prods., 92 N.C. App. 483, 374 S.E.2d 477 (1988); Hunt v. Scotsman Convenience Store No. 93, 95 N.C. App. 620, 383 S.E.2d 390 (1989); Wall v. North Carolina Dep't of Human Resources, 99 N.C. App. 330, 393 S.E.2d 109 (1990); Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994); Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 414 S.E.2d 102 (1992); Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); Bowden v. Boling Co., 110 N.C. App. 226, 429 S.E.2d 394 (1993); Conklin v. Carolina Narrow Fabrics Co., 113 N.C. App. 542, 439 S.E.2d 239 (1994); Baker v. City of Sanford, 120 N.C. App. 783, 463 S.E.2d 559 (1995); Brown v. S & N Communications, Inc., 124 N.C. App. 320, 477 S.E.2d 197 (1996); Neal v. Carolina Mgt., 130 N.C. App. 220, 502 S.E.2d 424 (1998), rev'd on other grounds, 350 N.C. 63, 510 S.E.2d 375 (1999); Timmons v. North Carolina DOT, 351 N.C. 177, 522 S.E.2d 62 (1999); Shah v. Johnson, 140 N.C. App. 58, 535 S.E.2d 577, 2000 N.C. App. LEXIS 1089 (2000); Clark v. ITT Grinnell Indus. Piping, Inc., 141 N.C. App. 417, 539 S.E.2d 369, 2000 N.C. App. LEXIS 1416 (2000); Bond v. Foster Masonry, Inc., 139 N.C. App. 123, 532 S.E.2d 583, 2000 N.C. App. LEXIS 803 (2000); Royce v. Rushco Food Stores, Inc., 139 N.C. App. 322, 533 S.E.2d 284, 2000 N.C. App. LEXIS 898 (2000); Devlin v. Apple Gold, Inc., 153 N.C. App. 442, 570 S.E.2d 257, 2002 N.C. App. LEXIS 1187 (2002); Gordon v. City of Durham, 153 N.C. App. 782, 571 S.E.2d 48, 2002 N.C. App. LEXIS 1257 (2002); Arnold v. Wal-Mart Stores, Inc., 154 N.C. App. 482, 571 S.E.2d 888, 2002 N.C. App. LEXIS 1461 (2002); Dial v. Cozy Corner Rest., Inc., 161 N.C. App. 694, 589 S.E.2d 146, 2003 N.C. App. LEXIS 2261 (2003); White v. Weyerhaeuser Co., 167 N.C. App. 658, 606 S.E.2d 389, 2005 N.C. App. LEXIS 5 (2005); Chambers v. Transit Mgmt., 360 N.C. 609, 636 S.E.2d 553, 2006 N.C. LEXIS 1195 (2006); Outerbridge v. Perdue Farms, Inc., — N.C. App. —, 638 S.E.2d 564, 2007 N.C. App. LEXIS 40 (2007).

II. PERMANENT AND TOTAL DISABILITY.

Temporary Total Disability Benefits Allowed in Light of Agreements. — The Commission did not err in awarding employee temporary total disability (TTD) benefits, given that the parties had entered into a Form 21 agreement and a Form 26 supplemental agreement stipulating to TTD benefits. Foster v. U.S. Airways, Inc., 149 N.C. App. 913, 563 S.E.2d 235, 2002 N.C. App. LEXIS 406 (2002), cert. denied, 356 N.C. 299, 570 S.E.2d 505 (2002).

This section contains a mandatory provision that applies when the Commission finds a permanent and total disability. Robinson v. J.P. Stevens & Co., 57 N.C. App. 619, 292 S.E.2d 144 (1982).

Establishment of Permanent Incapacity. — Once an employee has reached their maximum medical improvement, the employee may establish permanent incapacity pursuant to either this section, G.S. 97-30 or G.S. 97-31. Franklin v. Broyhill Furn. Indus., 123 N.C. App. 200, 472 S.E.2d 382 (1996).

Other Treatment Provision Is in Addition to Named Items. — The provision for other treatment or care goes beyond and is in addition to the specific named essential items and services set out in this section. Godwin v. Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967).

Medical Expenses Compensated Only Where Disability Is Total and Permanent. — This section entitles a claimant to recover compensation for medical care only where disability is found to be total and permanent. Peeler v. State Hwy. Comm., 48 N.C. App. 1, 269 S.E.2d 153 (1980), aff'd, 302 N.C. 183, 273 S.E.2d 705 (1981).

An employee's presumption of disability may not be defeated merely by a return to work. Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996).

Once the Form 21 agreement was entered into by the parties and approved by the Commission, a concomitant presumption of disability attached in favor of employee, and the burden of proof was on the employer, not the employee, to demonstrate that plaintiff was no longer entitled to his disability award. Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996).

Combination of Compensable and Noncompensable Illnesses. — Where a claimant is rendered totally unable to earn wages, partially as a result of a compensable injury and partially as a result of a non-work-related medical condition, the claimant is entitled to an award for total disability under this section. Counts v. Black & Decker Corp., 121 N.C. App. 387, 465 S.E.2d 343 (1996).

There was competent evidence before the Industrial Commission to support its finding that plaintiff's work-related shoulder injury combined with her non-work-related arthritic condition to render her totally disabled. Counts v. Black & Decker Corp., 121 N.C. App. 387, 465 S.E.2d 343 (1996).

Total Incapacity from Emotional Disturbance Caused by Injury. — Where employee receives a compensable injury which causes her to become so emotionally disturbed that she is unable to work, she is entitled to compensation for total incapacity under this section. Fayne v. Fieldcrest Mills, Inc., 54 N.C. App. 144, 282 S.E.2d 539 (1981), cert. denied, 304 N.C. 725, 288 S.E.2d 380 (1982).

If an employee suffers a compensable injury and the injury causes an emotional disturbance which renders him unable to work, he is entitled to compensation for total incapacity under this section. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

Compensation for Byssinosis. — It was not until 1975, when the General Assembly enacted the amendments to this section, that employees suffering from byssinosis were able to receive unlimited weekly benefits for their total and permanent disability. Prior to that time, this section only provided lifetime weekly benefits for persons disabled due to paralysis resulting from injury to the brain or spinal cord or from loss of mental capacity due to injury to the brain. In all other cases of total disability, compensation was restricted in the amount of money paid per week, in the amount of weeks paid and in the maximum amount which the claimant could receive. Taylor v. J.P. Stevens & Co., 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified and aff'd, 307 N.C. 392, 298 S.E.2d 681 (1983).

An award for damage to the lungs may be made under subdivision (24) of G.S. 97-31. But such an award, by the express terms of the statute, would be in lieu of all other compensation. Such award may also be based on this section, as had been done in many other reported cases involving byssinosis disability. West v. Bladenboro Cotton Mills, Inc., 62 N.C. App. 267, 302 S.E.2d 645 (1983).

Loss of Both Legs. — Section 97-31(17) provides that the loss of both legs constitutes total and permanent disability to be compensated according to this section, which provides for lifetime benefits. Timmons v. North Carolina DOT, 123 N.C. App. 456, 473 S.E.2d 356 (1996), aff'd, 346 N.C. 173, 484 S.E.2d 551 (1997).

Although plaintiff, who had lost both legs, returned to full-time employment, the employee was entitled to on-going benefits. Timmons v. North Carolina DOT, 123 N.C. App. 456, 473 S.E.2d 356 (1996), aff'd, 346 N.C. 173, 484 S.E.2d 551 (1997).

Depression Caused by Injury. — Evidence held sufficient to support the Commission's conclusion that employee was entitled to compensation under this section for total disability due to stress induced depression caused by on-the-job physical injuries which rendered him totally disabled. Hill v. Hanes Corp., 319 N.C. 167, 353 S.E.2d 392 (1987).

Chronic Fatigue Syndrome. — Evidence that an employee of a waste company whose job was to collect and dispose of raw sewage developed chronic fatigue syndrome and other ailments after being accidentally sprayed with raw sewage and that the employee's illnesses were most probably the result of the accident supported a ruling of the North Carolina Industrial Commission awarding the employee permanent workers' compensation disability benefits. Norton v. Waste Mgt., Inc., 146 N.C. App. 409, 552 S.E.2d 702, 2001 N.C. App. LEXIS 938 (2001).

Aggravation of Latent Condition. — When a pre-existing, nondisabling, non-job-related condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment or by an occupational disease so that disability results, then the employer must compensate the employee for the entire resulting disability, even though it would not have disabled a normal person to that extent. In such a case, where an injury has aggravated an existing condition and thus proximately caused the incapacity, the relative contributions of the accident and the pre-existing condition will not be weighed. Wilder v. Barbour Boat Works, 84 N.C. App. 689, 352 S.E.2d 690 (1987).

Evidence held to clearly indicate that plaintiff's 1983 injury to his leg aggravated a latent condition due to an unrelated 1977 injury and therefore proximately contributed to his total disability. Although a normal person may not have been disabled to that extent, plaintiff's entire disability was compensable. Wilder v. Barbour Boat Works, 84 N.C. App. 689, 352 S.E.2d 690 (1987).

Where an injury has aggravated an existing condition and thus proximately caused the incapacity, the relative contributions of the accident and the preexisting condition will not be weighed. McKenzie v. McCarter Elec. Co., 86 N.C. App. 619, 359 S.E.2d 249 (1987).

Although evidence in the record supported the North Carolina Industrial Commission's judgment that an employee's cancer was accelerated by injuries the employee sustained in a work-related accident, and the appellate court affirmed the Commission's decision to award temporary total disability benefits to the employee, the court remanded the case to the Commission for further proceedings because the record did not explain how the Commission had determined the employee's average weekly wage, a determination that was central to its award of benefits, and because there was conflicting evidence in the record which raised questions about the Commission's findings that a city which employed the employee was entitled to a credit for long-term disability benefits it paid the employee, and that the employee was not entitled to an award of attorney's fees. Cox v. City of Winston-Salem, 157 N.C. App. 228, 578 S.E.2d 669, 2003 N.C. App. LEXIS 535 (2003).

Total Incapacity Resulting from More Than One Injury. — If an injured employee is permanently and totally disabled, then he or she is entitled to receive compensation under this section, even if no single injury resulted in total and permanent disability, so long as the combined effect of all of the injuries caused permanent and total disability. McKenzie v. McCarter Elec. Co., 86 N.C. App. 619, 359 S.E.2d 249 (1987).

When Apportionment Not Permitted. — Apportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's nondisabling, pre-existing disease or infirmity. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

An employee is also entitled to full compensation for total disability without apportionment when the nature of the employee's total disability makes any attempt at apportionment between work-related and non-work-related causes speculative. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

Apportionment Held Necessary. — Where it is clear that claimant's permanent and total disability was only partially a result of the initial compensable heart attack, the award must be apportioned to reflect the extent to which claimant's permanent total disability was caused by the compensable heart attack. Weaver v. Swedish Imports Maintenance, Inc., 319 N.C. 243, 354 S.E.2d 477 (1987).

The apportionment rule established by Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981), was applicable to a silicosis case in which there was some evidence of the existence of a nonwork-related disease or condition which independently contributed to the employee's incapacity to earn wages. Pitman v. Feldspar Corp., 87 N.C. App. 208, 360 S.E.2d 696 (1987), cert. denied, 321 N.C. 474, 364 S.E.2d 924 (1988), remanding for specific findings as to what extent plaintiff's silicosis caused his incapacity for work.

Plaintiff could prove total loss of wage-earning capacity by producing evidence that he was capable of some work but, after a reasonable effort on his part, was unsuccessful in his effort to obtain employment. Zimmerman v. Eagle Elec. Mfg. Co., 147 N.C. App. 748, 556 S.E.2d 678, 2001 N.C. App. LEXIS 1255 (2001).

Evidence of Total Disability Held Sufficient. — Evidence provided by plaintiff's treating physician, occupational therapists, psychological associates, and vocational rehabilitation specialists supported the Commission's finding that plaintiff was unable, as a result of injury sustained in the course and scope of his employment, to earn wages in his former employment or in any other employment. Moore v. Davis Auto Serv., 118 N.C. App. 624, 456 S.E.2d 847 (1995).

Award of ongoing permanent and total disability compensation to plaintiff pursuant to G.S. 97-29 was upheld upon appellate court review where defendants, the former employer and its insurer, failed to meet their burden of showing that plaintiff was capable of returning to gainful employment and the greater weight of the evidence showed, by the testimony of an orthopedic specialist, that it was unlikely plaintiff would ever return to gainful employment due to her osteoporosis and compression fractures; defendants failed to present any evidence that employment opportunities existed for plaintiff that she had not explored given her age, education, physical limitations, vocational skills, and experience and the specialist's opinion that plaintiff would not be able to return to work and his reservation of plaintiff's ability to perform a sedentary job with no lifting requirements showed her incapacity to earn any wages on a permanent basis. Clark v. Wal-Mart, 163 N.C. App. 686, 594 S.E.2d 433, 2004 N.C. App. LEXIS 584 (2004).

Award finding a claimant totally disabled was upheld, despite the claimant receiving a tobacco allotment and owning a mobile home park, because the claimant did not perform any physical activity involved with either enterprise, and competent evidence showed that the claimant was unable to (1) walk or stand for any sustained period of time, (2) sleep for more than a few hours at a time because of continuous knee pain, and (3) remain balanced for any length of time. Hensley v. Indus. Maint. Overflow, 166 N.C. App. 413, 601 S.E.2d 893, 2004 N.C. App. LEXIS 1729 (2004), cert. denied, 359 N.C. 631, 613 S.E.2d 690 (2005), cert. dismissed, 359 N.C. 631, — S.E.2d — (2005).

North Carolina Industrial Commission's denial of a workers' compensation claimant's application for temporary total disability benefits was affirmed as: (1) the Commission was entitled to give greater weight to the testimony of some doctors over others, (2) the Commission made findings sufficient to address the issues and evidence before it, and (3) a doctor's testimony did not justify overturning the Commission's findings that a lightning strike was the precipitating event for the claimant's somatization disorder, but did not establish causation. Perkins v. U.S. Airways, 177 N.C. App. 205, 628 S.E.2d 402, 2006 N.C. App. LEXIS 867 (2006).

Employee's estate was entitled to permanent and total disability benefits under G.S. 97-29 and G.S. 97-54 because: (1) testimony by a physician appointed by the industrial commission supported the commission's finding of fact that the employee suffered from asbestosis as a result of his employment with the employer as an asbestos tile installer; (2) the employee's medical course continued as the appointed physician had predicted that it would based on his diagnosis; and (3) the employee suffered from breathing problems as a result of asbestosis that severely impaired his daily activities and rendered him unable to perform gainful employment. Estate of Gainey v. S. Flooring & Acoustical Co., — N.C. App. —, 646 S.E.2d 604, 2007 N.C. App. LEXIS 1468 (2007).

Evidence of Total Disability Held Insufficient. — There was no evidence in the medical records submitted to the Commission that supported an award of permanent total disability benefits under this section. Salaam v. North Carolina DOT, 122 N.C. App. 83, 468 S.E.2d 536 (1996), review denied, 345 N.C. 494, 480 S.E.2d 51 (1997).

No finding of fact supported the Commission's conclusion of law that an injured employee was entitled to permanent and total disability where because of an accident the employee may have aggravated her preexisting condition, but all the evidence showed that she was not totally incapable of earning wages, and instead the competent evidence showed that her wage earning capacity was greater than or equal to that prior to her fall at work. Frazier v. McDonald's, 149 N.C. App. 745, 562 S.E.2d 295, 2002 N.C. App. LEXIS 293 (2002), cert. denied, 356 N.C. 670, 577 S.E.2d 117 (2003).

Although evidence in the record supported the North Carolina Industrial Commission's judgment that an employee's cancer was accelerated by injuries the employee sustained in a work-related accident, and the appellate court affirmed the Commission's decision to award temporary total disability benefits to the employee, the court remanded the case to the Commission for further proceedings because the record did not explain how the Commission had determined the employee's average weekly wage, a determination that was central to its award of benefits, and because there was conflicting evidence in the record which raised questions about the Commission's findings that a city which employed the employee was entitled to a credit for long-term disability benefits it paid the employee, and that the employee was not entitled to an award of attorney's fees. Cox v. City of Winston-Salem, 157 N.C. App. 228, 578 S.E.2d 669, 2003 N.C. App. LEXIS 535 (2003).

Workers' compensation claimant was not entitled to compensation under G.S. 97-29 or G.S. 97-30 after a Form 24 was approved as the evidence supported the North Carolina Industrial Commission's determinations that the claimant was capable of returning to full-duty work without restrictions and that she failed in her burden of proving that she remained disabled as a result of the compensable injury where, while there was medical evidence to support a determination that the claimant could not return to full-time work as a flight attendant, this alone was insufficient to establish that she was incapable of earning wages at any job; the claimant's one contact with her employer about a light duty position was insufficient to establish she had made a reasonable effort to obtain employment under the second Russell option. Perkins v. U.S. Airways, 177 N.C. App. 205, 628 S.E.2d 402, 2006 N.C. App. LEXIS 867 (2006).

North Carolina Industrial Commission erred in awarding employee temporary total disability compensation because the Commission's finding that the employee was unable to work at her job or any other job was not based on medical evidence, but only on employee's testimony. Everett v. N.C. Indus. Comm'n No. 102217 Well Care & Nursing Servs., — N.C. App. —, 636 S.E.2d 824, 2006 N.C. App. LEXIS 2313 (2006).

Industrial Commission's opinion and award concluding that plaintiff was entitled to temporary total disability benefits from May 15 through Nov. 29, 2000, under G.S. 97-29, and was limited to benefits thereafter under G.S. 97-31 based on a five percent impairment rating, was remanded for additional findings of fact, because the Commission determined the existence of plaintiff's disability, but did not determine the extent of plaintiff's disability because it failed to address whether plaintiff was capable of earning the same wages he was earning at the time of his injury. Outerbridge v. Perdue Farms, Inc., — N.C. App. —, 638 S.E.2d 564, 2007 N.C. App. LEXIS 40 (2007).

Retirement. — Plaintiff was not barred from seeking disability benefits if his retirement was for reasons unrelated to his occupational disease; the pertinent issue was whether plaintiff, subsequent to retirement, experienced a loss in wage-earning capacity. Stroud v. Caswell Ctr., 124 N.C. App. 653, 478 S.E.2d 234 (1996).

Claimant was not barred from receiving workers' compensation benefits for an occupational disease solely because he or she was retired; the commission's award of benefits based on a worker's asbestosis was not error based on the fact that the worker "retired voluntarily" and not due to pulmonary problems. Austin v. Cont'l Gen. Tire, — N.C. App. —, 648 S.E.2d 570, 2007 N.C. App. LEXIS 1813 (2007).

III. MAXIMUM WEEKLY BENEFIT.

Legislative Intent. — The legislature intended the maximums to be separate and independent provisions of this section. Taylor v. J.P. Stevens Co., 307 N.C. 392, 298 S.E.2d 681 (1983).

The 1973 amendment to this section governing the maximum weekly workers' compensation benefit applies to § 97-38, so that G.S. 97-38 no longer limited recovery for death claims to $80.00 per week. Andrews v. Nu-Woods, Inc., 43 N.C. App. 591, 259 S.E.2d 306 (1979), aff'd, 299 N.C. 723, 264 S.E.2d 99 (1980).

The 1973 amendment clearly establishes maximum weekly benefits for all sections of the Workers' Compensation Act, including benefits for total incapacity and death, and benefits under G.S. 97-38 are no longer limited to $80.00 per week. Andrews v. Nu-Woods, Inc., 299 N.C. 723, 264 S.E.2d 99 (1980).

Application of Section as Amended in 1978 Upheld. — Where all of the evidence disclosed that plaintiff did not become totally disabled until 1978, no right to recover for permanent total disability vested until after the enactment of the 1978 version of this section (Session Laws 1973, c. 1308, G.S. 1, 2) and no possible liability accrued to defendants as a result of plaintiff's permanent total disability until after the enactment and effective date of the 1973 revision of this section; hence, the application of the 1978 version of this section did not constitute an unconstitutional application of substantive law. Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982).

In a workers' compensation case, plaintiff was compensated for his permanent and total disability under this section as it read in 1978 when his disability became permanent and total, rather than as it read in 1970 when he first became disabled and was entitled to compensation for partial disability under G.S. 97-30, since plaintiff had no right to claim compensation, nor was the employer exposed to liability, under this section until 1978 when plaintiff appeared to have become totally disabled. Smith v. American & Efird Mills, 51 N.C. App. 480, 277 S.E.2d 83, cert. denied and appeal dismissed, 304 N.C. 197, 285 S.E.2d 101 (1981), aff'd, 305 N.C. 507, 290 S.E.2d 634 (1982).

Section 97-29.1 Provides Parity with Certain Benefits Under This Section. — The import of G.S. 97-29.1 was to effectuate some economic parity in benefits afforded persons who prior to G.S. 97-29.1 received lifetime weekly benefits with those who received lifetime weekly benefits by virtue of the 1975 amendment to this section. Taylor v. J.P. Stevens & Co., 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified and aff'd, 307 N.C. 392, 298 S.E.2d 681 (1983).

Stacking of Benefits Under § 97-30 and This Section Not Permitted. — If the Industrial Commission in workers' compensation actions should find that a plaintiff is totally and permanently disabled, the plaintiff's compensation should be to the fullest extent allowed under this section and should be awarded without regard to compensation previously awarded the plaintiff under G.S. 97-30 for partial disability; however, a plaintiff should receive full compensation under this section only where an award under G.S. 97-30 was fully paid before the plaintiff became totally disabled, since, if the period for partial disability award overlapped the period for the total award, the stacking of total benefits on top of partial benefits for the same time period would allow the plaintiff a greater recovery than the legislature intended. Smith v. American & Efird Mills, 51 N.C. App. 480, 277 S.E.2d 83, cert. denied and appeal dismissed, 304 N.C. 197, 285 S.E.2d 101 (1981), aff'd, 305 N.C. 507, 290 S.E.2d 634 (1982).

At a given point in time, the provisions of this section and G.S. 97-30 must be mutually exclusive; that is, a claimant cannot simultaneously be both totally and partially incapacitated. Smith v. American & Efird Mills, 51 N.C. App. 480, 277 S.E.2d 83, cert. denied and appeal dismissed, 304 N.C. 197, 285 S.E.2d 101 (1981), aff'd, 305 N.C. 507, 290 S.E.2d 634 (1982).

This section did not entitle the plaintiff-registered nurse to yearly increases commensurate with the maximum rate calculated per annum. Clark v. Sanger Clinic, P.A., 142 N.C. App. 350, 542 S.E.2d 668, 2001 N.C. App. LEXIS 97, cert. denied, 353 N.C. 450, 548 S.E.2d 524 (2001).

Award Held Proper. — Industrial commission did not err in awarding the claimant, as a temporary total disability benefit, his average weekly wage multiplied by the maximum percentage award he was entitled to under statutory law, for a two-month period rather than including the seven months that passed from his injury that occurred prior to the two-month period; the evidence did not show that claimant was disabled during that seven-month time period, and the claimant did not show that an alternate calculation should have been used to determine his average weekly wage used to determine the temporary total disability benefit award. France v. Murrow's Transfer, 163 N.C. App. 340, 593 S.E.2d 450, 2004 N.C. App. LEXIS 377 (2004).

§ 97-29.1. Increase in payments in cases for total and permanent disability occurring prior to July 1, 1973.

In all cases of total and permanent disability occurring prior to July 1, 1973, weekly compensation payments shall be increased effective July 1, 1977, to an amount computed by multiplying the number of calendar years prior to July 1, 1973, that the case arose by five percent (5%). Payments made by the employer or its insurance carrier by reason of such increase in weekly benefits may be deducted by such employer or insurance carrier from the tax levied on such employer or carrier pursuant to G.S. 105-228.5 or G.S. 97-100. Every employer or insurance carrier claiming such deduction or credit shall verify such claim to the Secretary of Revenue or the Industrial Commission by affidavit or by such other method as may be prescribed by the Secretary of Revenue or the Industrial Commission. (1977, c. 651.)

CASE NOTES

Purpose. — In enacting this section, the legislature did not intend to do anything other than increase the weekly benefits of claimants who were totally and permanently disabled. Taylor v. J.P. Stevens & Co., 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified and aff'd, 307 N.C. 392, 298 S.E.2d 681 (1983).

The legislative history of this section reveals an intent to provide additional benefits for persons who were disabled prior to 1973. Taylor v. J.P. Stevens & Co., 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified and aff'd, 307 N.C. 392, 298 S.E.2d 681 (1983).

By enacting this section, the legislature intended only to affect those cases in which the claimant received lifetime weekly benefits under G.S. 97-29 prior to 1975 amendment to that statute which provided lifetime weekly benefits for total and permanent disability regardless of the cause of disability. Taylor v. J.P. Stevens Co., 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified and aff'd, 307 N.C. 392, 298 S.E.2d 681 (1983).

Effect of Section. — This section increases only the weekly compensation benefits in all cases of total and permanent disability occurring prior to July 1, 1973; no provision has been made for an increase in total benefits. It is a well-settled principle of statutory construction that where a statute is intelligible without any additional words, no additional words may be supplied. Taylor v. J.P. Stevens & Co., 307 N.C. 392, 298 S.E.2d 681 (1983).

Section Provides Parity with Certain Benefits Under § 97-29. — The import of this section was to effectuate some economic parity in benefits afforded persons who prior to this section received lifetime weekly benefits with those who received lifetime weekly benefits by virtue of the 1975 amendment to G.S. 97-29. Taylor v. J.P. Stevens & Co., 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified and aff'd, 307 N.C. 392, 298 S.E.2d 681 (1983).

Commission Properly Found No Causation. — North Carolina Industrial Commission properly held that a workers' compensation claimant's arthritic condition in her knees was not compensable as, although a prior award included "problems caused by falls" as compensable conditions, the degenerative arthritis was not the very injury that the Commission had previously determined to be the result of a compensable accident. Clark v. Sanger Clinic, P.A., 175 N.C. App. 76, 623 S.E.2d 293, 2005 N.C. App. LEXIS 2742 (2005).

North Carolina Industrial Commission properly found that a workers' compensation claimant's arthritic condition in her knees was not compensable where, although tears in the claimant's knees were related to falls, and therefore were compensable, the claimant failed to establish that she had a pre-existing arthritic condition in her knees and an expert testified that a long-standing tear could not cause arthritis of the knee; while there was evidence that the claimant's falls could have aggravated her degenerative knee condition, there was also testimony that the claimant's pre-existing obesity could have aggravated the degenerative changes in her knees. Clark v. Sanger Clinic, P.A., 175 N.C. App. 76, 623 S.E.2d 293, 2005 N.C. App. LEXIS 2742 (2005).

North Carolina Industrial Commission did not err in holding that the causal relationship between a workers' compensation claimant's compensable injuries and the need for restorative dental treatment was tenuous as an expert testified that the claimant's dental condition could have been caused by poor hygiene, xerostomia ("dry mouth" syndrome), possibly brought on by plaintiff's medications, stones in her salivary glands, or the six weeks that the claimant was in a coma following her unrelated gastric bypass procedure; while another expert testified that "dry mouth" syndrome was a potential side effect of several of the claimant's medications, there was no testimony as to what actually caused the claimant's dental condition. Clark v. Sanger Clinic, P.A., 175 N.C. App. 76, 623 S.E.2d 293, 2005 N.C. App. LEXIS 2742 (2005).

North Carolina Industrial Commission properly failed to specify treatment for a workers' compensation claimant's esophageal reflux, constipation, and nausea as compensable as there was no testimony as to what actually caused the conditions; while a treating physician testified that many of the claimant's medications had esophageal reflux, constipation, and nausea as side effects, there was no testimony that these conditions were causally related to the claimant's compensable injuries. Further, the physician testified that the claimant had ample reason to have nausea due to her gastric surgery, the complications from that, and her pain medication; further, if the claimant could establish that the conditions were related to her compensable injuries, her employer was obligated to provide the treatment for the ailments. Clark v. Sanger Clinic, P.A., 175 N.C. App. 76, 623 S.E.2d 293, 2005 N.C. App. LEXIS 2742 (2005).

§ 97-30. Partial incapacity.

Except as otherwise provided in G.S. 97-31, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 a week, and in no case shall the period covered by such compensation be greater than 300 weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability. An officer or member of the State Highway Patrol shall not be awarded any weekly compensation under the provisions of this section for the first two years of any incapacity resulting from an injury by accident arising out of and in the course of the performance by him of his official duties if, during such incapacity, he continues to be an officer or member of the State Highway Patrol, but he shall be awarded any other benefits to which he may be entitled under the provisions of this Article. (1929, c. 120, s. 30; 1943, c. 502, s. 4; 1947, c. 823; 1951, c. 70, s. 2; 1953, c. 1195, s. 3; 1955, c. 1026, s. 6; 1957, c. 1217; 1963, c. 604, s. 2; 1967, c. 84, s. 2; 1969, c. 143, s. 2; 1971, c. 281, s. 2; 1973, c. 515, s. 2; c. 759, s. 2; 1981, c. 276, s. 1.)

Cross References. — As to credits, see G.S. 97-42. As to certain state law-enforcement officers, see G.S. 143-166.16.

Legal Periodicals. — For comment on the 1943 amendment, which increased the maximum weekly compensation, see 21 N.C.L. Rev. 384 (1943).

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For comment on Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981), see 4 Campbell L. Rev. 107 (1981).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

CASE NOTES

The Workers' Compensation Act is only intended to furnish compensation for loss of earning capacity. Without such loss, there is no provision for compensation in this section, even if permanent physical injury is suffered. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

Test of Earning Capacity. — Under the act, wages earned, or the capacity to earn wages, is the test of earning capacity, or to state it differently, the diminution of the power or capacity to earn is the measure of compensability. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943), in which claimant, who was found to have suffered one-third "general partial disability" due to back injury, returned to lighter work but was paid the same wage as before the injury, and the Supreme Court rejected his contention that he was unable to work as he had before the injury and was thus entitled to compensation although still receiving the same wage, decided prior to the 1955 amendment to G.S. 97-31, which made back injuries compensable as specific disabilities under that section. Wilhite v. Liberty Veneer Co., 47 N.C. App. 434, 267 S.E.2d 566, rev'd on other grounds, 303 N.C. 281, 278 S.E.2d 234 (1981).

The disability of an employee is to be measured by his capacity or incapacity to earn the wages he was receiving at the time of the injury. Loss of earning capacity is the criterion. Dail v. Kellex Corp., 233 N.C. 446, 64 S.E.2d 438 (1951).

Compensation must be based upon loss of wage-earning power rather than the amount actually received. Hill v. DuBose, 234 N.C. 446, 67 S.E.2d 371 (1951). See also Evans v. Asheville Citizens Times Co., 246 N.C. 669, 100 S.E.2d 75 (1957).

Version of Statute in Effect for Determining Compensation. — Plaintiff, who became partially disabled in 1973 and was compensated pursuant to the laws in effect at that time, was entitled to compensation for total disability (arising out of the same injury) under the laws in effect in 1981, when he became totally disabled. Peace v. J.P. Stevens Co., 95 N.C. App. 129, 381 S.E.2d 798 (1989).

Medical Services to Employee Who Loses No Wages. — The rule that denies compensation to an injured employee who has lost no wages is necessarily applied in some cases growing out of this section in order to determine the amount of compensation due, but it is not applicable to medical, surgical, hospital, and nursing services under G.S. 97-25, as medical and hospital expenses are not a part of, and are not included in, determining recoverable compensation. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Return to Work — Generally. — If there is a presumption that disability lasts until the employee returns to work, there is likewise a presumption that disability ended when the employee returned to work. Tucker v. Lowdermilk, 233 N.C. 185, 63 S.E.2d 109 (1951).

Same — At Higher Wages. — Employee was receiving compensation under this section for permanent partial disability resulting from injury to his back. He obtained a new job in which he earned more than he was earning at the time of injury. His physical condition remained unchanged. The Supreme Court held that he had undergone a change of condition within the meaning of G.S. 97-47 justifying a modification of the award and reduction of the compensation payable. Smith v. Swift & Co., 212 N.C. 608, 194 S.E. 106 (1937), decided prior to the 1955 amendment to § 97-31 which made back injuries compensable as specific disabilities under that section.

Establishment of Permanent Incapacity. — Once an employee has reached their maximum medical improvement, the employee may establish permanent incapacity pursuant to either this section, G.S. 97-29 or G.S. 97-31. Franklin v. Broyhill Furn. Indus., 123 N.C. App. 200, 472 S.E.2d 382 (1996).

For discussion of the two lines of case law relating to the concept of Maximum Medical Improvement and its applicability to G.S. 97-29, 97-30 and 97-31, see Effingham v. Kroger Co., 149 N.C. App. 105, 561 S.E.2d 287, 2002 N.C. App. LEXIS 141 (2002).

Concept of Maximum Medical Improvement Is Not Applicable to § 97-29 or § 97-30. — While G.S. 97-31 contemplates a "healing period" followed by a statutory period of time corresponding to the specific physical injury, and allows an employee to receive scheduled benefits for a specific physical impairment only once "the healing period" ends, neither G.S. 97-29 nor G.S. 97-30 contemplates a framework similar to that established by G.S. 97-31. Under G.S. 97-29 or G.S. 97-30, an employee may receive compensation once the employee has established a total or partial loss of wage-earning capacity, and the employee may receive such compensation for as long as the loss of wage-earning capacity continues, for a maximum of 300 weeks in cases of partial loss of wage-earning capacity. Hence, the primary significance of the concept of Maximum Medical Improvement (MMI) is to delineate a crucial point in time only within the context of a claim for scheduled benefits under G.S. 97-31; the concept of MMI does not have any direct bearing upon an employee's right to continue to receive temporary disability benefits once the employee has established a loss of wage-earning capacity pursuant to G.S. 97-29 or G.S. 97-30. Knight v. Wal-Mart Stores, Inc., 149 N.C. App. 1, 562 S.E.2d 434, 2002 N.C. App. LEXIS 140 (2002), cert. denied, 355 N.C. 749, 565 S.E.2d 667 (2002), aff'd, 357 N.C. 44, 577 S.E.2d 620 (2003).

Maximum Medical Improvements Prerequisite to Permanent Disability. — An employee may seek a determination of her entitlement to permanent disability under G.S. 97-29, 97-30, or 97-31 only after reaching maximum medical improvement. Effingham v. Kroger Co., 149 N.C. App. 105, 561 S.E.2d 287, 2002 N.C. App. LEXIS 141 (2002).

Extent of Disability Must Be Known. — The Commission is not in a position to make a proper award until the extent of disability or permanent injury, if any, is determined. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Since Degree of Disability Is Measure for Compensation. — Under this section, compensation for permanent partial disability is measured by the degree of disability, except in case of loss of a member as specified in G.S. 97-31. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Version of Statute in Effect for Determining Compensation. — Plaintiff, who became partially disabled in 1973 and was compensated pursuant to the laws in effect at that time, was entitled to compensation for total disability (arising out of the same injury) under the laws in effect in 1981, when he became totally disabled. Peace v. J.P. Stevens Co., 95 N.C. App. 129, 381 S.E.2d 798 (1989).

This section and § 97-29 are mutually exclusive. A claimant cannot simultaneously be both totally and partially incapacitated. Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

When an employee suffers a diminution of the power or capacity to earn, he or she is entitled to benefits under this section; when the power or capacity to earn is totally obliterated, he or she is entitled to benefits under G.S. 97-29. Gupton v. Builders Transp., 320 N.C. 38, 357 S.E.2d 674 (1987).

Award of benefits by the North Carolina Industrial Commission was remanded to allow an employer and its insurer a credit for an award of permanent partial disability because an employee was unable to recover simultaneous benefits under G.S. 97-29 or G.S. 97-30 and G.S. 97-31. Guerrero v. Brodie Contrs., Inc., 158 N.C. App. 678, 582 S.E.2d 346, 2003 N.C. App. LEXIS 1226 (2003).

Stacking of Benefits Under § 97-29 and This Section Not Permitted. — If the Industrial Commission in workers' compensation actions should find that a plaintiff became totally and permanently disabled, the plaintiff's compensation should be to the fullest extent allowed under G.S. 97-29 and should be awarded without regard to compensation previously awarded the plaintiff under this section for partial disability; however, a plaintiff should receive full compensation under G.S. 97-29 only where an award under this section was fully paid before the plaintiff became totally disabled, since if the period for the partial disability award overlapped the period for the total award, the stacking of total benefits on top of partial benefits, for the same time period, would allow the plaintiff a greater recovery than the legislature intended. Smith v. American & Efird Mills, 51 N.C. App. 480, 277 S.E.2d 83, cert. denied and appeal dismissed, 304 N.C. 197, 285 S.E.2d 101 (1981), aff'd, 305 N.C. 507, 290 S.E.2d 634 (1982).

At a given point in time, the provisions of G.S. 97-29 and this section must be mutually exclusive; that is, a claimant cannot simultaneously be both totally and partially incapacitated. Smith v. American & Efird Mills, 51 N.C. App. 480, 277 S.E.2d 83, cert. denied and appeal dismissed, 304 N.C. 197, 285 S.E.2d 101 (1981), aff'd, 305 N.C. 507, 290 S.E.2d 634 (1982).

The proper formula for compensation under this section would be the difference between wages before and after the disease multiplied by 66⅔ percent multiplied by the percentage of disability for work on account of work-related causes rather than by the percentage of the physical impairment that is work-related. Parrish v. Burlington Indus., Inc., 71 N.C. App. 196, 321 S.E.2d 492 (1984).

Section 97-31 Compared. — In all cases in which compensation is sought under G.S. 97-29 or this section, total or partial disablement must be shown; however, if compensation is sought in the alternative under G.S. 97-31, disablement is presumed from the injury and compensation is accordingly based on the schedule. Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Often an award under G.S. 97-29, and by implication of this section, better fulfills the policy of the Workers' Compensation Act than an award under G.S. 97-31(24). Strickland v. Burlington Indus., Inc., 87 N.C. App. 507, 361 S.E.2d 394 (1987).

An employee who suffers injuries resulting in partial disability of a general nature is entitled to compensation under this section, while an employee who sustains injuries of a specific nature is entitled to recover pursuant to the schedule provided in G.S. 97-31. In fact, an employee who sustains both general and specific injuries may recover benefits under both this section and G.S. 97-31. Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 414 S.E.2d 102 (1992).

Where all of a worker's injuries are included in the schedule set out in § 97-31 his compensation is limited to that provided for in the statutory schedule without regard to his ability or inability to earn wages. Jones v. Murdoch Center, 74 N.C. App. 128, 327 S.E.2d 294 (1985).

Unjustifiable Refusal of Employment. — If an employer shows that the employee has unjustifiably refused employment procured for him that is suitable to the employee's capacity and the evidence is accepted by the Industrial Commission, the employee is not entitled to any benefits pursuant to this section or G.S. 97-29. Franklin v. Broyhill Furn. Indus., 123 N.C. App. 200, 472 S.E.2d 382 (1996).

Industrial Commission's findings that an employee had not unjustifiably refused suitable employment, after having received temporary disability benefits due to a slip and fall during her employment, was supported by the evidence that indicated that she had called in sick daily, as directed by her supervisor; accordingly, her discharge a week later for her failure to report to work was not credible as a refusal to work and the Commission's award of continuing benefits was upheld due to the failure of the employer to meet its burden pursuant to G.S. 97-29 and 97-30. Whitfield v. Lab. Corp., 158 N.C. App. 341, 581 S.E.2d 778, 2003 N.C. App. LEXIS 1192 (2003).

Section Construed With G.S. 97-42. — Where the employer and insurer paid workers' compensation benefits to the employee while he was incarcerated to which the employee was not entitled, the employer and insurer were entitled to credit under G.S. 97-42; because the award was for an indefinite period, the employer and insurer were permitted to reduce the amount of the employee's payments, as shortening the period of benefits was not possible because the employee's benefits were to terminate pursuant to G.S. 97-30, G.S. 97-31 when the employee returned to work and there would be no opportunity to shorten the period of disability. Easton v. J.D. Denson Mowing, 173 N.C. App. 439, 620 S.E.2d 201, 2005 N.C. App. LEXIS 2014 (2005).

Where all of a worker's injuries are not included in the schedule contained in § 97-31 and the worker's earning capacity has been permanently, but only partially, impaired he is entitled to the scheduled compensation provided for in G.S. 97-31 and an award for permanent partial disability as provided for in this section. Jones v. Murdoch Ctr., 74 N.C. App. 128, 327 S.E.2d 294 (1985).

Injuries Also Entitling Employee to Compensation Under § 97-31. — An employee sustained injuries resulting in disability of a general nature such as would entitle him to compensation under this section. In addition to such injuries, he had also sustained injuries of a specific nature such as to entitle him to compensation under G.S. 97-31. He is entitled to compensation for the specific injuries under G.S. 97-31, and then, if still disabled as a result of the other injuries, compensation will be paid under this section. Morgan v. Town of Norwood, 211 N.C. 600, 191 S.E. 345 (1937).

Where all of a worker's injuries are compensable under G.S. 97-31, the compensation provided for under that section is in lieu of all other compensation. When, however, an employee cannot be fully compensated under G.S. 97-31 and is permanently incapacitated, he or she is entitled to compensation under G.S. 97-29 for total incapacity or this section for partial incapacity. Kendrick v. City of Greensboro, 80 N.C. App. 183, 341 S.E.2d 122, cert. denied, 317 N.C. 335, 346 S.E.2d 500 (1986).

Because stacking of benefits covering the same injury for the same time period is prohibited, and because the prevention of double recovery, not exclusivity of remedy, is patently the intent of the "in lieu of all other compensation" clause in G.S. 97-31, a plaintiff entitled to select a remedy under either G.S. 97-31 or this section may receive benefits under the provisions offering the more generous benefits, less the amount he or she has already received. Gupton v. Builders Transp., 320 N.C. 38, 357 S.E.2d 674 (1987).

Award for both partial incapacity under this section and for disfigurement under § 97-31(22) is now permissible for injuries occurring since July 1, 1963. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

When an employee's power to earn is diminished but not obliterated, he is entitled to benefits under this section for a permanent partial disability. Brown v. S & N Communications, Inc., 124 N.C. App. 320, 477 S.E.2d 197 (1996).

Award for Partial Disability Not Increased to Compensation for Total Disability. — Where an award was entered for total disability for a certain length of time, and for partial disability thereafter for a total of 300 weeks under this section, the Industrial Commission could not increase the award of compensation to that allowed for total disability, upon its finding that at the time of the review of the award claimant's condition was unchanged and that he was at the time only 50 percent disabled. Murray v. Nebel Knitting Co., 214 N.C. 437, 199 S.E. 609 (1938), distinguishing Smith v. Swift & Co., 212 N.C. 608, 194 S.E. 106 (1937).

Occupational Disease Is Not Compensable Until It Causes Incapacity for Work. — An occupational disease does not become compensable under G.S. 97-29 (relating to total incapacity) or this section (relating to partial incapacity) until it causes incapacity for work.

This incapacity is the basic "loss" for which the worker receives compensation under those statutes. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

Amount of Benefit. — Subject to the limitations and percentages stated in the statute in partial disability cases, the weekly benefit due is based on the difference between the employee's average weekly wage before the injury and average weekly wage which he is able to earn thereafter. Thomason v. Fiber Indus., 78 N.C. App. 159, 336 S.E.2d 632 (1985), cert. denied, 316 N.C. 202, 341 S.E.2d 573 (1986).

Where the evidence tended to show that plaintiff was permanently partially disabled by reason of occupational disease and that after failing to obtain employment in the cotton textile industry in which he had been employed for 29 years, the plaintiff made an earnest and highly commendable search for other employment, and was able to obtain a permanent job with a restaurant at the minimum wage but was released from that employment only because business conditions resulted in the restaurant going out of business, the Commission was required to enter an award setting the plaintiff's compensation at two-thirds of the difference between his average wage of $196.91 a week while working for the defendant and the minimum wage of $134.00 a week which he received thereafter, an award of $41.94 per week, not to exceed 300 weeks. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Compensation under this section is to be computed upon the basis of the difference in the average weekly earnings before the injury and the average weekly wages the employee is able to earn thereafter. Gupton v. Builders Transp., 320 N.C. 38, 357 S.E.2d 674 (1987).

Commission Erred by Not Assessing Most Munificient Remedy. — The Industrial Commission erred when it awarded permanent disability compensation solely for plaintiff's scheduled hand injury under G.S. 97-31 without assessing whether G.S. 97-29 or this section would provide him a more munificent remedy. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

The Commission did not err in allowing defendants a credit only for the wages actually earned by employee after he was found to be disabled, as implicit in the Commission's finding that employee was entitled to compensation at two-thirds the difference between his wages prior to disability and his average weekly wages immediately thereafter was a finding that the wages actually earned by the employee after he was found to be disabled were the wages he was capable of earning. Calloway v. Mills, 78 N.C. App. 702, 338 S.E.2d 548 (1986), remanding, however, for further findings so that the exact amount of credit could be set and compensation could be properly calculated.

Showing Necessary to Secure Award Under Section. — In order to secure an award under this section, the claimant has the burden of proving (1) that the injury resulted from accident arising out of and in the course of his employment; (2) that there resulted from that injury a loss of earning capacity (disability); and (3) the extent of that disability. Without such proof, there is no authority upon which to make an award, even though permanent physical injury may have been suffered. Gaddy v. Kern, 17 N.C. App. 680, 195 S.E.2d 141, cert. denied, 283 N.C. 585, 197 S.E.2d 873 (1973).

In order to secure an award under this section, the plaintiff has the burden of showing not only permanent partial disability, but also its degree. Gupton v. Builders Transp., 320 N.C. 38, 357 S.E.2d 674 (1987).

An employee's presumption of disability may not be defeated merely by a return to work. Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996).

Burden is on claimant to show permanent partial disability. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Presumption of Disability Not Rebutted. — Where the parties executed a Form 21 Agreement relieving the employee of the burden of proving his disability, the fact that plaintiff held a job one year before the matter was initially heard was not sufficient to prove that suitable jobs were available to him and that he was capable of getting one. Flores v. Stacy Penny Masonry Co., 134 N.C. App. 452, 518 S.E.2d 200 (1999).

Determination that a plaintiff suffered a fractured wrist was supported by competent evidence and he was properly found entitled to 300 weeks of partial disability payments, as the employer failed to show that the plaintiff was capable of earning his pre-injury wages post-injury since the plaintiff was not in professional football player condition due to his injury; in the future, the defendant was entitled to file a motion with the Commission pursuant to G.S. 97-47 for a modification of the plaintiff's award. Renfro v. Richardson Sports, Ltd. Partners, 172 N.C. App. 176, 616 S.E.2d 317, 2005 N.C. App. LEXIS 1435 (2005), cert. denied, 360 N.C. 535, 633 S.E.2d 821 (2006), cert. dismissed, 360 N.C. 535, 633 S.E.2d 821 (2006).

And also its degree. See Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Because plaintiff's presumption of post-injury diminished earning capacity was established by plaintiff and unrebutted by defendant, plaintiff was allowed to elect benefits pursuant to this section. Shaw v. UPS, 116 N.C. App. 598, 449 S.E.2d 50 (1994), aff'd per curiam, 342 N.C. 189, 463 S.E.2d 78 (1995).

Entitlement to Partial Disability Compensation Shown. — Plaintiff, who received temporary total disability benefits under G.S. 97-29 for a compensable heart attack in April, 1979, was properly awarded permanent partial disability under this section on his application under G.S. 97-47 for modification of the prior award following three additional heart attacks, where the Commission found that he had been permanently and totally disabled since June 1981, partially as a result of his compensable heart attack in 1979. Weaver v. Swedish Imports Maintenance, Inc., 80 N.C. App. 432, 343 S.E.2d 205 (1986), modified, 319 N.C. 243, 354 S.E.2d 477 (1987).

Individual who retired from job in which he had 47 years of experience at age 70, and subsequently attempted to return to work but could not obtain comparable employment, was entitled to partial disability compensation based on the difference between his present and former wages, in view of environmental restriction, caused by his occupational disease (COPD), which combined with other factors to limit the scope of his potential employment. Preslar v. Cannon Mills Co., 80 N.C. App. 610, 343 S.E.2d 209 (1986).

Truck driver, who suffered a 7% loss in the visual field of one eye in a job-related accident and was unable thereafter to find work at wages comparable to those he had been earning as a truck driver, was not precluded from receiving benefits under this section merely because he had received some compensation under G.S. 97-31 for a scheduled injury. Gupton v. Builders Transp., 320 N.C. 38, 357 S.E.2d 674 (1987).

The record contained competent evidence to support the plaintiff's temporary partial disability compensation: the Commission's determination that, but for his injury, plaintiff would have received the Panthers contract amount of $ 86,000; its finding that plaintiff was unable to obtain other professional football employment; plaintiff's failure to obtain employment with the Dallas Cowboys; and his three treating physicians' note that a symptomatic disc would contraindicate his playing professional football. Larramore v. Richardson Sports Ltd. Partners, 141 N.C. App. 250, 540 S.E.2d 768, 2000 N.C. App. LEXIS 1305 (2000), aff'd, 353 N.C. 520, 546 S.E.2d 87 (2001).

Employee met burden of proving employment at a diminished capacity after a work-related injury by showing employment at a wage lower than pre-injury employment wage and because employer did not prove that the employee was able to earn higher wages, the North Carolina Industrial Commission did not err by finding that the employee was eligible to receive partial disability compensation. Osmond v. Carolina Concrete Specialties, 151 N.C. App. 541, 568 S.E.2d 204, 2002 N.C. App. LEXIS 906 (2002), review denied, 356 N.C. 676, 577 S.E.2d 631 (2003).

Where an employee suffered a general partial disability, but continued to receive the same wages, which amounted to more than the assessable compensation for his injury, he could not receive additional compensation. But to protect the employee against the possibility that the employer might, after the expiration of the time limit specified in G.S. 97-24, discontinue the employment and thus defeat the rights of the employee, the Commission, after finding the existing of the disability, directed that an award issue subject to specified limitations. It directed compensation at the statutory rate "at any time it is shown that the claimant is earning less," etc., during the statutory period of 300 weeks. By this order the Commission, in effect retained jurisdiction for future adjustments. In so doing it did not exceed its authority. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

Partial Disability Benefits Not Warranted. — An award also containing a provision by which the Commission sought to retain jurisdiction during 300 weeks so that claimant might be paid more compensation if he had a wage loss as a result of his injury within that time was held to be error by the Supreme Court, which said, "There is nothing in the statute . . . that contemplates or authorizes an anticipatory finding by the Commission that a physical impairment may develop into a compensable disability. Neither does the statute vest in the Commission the power to retain jurisdiction of a claim, after compensation has been awarded, merely because some physical impairment suffered by the claimant may, at some time in the future, cause a loss of wages. The Commission is concerned with conditions existing prior to and at the time of the hearing. If such conditions change in the future, to the detriment of the claimant, the statute affords the claimant a remedy and fixes the time within which he must seek it. G.S. 97-47." Dail v. Kellex Corp., 233 N.C. 446, 64 S.E.2d 438 (1951).

In Harris v. Asheville Contracting Co., 240 N.C. 715, 83 S.E.2d 802 (1954), the court again stated that the Commission was without jurisdiction to retain jurisdiction for 300 weeks. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943), was distinguished. See also Hill v. DuBose, 234 N.C. 446, 67 S.E.2d 371 (1951); Hill v. DuBose, 237 N.C. 501, 75 S.E.2d 401 (1953).

Workers' compensation claimant was not entitled to compensation under G.S. 97-29 or G.S. 97-30 after a Form 24 was approved as the evidence supported the North Carolina Industrial Commission's determinations that the claimant was capable of returning to full-duty work without restrictions and that she failed in her burden of proving that she remained disabled as a result of the compensable injury where, while there was medical evidence to support a determination that the claimant could not return to full-time work as a flight attendant, this alone was insufficient to establish that she was incapable of earning wages at any job; the claimant's one contact with her employer about a light duty position was insufficient to establish she had made a reasonable effort to obtain employment under the second Russell option. Perkins v. U.S. Airways, 177 N.C. App. 205, 628 S.E.2d 402, 2006 N.C. App. LEXIS 867 (2006).

Apportionment Held Proper. — Where evidence supported the Industrial Commission's conclusion that claimant was totally disabled and that 55 percent of her disability was due to an occupational disease while 45 percent was due to other physical infirmities, it was not error for the Industrial Commission to award claimant compensation for a 55 percent partial disability rather than for total disability. Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981).

Employer's failure to tell employee about benefits provided under this section was not sufficient reason to set aside the award where employee-plaintiff entered into an agreement, accepted all the benefits from it, and chose not to contest it until almost two years after entering the agreement. Crump v. Independence Nissan, 112 N.C. App. 587, 436 S.E.2d 589 (1993).

Exaggerated Post-Injury Earnings. — Where plaintiff's hourly wage after he terminated his employment due to lung impairment was less than he had earned; however, his weekly income was approximately the same as pre-injury due to his working more hours post-injury, plaintiff's actual post-injury earnings were exaggerated and were not a reliable indicator of his earning capacity. Harris v. North Am. Prods., 125 N.C. App. 349, 481 S.E.2d 321 (1997).

Factors other than actual post-injury earnings may be considered in determining an injured employee's post-injury earning capacity. Harris v. North Am. Prods., 125 N.C. App. 349, 481 S.E.2d 321 (1997).

Failure to Make Required Findings as to Earning Capacity. — Industrial commission erred in determining a worker's permanent partial disability rating pursuant to G.S. 97-31; disability was defined by a diminished capacity to earn wages, not by physical infirmity alone, G.S. 97-2(9), and the commission failed to make required findings pursuant to G.S. 97-30 on whether the job offered to the worker by her employer accurately reflected her ability to earn wages. Baker v. Sam's Club, 161 N.C. App. 712, 589 S.E.2d 387, 2003 N.C. App. LEXIS 2255 (2003).

Remand for Findings as to Wage Earning Capacity. — Where plaintiff suffered a permanent disability to her lungs, the Industrial Commission committed error in compensating her under G.S. 97-31, but failing to consider or make findings of fact as to whether her disability affected her wage earning capacity under either G.S. 97-29 or this section, as this prevented plaintiff from electing to recover under either this section or G.S. 97-29, if she was so entitled. Strickland v. Burlington Indus., Inc., 87 N.C. App. 507, 361 S.E.2d 394 (1987).

Psychological injuries are compensable, if at all, under G.S. 97-29 or this section and wage-earning capacity is critical to the assessment of a plaintiff's entitlement to benefits under these sections. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

Disability Related to Asbestosis. — The claimant could not recover compensation for total or partial incapacity to earn wages, both of which require a showing of disablement, where his prior award of 104-weeks compensation for asbestosis did not establish his disablement, but he was entitled to compensation for permanent injury to his lungs. Davis v. Weyerhaeuser Co., 132 N.C. App. 771, 514 S.E.2d 91 (1999).

Concept of Maximum Medical Improvement Is Not Applicable to Temporary Disability Payments. — Employee's reaching of maximum medical improvement (MMI) did not affect the employee's right to continue to receive temporary disability workers' compensation benefits and MMI did not represent the point in time at which a loss of wage-earning capacity automatically converted from temporary to permanent. Hooker v. Stokes-Reynolds Hospital/North Carolina Baptist Hosp. Inc., 161 N.C. App. 111, 587 S.E.2d 440, 2003 N.C. App. LEXIS 1975 (2003).

Award finding a claimant totally disabled was upheld, despite the claimant receiving a tobacco allotment and owning a mobile home park, because the claimant did not perform any physical activity involved with either enterprise, and competent evidence showed that the claimant was unable to (1) walk or stand for any sustained period of time, (2) sleep for more than a few hours at a time because of continuous knee pain, and (3) remain balanced for any length of time. Hensley v. Indus. Maint. Overflow, 166 N.C. App. 413, 601 S.E.2d 893, 2004 N.C. App. LEXIS 1729 (2004), cert. denied, 359 N.C. 631, 613 S.E.2d 690 (2005), cert. dismissed, 359 N.C. 631, — S.E.2d — (2005).

Award Supported By the Evidence. — North Carolina Industrial Commission's finding that an employee retained only minimal earning capacity was supported by the medical and record evidence and accorded to the appellate court's mandate in an earlier remand; the commission properly took judicial notice of the federal minimum wage to conclude that the employee was entitled to $14,181 more under G.S. 97-30 than he was under the Form 26 agreement, and to set the agreement aside and award the employee $14,181. Lewis v. Craven Reg'l Med. Ctr., 174 N.C. App. 561, 621 S.E.2d 259, 2005 N.C. App. LEXIS 2473 (2005), cert. denied, — N.C. —, 629 S.E.2d 853 (2006).

Applied in Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983); Roper v. J.P. Stevens & Co., 65 N.C. App. 69, 308 S.E.2d 485 (1983); Fleming v. K-Mart Corp., 312 N.C. 538, 324 S.E.2d 214 (1985); Weaver v. Swedish Imports Maintenance, Inc., 319 N.C. 243, 354 S.E.2d 477 (1987); King v. Yeargin Constr. Co., 124 N.C. App. 396, 476 S.E.2d 898 (1996); Trivette v. Mid-South Mgmt., 154 N.C. App. 140, 571 S.E.2d 692, 2002 N.C. App. LEXIS 1408 (2002).

Cited in Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952); Little v. Anson County Schools Food Serv., 295 N.C. 527, 246 S.E.2d 743 (1978); Morrison v. Burlington Indus., 301 N.C. 226, 271 S.E.2d 364 (1980); Gamble v. Borden, Inc., 45 N.C. App. 506, 263 S.E.2d 280 (1980); Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982); Cloutier v. State, 57 N.C. App. 239, 291 S.E.2d 362 (1982); West v. Bladenboro Cotton Mills, Inc., 62 N.C. App. 267, 302 S.E.2d 645 (1983); Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983); Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1 (1986); Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986); Gupton v. Builders Transp., 83 N.C. App. 1, 348 S.E.2d 601 (1986); Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986); Hill v. Hanes Corp., 319 N.C. 167, 353 S.E.2d 392 (1987); Thomas v. Hanes Printables, 91 N.C. App. 45, 370 S.E.2d 419 (1988); Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994); McGee v. Estes Express Lines, 125 N.C. App. 298, 480 S.E.2d 416 (1997); Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994); Neal v. Carolina Mgt., 130 N.C. App. 220, 502 S.E.2d 424 (1998), rev'd on other grounds, 350 N.C. 63, 510 S.E.2d 375 (1999); Lanning v. Fieldcrest-Cannon, Inc., 352 N.C. 98, 530 S.E.2d 54, 2000 N.C. LEXIS 434 (2000); Lewis v. Sonoco Prods. Co., 137 N.C. App. 61, 526 S.E.2d 671, 2000 N.C. App. LEXIS 257 (2000); Bond v. Foster Masonry, Inc., 139 N.C. App. 123, 532 S.E.2d 583, 2000 N.C. App. LEXIS 803 (2000); Oliver v. Lane Co., 143 N.C. App. 167, 544 S.E.2d 606, 2001 N.C. App. LEXIS 220 (2001); Devlin v. Apple Gold, Inc., 153 N.C. App. 442, 570 S.E.2d 257, 2002 N.C. App. LEXIS 1187 (2002); Arnold v. Wal-Mart Stores, Inc., 154 N.C. App. 482, 571 S.E.2d 888, 2002 N.C. App. LEXIS 1461 (2002); White v. Weyerhaeuser Co., 167 N.C. App. 658, 606 S.E.2d 389, 2005 N.C. App. LEXIS 5 (2005); Smith v. Richardson Sports Ltd. Partners, 168 N.C. App. 410, 608 S.E.2d 342, 2005 N.C. App. LEXIS 348 (2005); Smith v. Richardson Sports Ltd. Partners, 172 N.C. App. 200, 616 S.E.2d 245, 2005 N.C. App. LEXIS 1440 (2005), cert. denied, 360 N.C. 536, 633 S.E.2d 824 (2006), cert. dismissed, 360 N.C. 536, 633 S.E.2d 824 (2006); Swift v. Richardson Sports, Inc., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 725 (Apr. 5, 2005); Everett v. N.C. Indus. Comm'n No. 102217 Well Care & Nursing Servs., — N.C. App. —, 636 S.E.2d 824, 2006 N.C. App. LEXIS 2313 (2006); Outerbridge v. Perdue Farms, Inc., — N.C. App. —, 638 S.E.2d 564, 2007 N.C. App. LEXIS 40 (2007); Ward v. Floors Perfect, — N.C. App. —, 645 S.E.2d 109, 2007 N.C. App. LEXIS 1179 (2007).

§ 97-31. Schedule of injuries; rate and period of compensation.

In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation, including disfigurement, to wit:

(1) For the loss of a thumb, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 75 weeks.

(2) For the loss of a first finger, commonly called the index finger, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 45 weeks.

(3) For the loss of a second finger, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 40 weeks.

(4) For the loss of a third finger, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 25 weeks.

(5) For the loss of a fourth finger, commonly called the little finger, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 20 weeks.

(6) The loss of the first phalange of the thumb or any finger shall be considered to be equal to the loss of one half of such thumb or finger, and the compensation shall be for one half of the periods of time above specified.

(7) The loss of more than one phalange shall be considered the loss of the entire finger or thumb: Provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

(8) For the loss of a great toe, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 35 weeks.

(9) For the loss of one of the toes other than a great toe, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 10 weeks.

(10) The loss of the first phalange of any toe shall be considered to be equal to the loss of one half of such toe, and the compensation shall be for one half of the periods of time above specified.

(11) The loss of more than one phalange shall be considered as the loss of the entire toe.

(12) For the loss of a hand, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 200 weeks.

(13) For the loss of an arm, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 240 weeks.

(14) For the loss of a foot, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 144 weeks.

(15) For the loss of a leg, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 200 weeks.

(16) For the loss of an eye, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 120 weeks.

(17) The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of G.S. 97-29. The employee shall have a vested right in a minimum amount of compensation for the total number of weeks of benefits provided under this section for each member involved. When an employee dies from any cause other than the injury for which he is entitled to compensation, payment of the minimum amount of compensation shall be payable as provided in G.S. 97-37.

(18) For the complete loss of hearing in one ear, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 70 weeks; for the complete loss of hearing in both ears, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 150 weeks.

(19) Total loss of use of a member or loss of vision of an eye shall be considered as equivalent to the loss of such member or eye. The compensation for partial loss of or for partial loss of use of a member or for partial loss of vision of an eye or for partial loss of hearing shall be such proportion of the periods of payment above provided for total loss as such partial loss bears to total loss, except that in cases where there is eighty-five per centum (85%), or more, loss of vision in any eye, this shall be deemed "industrial blindness" and compensated as for total loss of vision of such eye.

(20) The weekly compensation payments referred to in this section shall all be subject to the same limitations as to maximum and minimum as set out in G.S. 97-29.

(21) In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed twenty thousand dollars ($20,000). In case of enucleation where an artificial eye cannot be fitted and used, the Industrial Commission may award compensation as for serious facial disfigurement.

(22) In case of serious bodily disfigurement for which no compensation is payable under any other subdivision of this section, but excluding the disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the schedule contained in this section, the Industrial Commission may award proper and equitable compensation not to exceed ten thousand dollars ($10,000).

(23) For the total loss of use of the back, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 300 weeks. The compensation for partial loss of use of the back shall be such proportion of the periods of payment herein provided for total loss as such partial loss bears to total loss, except that in cases where there is seventy-five per centum (75%) or more loss of use of the back, in which event the injured employee shall be deemed to have suffered "total industrial disability" and compensated as for total loss of use of the back.

(24) In case of the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed twenty thousand dollars ($20,000). (1929, c. 120, s. 31; 1931, c. 164; 1943, c. 502, s. 2; 1955, c. 1026, s. 7; 1957, c. 1221; c. 1396, ss. 2, 3; 1963, c. 424, ss. 1, 2; 1967, c. 84, s. 3; 1969, c. 143, s. 3; 1973, c. 515, s. 3; c. 759, s. 3; c. 761, ss. 1, 2; 1975, c. 164, s. 1; 1977, c. 892, s. 1; 1979, c. 250; 1987, c. 729, ss. 7, 8.)

Study Committee on Workers' Compensation Benefits. — Session Laws 2005-448, ss. 1(a)-(e), provide: "(a) There is established the Study Committee on Workers' Compensation Benefits. The Committee shall study disability benefits available under the Workers' Compensation Act, including the following:

"(1) The appropriate coverage and benefit levels, including the level of scheduled payments under G.S. 97-31, the appropriateness of cost-of-living adjustments, and a comparison of workers' compensation benefits in other states.

"(2) How the workers' compensation system functions with other disability benefits, including social security and private disability.

"(3) Employment issues and their relationship to the current workers' compensation system.

"(4) The appropriate manner for compensation related to exposure to asbestos or silica.

"(5) The manner and duration of medical benefits.

"(6) Any other issues the Committee deems relevant under the workers' compensation system.

"(b) The Study Committee on Workers' Compensation Benefits shall consist of 12 members, appointed as follows:

"(1) Six appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.

"(2) Six appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate.

"Vacancies in membership shall be filled by the original appointing authority. The Committee, while in the discharge of its official duties, may exercise all powers provided for under G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4. The Committee may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02.

"(c) Subject to the approval of the Legislative Services Commission, the Committee may meet in the Legislative Building or the Legislative Office Building. The Legislative Services Commission, through the Legislative Services Officer, shall assign professional staff to assist the Committee in its work. The House of Representatives' and the Senate's Supervisors of Clerks shall assign clerical support staff to the Committee, and the expenses relating to clerical employees shall be borne by the Committee. Members of the Committee shall receive subsistence and travel expenses at the rates set forth in G.S. 120-3.1, 138-5, or 138-6, as appropriate.

"(d) The Committee shall report to the 2006 Regular Session of the 2005 General Assembly upon its convening and shall make its final report to the 2007 General Assembly upon its convening. Progress and final reports of the Commission may include recommended legislation. The Committee shall terminate upon the convening of the 2007 General Assembly.

"(e) Of the funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds for the expenses of the Committee established by this act."

Legal Periodicals. — For comment on the 1943 amendment, which rewrote this section, see 21 N.C.L. Rev. 384 (1943).

For note as to eye injuries and loss of vision, see 35 N.C.L. Rev. 443 (1957).

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For note discussing the use of age, education, and work experience in determining disability in workers' compensation cases, see 15 Wake Forest L. Rev. 570 (1979).

For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

For note discussing proof of causation requirement in occupational disease cases, in light of Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983), see 7 Campbell L. Rev. 99 (1984).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

CASE NOTES

I. In General.
II. Thumb or Fingers.
III. Hands.
IV. Legs.
V. Eyes.
VI. Partial Loss or Partial Loss of Use.
VII. Disfigurement.
VIII. Back.
IX. Important Organs.

I. IN GENERAL.

Editor's Note. — *Many of the cases below construe this section as it read prior to the 1943 amendment.*

The amending statute of 1963 is not retroactive. Arrington v. Stone & Webster Eng'g Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

The 1963 Amendment Separated Provisions for Disfigurement and Loss of Organ. — By Session Laws 1963, c. 424, the General Assembly rewrote subdivision (22) and added subdivision (24), separating the provisions for awards of compensation for disfigurement and for loss of an important organ of the body. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

Which Are Not Covered by Subdivisions (1) to (20). — Subdivisions (1) to (20), inclusive, do not provide any compensation whatever for injuries on account of disfigurement. Neither do they provide compensation for loss of or injury to an organ or part of the body. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

Liberal Construction. — The act should be liberally construed to the end that the benefits thereof shall not be denied upon technical, narrow, and strict interpretation. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

The act requires the Industrial Commission and the courts to construe the compensation act liberally in favor of the injured worker. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

This section should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation. Gaddy v. Anson Wood Prods., 92 N.C. App. 483, 374 S.E.2d 477 (1988).

Purpose of Schedule Is to Expand Employee's Remedies. — Although this section relieves an employee from proving diminished earning capacity for injuries caused thereunder, it was not intended to mean that the presumption of reduced earning capacity should be used to the employee's detriment. The purpose of the schedule was to expand, not restrict, the employee's remedies. Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986).

Purpose of "In Lieu of" Clause. — The legislature enacted the "in lieu of" clause in this section to express its intent not to permit compensation for both loss and disfigurement of body parts. Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986).

The "in lieu of" clause of this section acts to prevent double recovery of benefits under different sections of the Workers' Compensation Act, but it does not provide for an exclusive remedy. Mitchell v. Fieldcrest Mills, Inc., 84 N.C. App. 661, 353 S.E.2d 638 (1987).

Applicability of "In Lieu of" Provisions. — The "in lieu of" provisions of this section, the scheduled injury statute, apply only when all the employee's injuries fall within those set out in the schedule. Hill v. Hanes Corp., 319 N.C. 167, 353 S.E.2d 392 (1987).

Meaning of "Shall Be Deemed". — The words "shall be deemed," as used in the opening paragraph of this section, mean "shall be held," "shall be adjudged," "shall be determined," "shall be treated as if," "shall be construed." Watts v. Brewer, 243 N.C. 422, 90 S.E.2d 764 (1956).

Disablement Presumed. — In all cases in which compensation is sought under G.S. 97-29 or G.S. 97-30, total or partial disablement must be shown; however, if compensation is sought in the alternative under this section, disablement is presumed from the injury and compensation is accordingly based on the schedule. Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

To obtain an award of benefits under any subsection of this section, a specific showing that the claimant has undergone a diminution in wage-earning capacity is not required; instead, disability is presumed from the fact of injury. Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

This section is a schedule of losses for which compensation is payable even if a claimant does not demonstrate loss of wage-earning capacity. Losses included in the schedule are conclusively presumed to diminish wage-earning ability. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Under this section, a worker may receive compensation even if he or she cannot demonstrate loss of wage-earning capacity, because losses included in the schedule are conclusively presumed to diminish wage-earning ability. Strickland v. Burlington Indus., Inc., 86 N.C. App. 598, 359 S.E.2d 19, modified and aff'd on rehearing, 87 N.C. App. 507, 361 S.E.2d 394 (1987).

Maximum Medical Improvement. — The healing period ends when after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established; the point at which the injury has stabilized is often called "maximum medical improvement." Horne v. Universal Leaf Tobacco Processors, 119 N.C. App. 682, 459 S.E.2d 797 (1995).

Evidence indicating that a skin graft would be necessary before a complete healing of plaintiff's foot would occur and the release of plaintiff to work only with certain restrictions supported the finding that plaintiff had not yet reached maximum medical improvement. Davis v. Embree-Reed, Inc., 135 N.C. App. 80, 519 S.E.2d 763, 1999 N.C. App. LEXIS 923 (1999), cert. denied, 351 N.C. 102, 541 S.E.2d 143 (1999).

A finding of maximum medical improvement is simply the prerequisite to a determination of the amount of any permanent disability under this section. Silver v. Roberts Welding Contractors, 117 N.C. App. 707, 453 S.E.2d 216 (1995).

Once an employee has reached their maximum medical improvement, the employee may establish permanent incapacity pursuant to either this section, G.S. 97-29 or G.S. 97-30. Franklin v. Broyhill Furn. Indus., 123 N.C. App. 200, 472 S.E.2d 382 (1996).

Contrary to the defendants' contention, the plaintiff reached maximum medical improvement—given his refusal to undergo further surgeries recommended by his doctor—with respect to his right and left upper extremities on January 24, 1994 and with respect to all of his injuries, on October 3, 1994 when he was found to be permanently and totally disabled. Aderholt v. A.M. Castle Co., 137 N.C. App. 718, 529 S.E.2d 474, 2000 N.C. App. LEXIS 492 (2000).

The Industrial Commission's award of temporary total disability benefits without determining whether the employee had reached maximum medical improvement required a remand for such a determination. Anderson v. Gulistan Carpet, Inc., 144 N.C. App. 661, 550 S.E.2d 237, 2001 N.C. App. LEXIS 575 (2001).

A workers' compensation commission could not award benefits for lost earning capacity to an injured employee where it did not find the date a "healing period" ended or the date an employee reached "maximum medical improvement." Arnold v. Wal-Mart Stores, Inc., 154 N.C. App. 482, 571 S.E.2d 888, 2002 N.C. App. LEXIS 1461 (2002).

Employee's reaching of maximum medical improvement (MMI) did not affect the employee's right to continue to receive temporary disability workers' compensation benefits and MMI did not represent the point in time at which a loss of wage-earning capacity automatically converted from temporary to permanent. Hooker v. Stokes-Reynolds Hospital/North Carolina Baptist Hosp. Inc., 161 N.C. App. 111, 587 S.E.2d 440, 2003 N.C. App. LEXIS 1975 (2003).

For discussion of the two lines of case law relating to the concept of Maximum Medical Improvement and its applicability to G.S. 97-29, 97-30 and 97-31, see Effingham v. Kroger Co., 149 N.C. App. 105, 561 S.E.2d 287, 2002 N.C. App. LEXIS 141 (2002).

Concept of Maximum Medical Improvement Is Not Applicable to § 97-29 or § 97-30. — While G.S. 97-31 contemplates a "healing period" followed by a statutory period of time corresponding to the specific physical injury, and allows an employee to receive scheduled benefits for a specific physical impairment only once "the healing period" ends, neither G.S. 97-29 nor G.S. 97-30 contemplates a framework similar to that established by G.S. 97-31. Under G.S. 97-29 or G.S. 97-30, an employee may receive compensation once the employee has established a total or partial loss of wage-earning capacity, and the employee may receive such compensation for as long as the loss of wage-earning capacity continues, for a maximum of 300 weeks in cases of partial loss of wage-earning capacity. Hence, the primary significance of the concept of Maximum Medical Improvement (MMI) is to delineate a crucial point in time only within the context of a claim for scheduled benefits under G.S. 97-31; the concept of MMI does not have any direct bearing upon an employee's right to continue to receive temporary disability benefits once the employee has established a loss of wage-earning capacity pursuant to G.S. 97-29 or G.S. 97-30. Effingham v. Kroger Co., 149 N.C. App. 105, 561 S.E.2d 287, 2002 N.C. App. LEXIS 141 (2002).

Maximum Medical Improvement Is Prerequisite to Determine Disability. — A finding of maximum medical improvement is not the equivalent of a finding that the employee is able to earn the same wage earned prior to injury; the maximum medical improvement finding is solely the prerequisite to determination of the amount of any permanent disability for purposes of this section. Watson v. Winston-Salem Transit Auth., 92 N.C. App. 473, 374 S.E.2d 483 (1988).

Employee may seek a determination of her entitlement to permanent disability under G.S. 97-29, 97-30, or 97-31 only after reaching maximum medical improvement. Effingham v. Kroger Co., 149 N.C. App. 105, 561 S.E.2d 287, 2002 N.C. App. LEXIS 141 (2002).

Section Construed with § 97-29. — In many instances, an award under G.S. 97-29 better fulfills the policy of the Workers' Compensation Act than an award under this section, because it is a more favorable remedy and is more directly related to compensating inability to work. West v. Bladenboro Cotton Mills, Inc., 62 N.C. App. 267, 302 S.E.2d 645 (1983).

An employee who suffers an injury scheduled in this section may recover compensation under § 97-29 instead of under this section if he is totally and permanently disabled. Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986).

Section Construed With G.S. 97-42. — Where the employer and insurer paid workers' compensation benefits to the employee while he was incarcerated to which the employee was not entitled, the employer and insurer were entitled to credit under G.S. 97-42; because the award was for an indefinite period, the employer and insurer were permitted to reduce the amount of the employee's payments, as shortening the period of benefits was not possible because the employee's benefits were to terminate pursuant to G.S. 97-30, G.S. 97-31 when the employee returned to work and there would be no opportunity to shorten the period of disability. Easton v. J.D. Denson Mowing, 173 N.C. App. 439, 620 S.E.2d 201, 2005 N.C. App. LEXIS 2014 (2005).

The "in lieu of" clause in this section does not prevent a worker who qualifies from recovering lifetime benefits under G.S. 97-29. Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986), overruling Perry v. Hibriten Furn. Co., 296 N.C. 88, 249 S.E.2d 397 (1978).

If a claimant is totally and permanently disabled within the meaning of G.S. 97-29, then that claimant is not limited to a recovery under the schedule of compensation of this section. Mitchell v. Fieldcrest Mills, Inc., 84 N.C. App. 661, 353 S.E.2d 638 (1987).

Where claimant is totally disabled as a result of injuries not included in G.S. 97-31 schedule, claimant is entitled to an award for total disability under G.S. 97-29. Weaver v. Swedish Imports Maintenance, Inc., 319 N.C. 243, 354 S.E.2d 477 (1987).

The interpretation of Perry v. Hibriten Furn. Co., 296 N.C. 88, 249 S.E.2d 397 (1978), that when all of a plaintiff's disability resulting from an injury are covered by this section, an employee is entitled to no compensation for permanent total disability, was overruled in Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986), which held that the "in lieu of" clause of this section does not prevent a worker who qualifies from recovering lifetime benefits under G.S. 97-29. Harrington v. Pait Logging Company/Georgia Pac., 86 N.C. App. 77, 356 S.E.2d 365 (1987).

Section 97-29 and this section are alternate sources of compensation for an employee who suffers a disabling injury which is also included as a scheduled injury. The injured worker is allowed to select the more favorable remedy, but he cannot recover compensation under both sections. Cockman v. PPG Indus., 84 N.C. App. 101, 351 S.E.2d 771 (1987).

Right to Claim Under § 97-29. — Even if all injuries are covered under this section, the scheduled injury section, an employee may nevertheless elect to claim under G.S. 97-29 if G.S. 97-29 is more favorable, but he may not recover under both sections. Hill v. Hanes Corp., 319 N.C. 167, 353 S.E.2d 392 (1987).

Section 97-29 is an alternate source of compensation for an employee who suffers an injury which is also included under the schedule under this section; the injured worker is allowed to select the more favorable remedy, but he or she cannot recover compensation under both sections, because this section is "in lieu of all other compensation." Harrington v. Pait Logging Company/Georgia Pac., 86 N.C. App. 77, 356 S.E.2d 365 (1987); McKenzie v. McCarter Elec. Co., 86 N.C. App. 619, 359 S.E.2d 249 (1987).

Employee Required to Elect Section Under Which to Proceed. — Claimant who suffered a brain injury accompanied by hearing and vision loss was not entitled to recover under both this section and G.S. 97-29, but was required to elect to proceed under one section or the other. Dishmond v. International Paper Co., 132 N.C. App. 576, 512 S.E.2d 771 (1999).

The Industrial Commission is required to conduct a full investigation and a determination that a Form 26 compensation agreement is fair and just, in order to assure that the settlement is in accord with the intent and purpose of the Workers' Compensation Act, that an injured employee receives the disability benefits to which he is entitled, and, particularly, that an employee qualifying for disability compensation under both G.S. 97-29 and this section have the benefit of the more favorable remedy. Vernon v. Steven L. Mabe Bldrs., 336 N.C. 425, 444 S.E.2d 191 (1994).

Failure of Commission to Determine Fairness of Agreement. — Where plaintiff may have been entitled to permanent total disability benefits under G.S. 97-29, as well as permanent partial disability benefits under this section, but under G.S. 97-29 plaintiff would receive such benefits for as long as he remained totally disabled rather than 45 weeks, and claims employee assumed, rather than determined, that plaintiff was knowledgeable about workers' compensation benefits and his rights, in approving the Form 26 compensation agreement between plaintiff and defendants, the Industrial Commission did not, as the statute requires, act in a judicial capacity to determine the fairness of the agreement. Vernon v. Steven L. Mabe Bldrs., 336 N.C. 425, 444 S.E.2d 191 (1994).

Award Under § 97-29 Upheld. — There was sufficient evidence to support award and the provision of vocational rehabilitation services where the Industrial Commission found that plaintiff was impaired as a result of his head injury and had yet to overcome resistance on the part of potential employers in order to obtain employment and required vocational rehabilitation to assist him in obtaining stable employment. Silver v. Roberts Welding Contractors, 117 N.C. App. 707, 453 S.E.2d 216 (1995).

Where physician testified that plaintiff suffered continuous pain in his back, both hips, and legs and continuous numbness of the right foot, and that he was 100% disabled, and opined that plaintiff's pain was caused by the use of his back in coordination with the hips and the legs, the Commission could determine that plaintiff would not be totally compensated for his injuries under this section and that, as a result, he was entitled to compensation for permanent total incapacity under G.S. 97-29. Kendrick v. City of Greensboro, 80 N.C. App. 183, 341 S.E.2d 122, cert. denied, 317 N.C. 335, 346 S.E.2d 500 (1986).

Plaintiff, who suffered a fall causing a permanent partial impairment to his back of 20% and whom the Commission found unable to work at his previous job as a nurse or at any other employment, was totally and permanently disabled and was entitled to recover under G.S. 97-29, and was not limited to recovery under this section. Taylor v. Margaret R. Pardee Mem. Hosp., 83 N.C. App. 385, 350 S.E.2d 148 (1986), cert. denied, 319 N.C. 410, 354 S.E.2d 729 (1987).

Plaintiff, who sustained a 30% permanent physical impairment of his left leg as a result of a 1977 leg condition, and a 15% permanent physical impairment of the left leg as a result of a December, 1983 job related accident, was not limited to recovery under this section. Wilder v. Barbour Boat Works, 84 N.C. App. 689, 352 S.E.2d 690 (1987).

An employee may be compensated for both a scheduled compensable injury under this section and total incapacity for work under G.S. 97-29 when the total incapacity is caused by a psychiatric disorder brought on by the scheduled injury. Hill v. Hanes Corp., 319 N.C. 167, 353 S.E.2d 392 (1987).

Truck driver who suffered a 7% loss in the visual field of one eye in a job-related accident, and was unable thereafter to find work at wages comparable to those he had been earning as a truck driver, was not precluded from receiving benefits under G.S. 97-30 merely because he had received some compensation under this section for a scheduled injury. Gupton v. Builders Transp., 320 N.C. 38, 357 S.E.2d 674 (1987).

Section Construed with § 97-30. — Because stacking of benefits covering the same injury for the same time period is prohibited, and because the prevention of double recovery, not exclusivity of remedy, is patently the intent of the "in lieu of all other compensation" clause in this section, a plaintiff entitled to select a remedy under either this section or G.S. 97-30 may receive benefits under the provisions offering the more generous benefits, less the amount he or she has already received. Gupton v. Builders Transp., 320 N.C. 38, 357 S.E.2d 674 (1987).

An employee who suffers injuries resulting in partial disability of a general nature is entitled to compensation under G.S. 97-30, while an employee who sustains injuries of a specific nature is entitled to recover pursuant to the schedule provided in this section. In fact, an employee who sustains both general and specific injuries may recover benefits under both G.S. 97-30 and this section. Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 414 S.E.2d 102 (1992).

This Section Is Exception to § 97-30. — Under G.S. 97-30 compensation for permanent partial disability is measured by the degree of disability, except in case of loss of a member as specified in this section. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Disability Need Not Be Shown. — North Carolina Industrial Commission was correct in holding that a disability need not be proven in order for G.S. 97-31(24) to apply. Childress v. Fluor Daniel, Inc., 162 N.C. App. 524, 590 S.E.2d 893, 2004 N.C. App. LEXIS 185 (2004).

Section 97-52 Does Not Require Showing of Disability. — The obvious intent of the Legislature in enacting G.S. 97-52 was to permit and not restrict recovery for occupational diseases. Section 97-52, therefore, does not require that disability be shown as a condition to recovery under the schedule for occupational disease in this section. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Words "disablement or death" in § 97-52 merely describe a condition that must occur before recovery may be had under G.S. 97-29. They do not predicate recovery under this section upon disability. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Section Construed with § 97-61.5. — The acceptance of benefits under G.S. 97-61.5 does not necessarily preclude an award under subsection (24) of this section. Hicks v. Leviton Mfg. Co., 121 N.C. App. 453, 466 S.E.2d 78 (1996).

The philosophy which supports the Workers' Compensation Act is that the wear and tear of the worker, as well as the machinery, shall be charged to the industry. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

This section sets out a strict and exclusive compensation scheme. Perry v. Hibriten Furn. Co., 35 N.C. App. 518, 241 S.E.2d 697, aff'd in part and remanded in part, 296 N.C. 88, 249 S.E.2d 397 (1978).

The Provisions of Which Are Mandatory. — The language of this section is clear, and its provisions are mandatory, so that the Commission is without authority to deny the compensation for which it provides on the ground that the employee is earning as much as he was earning before the injury. Watts v. Brewer, 243 N.C. 422, 90 S.E.2d 764 (1956); Loflin v. Loflin, 13 N.C. App. 574, 186 S.E.2d 660, cert. denied, 281 N.C. 154, 187 S.E.2d 585 (1972).

Injuries Enumerated in Schedule Not Compensated Under Other Provisions. — The fact that an injury is one of those enumerated in the schedule of payments set forth under this section precludes the Commission from awarding compensation under any other provision of the act. Loflin v. Loflin, 13 N.C. App. 574, 186 S.E.2d 660, cert. denied, 281 N.C. 154, 187 S.E.2d 585 (1972); Baldwin v. North Carolina Mem. Hosp., 32 N.C. App. 779, 233 S.E.2d 600 (1977).

When all of an employee's injuries are included in the schedule set out in this section, his entitlement to compensation is exclusively under this section. Perry v. Hibriten Furn. Co., 296 N.C. 88, 249 S.E.2d 397 (1978).

If by reason of any compensable injury an employee is unable to work and earn any wages, he is totally disabled and entitled to compensation for permanent total disability under G.S. 97-29, unless all his injuries are included in the schedule set out in this section. In that event, the injured employee is entitled to compensation exclusively under this section, regardless of his ability or inability to earn wages in the same or any other employment; such compensation is "in lieu of all other compensation, including disfigurement." Perry v. Hibriten Furn. Co., 296 N.C. 88, 249 S.E.2d 397 (1978).

Where all of a worker's injuries are included in the schedule set out in this section his compensation is limited to that provided for in the statutory schedule without regard to his ability or inability to earn wages. Jones v. Murdoch Center, 74 N.C. App. 128, 327 S.E.2d 294 (1985).

Where the only injury plaintiff sustained was an injury to a bodily member covered by this section, her compensation after returning to her job was limited to the schedule stated in this section, whether earning capacity was impaired or not. Algary v. McCarley & Co., 74 N.C. App. 125, 327 S.E.2d 296 (1985).

When all of an employee's injuries are included in the schedule set out in this section, the employee's entitlement to compensation is exclusively under that section. However, if an employee receives an injury which is compensable and the injury causes him to become so emotionally disturbed that he is unable to work, he is entitled to compensation for total incapacity under G.S. 97-29. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1 (1986), aff'd in part, rev'd in part, 319 N.C. 167, 353 S.E.2d 392 (1987).

Where all of a worker's injuries are not included in the schedule contained in this

section and the worker's earning capacity has been permanently, but only partially, impaired he is entitled to the scheduled compensation provided for in this section and an award for permanent partial disability as provided for in G.S. 97-29 and 97-30. Jones v. Murdoch Center, 74 N.C. App. 128, 327 S.E.2d 294 (1985).

Where all of a worker's injuries are compensable under this section, the compensation provided for under this section is in lieu of all other compensation. When, however, an employee cannot be fully compensated under this section and is permanently incapacitated, he or she is entitled to compensation under G.S. 97-29 for total incapacity or G.S. 97-30 for partial incapacity. Kendrick v. City of Greensboro, 80 N.C. App. 183, 341 S.E.2d 122, cert. denied, 317 N.C. 335, 346 S.E.2d 500 (1986).

Measure of Compensation. — Though "disability" signifies an impairment of wage-earning capacity rather than a physical impairment, this signification does not establish impairment of wage-earning capacity as the measure of compensation. Perry v. Hibriten Furn. Co., 35 N.C. App. 518, 241 S.E.2d 697, aff'd in part and remanded, 296 N.C. 88, 249 S.E.2d 397 (1978).

Meaning of "Disability". — As used in this section, the term "disability" signifies an impairment of wage-earning capacity rather than a physical impairment. Loflin v. Loflin, 13 N.C. App. 574, 186 S.E.2d 660, cert. denied, 281 N.C. 154, 187 S.E.2d 585 (1972).

To support a conclusion of disability the North Carolina Supreme Court has said that the Commission must find the following three facts: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury. Cook v. Bladenboro Cotton Mills, Inc., 61 N.C. App. 562, 300 S.E.2d 852 (1983).

Partial Disability Term. — The term of partial disability, not the term of total and partial disability combined, is to last no longer than 300 weeks less the period of total disability; the 300-week maximum partial disability period includes the time during which temporary total disability is paid or is in addition to the time in which temporary total disability is paid. Brown v. Public Works Comm'n, 122 N.C. App. 473, 470 S.E.2d 352 (1996).

In determining the extent of a particular employee's capacity for work, the Commission may consider such factors as the individual's degree of pain and the individual's age, education, and work experience. Niple v. Seawell Realty & Indus. Co., 88 N.C. App. 136, 362 S.E.2d 572 (1987).

Pain. — Pain is not in and of itself a compensable injury. Jackson v. Fayetteville Area Sys. of Transp., 78 N.C. App. 412, 337 S.E.2d 110 (1985).

Pain, rather than being itself an injury, is a manifestation or indication of an injury. Jackson v. Fayetteville Area Sys. of Transp., 78 N.C. App. 412, 337 S.E.2d 110 (1985).

Finding that plaintiff experienced pain as a result of what occurred while she was performing her duties was not a sufficient finding that plaintiff sustained an injury. Jackson v. Fayetteville Area Sys. of Transp., 78 N.C. App. 412, 337 S.E.2d 110 (1985).

"Healing Period" Defined. — The healing period, within the meaning of this section, is the time when the claimant is unable to work because of his injury, is submitting to treatment, which may include an operation or operations, or is convalescing. Crawley v. Southern Devices, Inc., 31 N.C. App. 284, 229 S.E.2d 325 (1976), cert. denied, 292 N.C. 467, 234 S.E.2d 2 (1977); Perry v. Hibriten Furn. Co., 35 N.C. App. 518, 241 S.E.2d 697, aff'd in part and remanded, 296 N.C. 88, 249 S.E.2d 397 (1978).

The "healing period" of the injury is the time when the claimant is unable to work because of his injury, is submitting to treatment, which may include an operation or operations, or is convalescing. This period of temporary total disability contemplates that eventually there will be either complete recovery, or an impaired bodily condition which is stabilized. The "healing period" ends when, after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established. Carpenter v. Industrial Piping Co., 73 N.C. App. 309, 326 S.E.2d 328 (1985).

The healing period within the meaning of this section does not include time when an injured worker is able to and does work at his or her regular job. Algary v. McCarley & Co., 74 N.C. App. 125, 327 S.E.2d 296 (1985).

The healing period of an injury is defined as the time when the claimant is unable to work because of the injury, is submitting to treatment, or is convalescing; the healing period ends when, after a course of treatment and observation, the injury is discovered to be permanent, and that fact is duly established. Hudson v. Mastercraft Div., 86 N.C. App. 411, 358 S.E.2d 134, cert. denied, 320 N.C. 792, 361 S.E.2d 77 (1987).

This section provides for compensation of temporary disability during the healing period of the injury and for permanent disability at the end of the healing period, when maximum recovery has been achieved. Carpenter v. Industrial Piping Co., 73 N.C. App. 309, 326 S.E.2d 328 (1985).

Compensation for temporary disability is available until maximum recovery has been achieved. Permanent disability is available pursuant to this section at the end of the healing period when maximum recovery has been achieved. Moretz v. Richards & Assocs., 74 N.C. App. 72, 327 S.E.2d 290 (1985), modified on other grounds, 316 N.C. 539, 342 S.E.2d 844 (1986).

A disability is deemed to continue after the healing period of employee's injuries and is made compensable under the provisions of this section without regard to the loss of wage-earning power and in lieu of all other compensation. Loflin v. Loflin, 13 N.C. App. 574, 186 S.E.2d 660, cert. denied, 281 N.C. 154, 187 S.E.2d 585 (1972); Perry v. Hibriten Furn. Co., 35 N.C. App. 518, 241 S.E.2d 697, aff'd in part and remanded, 296 N.C. 88, 249 S.E.2d 397 (1978).

When Healing Period Terminates. — Maximum recovery from the injury, not from an operation, is what signifies termination of the healing period. Crawley v. Southern Devices, Inc., 31 N.C. App. 284, 229 S.E.2d 325 (1976), cert. denied, 292 N.C. 467, 234 S.E.2d 2 (1977).

When the claimant has an operation to correct or improve the impairment resulting from his injury, the healing period continues after recovery from the operation until he reaches maximum recovery. The healing period continues until, after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established. Crawley v. Southern Devices, Inc., 31 N.C. App. 284, 229 S.E.2d 325 (1976), cert. denied, 292 N.C. 467, 234 S.E.2d 2 (1977); Perry v. Hibriten Furn. Co., 35 N.C. App. 518, 241 S.E.2d 697, aff'd in part and remanded, 296 N.C. 88, 249 S.E.2d 397 (1978).

The point at which the injury has stabilized is often called "maximum medical improvement," although that term is not found in the statute itself. This term creates confusion. It connotes that a claimant is only temporarily totally disabled and his body healing when his condition is steadily improving, and/or he is receiving medical treatment. Carpenter v. Industrial Piping Co., 73 N.C. App. 309, 326 S.E.2d 328 (1985).

Recovery from injuries often entails a healing period of alternating improvement and deterioration. In these cases, the healing period is over when the impaired bodily condition is stabilized, or determined to be permanent, and not at one of the temporary high points. In many cases the body is able to heal itself, and during convalescence doctors refrain from active treatment with surgery or drugs. Thus, the absence of such medical treatment does not mean that the injury has completely improved or that the impaired bodily condition has stabilized. Carpenter v. Industrial Piping Co., 73 N.C. App. 309, 326 S.E.2d 328 (1985).

Where plaintiff's "healing period" had stabilized and he had reached his maximum recovery by December 1977, it was this date that marked the termination of his compensation for temporary total disability and the initiation of compensation for permanent disability. And where according to the payment schedule of this section and in accord with the findings of the Commission, plaintiff was entitled to 180 weeks of permanent disability payments, and plaintiff had received nearly 255 weeks of disability payments since that date, plaintiff had already received more than he was entitled by statute to receive, and defendants owed plaintiff no additional compensation. Moretz v. Richards & Assocs., 316 N.C. 539, 342 S.E.2d 844 (1986).

Healing Period Ends with Maximum Medical Improvement. — Temporary total disability is payable only during the healing period. The healing period ends when an employee reaches maximum medical improvement; only them does the question of entitlement to permanent disability arise. Franklin v. Broyhill Furn. Indus., 123 N.C. App. 200, 472 S.E.2d 382 (1996).

Aggravation of Existing Condition. — Where an injury has aggravated an existing condition and thus proximately caused the incapacity, the relative contributions of the accident and the preexisting condition will not be weighed. McKenzie v. McCarter Elec. Co., 86 N.C. App. 619, 359 S.E.2d 249 (1987).

Employee Must Establish Disability Unless It Is Included in the Schedule. — In order to obtain compensation, an employee must establish that his injury caused his "disability," unless it is included in the schedule of injuries made compensable by this section without regard to loss of wage-earning power. Loflin v. Loflin, 13 N.C. App. 574, 186 S.E.2d 660, cert. denied, 281 N.C. 154, 187 S.E.2d 585 (1972).

Psychological Injury Not Compensable. — Findings and conclusions regarding wage-earning capacity are not required when only scheduled injuries under this section are involved; however, this approach is inadequate for any psychological disability suffered by plaintiff because psychological injuries are not compensable under this section. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

Specific Disability Following Temporary Total Disability. — Where claimant suffers an injury that results in temporary total disability, followed by a specific disability compensable under this section, compensation for specific disability is payable in addition to that awarded for temporary total disability. Rice v. Denny Roll & Panel Co., 199 N.C. 154, 154 S.E. 69 (1930); Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971); Loflin v. Loflin, 13 N.C. App. 574, 186 S.E.2d 660, cert. denied, 281 N.C. 154, 187 S.E.2d 585 (1972); Moretz v.

Richards & Assocs., 74 N.C. App. 72, 327 S.E.2d 290 (1985), modified on other grounds, 316 N.C. 539, 342 S.E.2d 844 (1986).

Loss of Earning Power. — Although disability compensation under this section is awarded for physical impairment irrespective of ability to work or loss of wage-earning power, there is nothing in this section or the case law that forbids consideration of loss of earning capacity. Key v. McLean Trucking, 61 N.C. App. 143, 300 S.E.2d 280 (1983).

Failure to Make Required Findings Concerning Earning Capacity in Relation to Knee Injury. — Industrial commission erred in determining a worker's permanent partial disability rating pursuant to G.S. 97-31; disability was defined by a diminished capacity to earn wages, not by physical infirmity alone, G.S. 97-2(9), and the commission failed to make required findings pursuant to G.S. 97-30 on whether the job offered to the worker by her employer accurately reflected her ability to earn wages. Baker v. Sam's Club, 161 N.C. App. 712, 589 S.E.2d 387, 2003 N.C. App. LEXIS 2255 (2003).

Retirement. — Plaintiff was not barred from seeking disability benefits if his retirement was for reasons unrelated to his occupational disease; the pertinent issue was whether plaintiff, subsequent to retirement, experienced a loss in wage-earning capacity. Stroud v. Caswell Ctr., 124 N.C. App. 653, 478 S.E.2d 234 (1996).

Proceedings Pend Until All Injuries Adjudicated. — Until all of an injured employee's compensable injuries and disabilities have been considered and adjudicated by the commission, the proceeding pends for the purpose of evaluation, absent laches or some statutory time limitation. Wilhite v. Liberty Veneer Co., 303 N.C. 281, 278 S.E.2d 234 (1981).

Deductions from Gross Income in Calculating Farm Income. — Farm income of injured volunteer fireman could not be properly calculated without deducting from gross income interest on money which was borrowed to finance crop production, depreciation on equipment used to produce the crops, license fees for things used in crop production, and taxes on land used to produce crops. York v. Unionville Volunteer Fire Dep't, 58 N.C. App. 591, 293 S.E.2d 812 (1982).

Defendants Held Not Entitled to Credit for Scheduled Award. — Where temporary total disability payments for stress-induced depression resulting from injury were to begin approximately six months after the final payment on the scheduled award for permanent partial disability, the defendants would not be given credit on the compensation awarded for temporary total disability for compensation previously awarded under subdivision (15) of this section. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1 (1986), aff'd in part, rev'd in part, 319 N.C. 167, 353 S.E.2d 392 (1987).

Survivor Held Not Entitled to Benefits. — The dependent of a deceased employee who, prior to his death, was receiving benefits for permanent disability under subdivision (17) of this section, due to an injury that occurred prior to July 1, 1979, the effective date of the 1979 amendment, was not entitled to receive payments under the Workers' Compensation Act as a survivor. Costner v. A.A. Ramsey & Sons, 81 N.C. App. 121, 343 S.E.2d 607 (1986), aff'd, 318 N.C. 687, 351 S.E.2d 299 (1987).

Deduction of Period of Total Disability Benefits from Maximum Period for Partial Disability Benefits. — The term of partial disability, not the term of total and partial disability combined, is to last no longer than 300 weeks less the period of total disability; the 300-week maximum partial disability period includes the time during which temporary total disability is paid or is in addition to the time in which temporary total disability is paid. Brown v. Public Works Comm'n, 122 N.C. App. 473, 470 S.E.2d 352 (1996).

Award of benefits by the North Carolina Industrial Commission was remanded to allow an employer and its insurer a credit for an award of permanent partial disability because an employee was unable to recover simultaneous benefits under G.S. 97-29 or G.S. 97-30 and G.S. 97-31. Guerrero v. Brodie Contrs., Inc., 158 N.C. App. 678, 582 S.E.2d 346, 2003 N.C. App. LEXIS 1226 (2003).

Matter Remanded for Consideration of G.S. 97-31. — Workers' compensation claimant's appeal was remanded to the North Carolina Industrial Commission for a determination of whether the claimant was entitled to compensation under G.S. 97-31 where the Commission did not address a doctor's opinion that the claimant had a 10 percent permanent partial disability rating to the right upper extremity; further, the Commission's opinion did not explain why the Commission did not believe that the claimant was entitled to compensation for permanent partial disability benefits based on that rating. Perkins v. U.S. Airways, 177 N.C. App. 205, 628 S.E.2d 402, 2006 N.C. App. LEXIS 867 (2006).

Applied in Oaks v. Cone Mills Corp., 249 N.C. 285, 106 S.E.2d 202 (1958); Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960); Sides v. G.B. Weaver & Sons Elec. Co., 12 N.C. App. 312, 183 S.E.2d 308 (1971); Blalock v. Roberts Co., 12 N.C. App. 499, 183 S.E.2d 827 (1971); Dudley v. Downtowner Motor Inn, 13 N.C. App. 474, 186 S.E.2d 188 (1972); Giles v. Tri-State Erectors, 287 N.C. 219, 214 S.E.2d 107 (1975); Lewallen v. National Upholstery Co., 27 N.C. App. 652, 219 S.E.2d 798 (1975); Thompson v. Frank IX & Sons, 294 N.C. 358, 240 S.E.2d 783 (1978);

Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981); Davis v. Edgecomb Metals Co., 63 N.C. App. 48, 303 S.E.2d 612 (1983); Roper v. J.P. Stevens & Co., 65 N.C. App. 69, 308 S.E.2d 485 (1983); Sparks v. Sailors' Snug Harbor, 70 N.C. App. 596, 320 S.E.2d 436 (1984); Fleming v. K-Mart Corp., 312 N.C. 538, 324 S.E.2d 214 (1985); Forrest v. Pitt County Bd. of Educ., 100 N.C. App. 119, 394 S.E.2d 659 (1990); Cratt v. Perdue Farms, Inc., 102 N.C. App. 336, 401 S.E.2d 771 (1991); King v. Yeargin Constr. Co., 124 N.C. App. 396, 476 S.E.2d 898 (1996); Rivera v. Trapp, 135 N.C. App. 296, 519 S.E.2d 777 (1999); Trivette v. Mid-South Mgmt., 154 N.C. App. 140, 571 S.E.2d 692, 2002 N.C. App. LEXIS 1408 (2002).

Cited in Smith v. Swift & Co., 212 N.C. 608, 194 S.E. 106 (1937); Maley v. Thomasville Furn. Co., 214 N.C. 589, 200 S.E. 438 (1939); Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951); Marshburn v. Patterson, 241 N.C. 441, 85 S.E.2d 683 (1955); Smith v. Mecklenburg County Chapter Am. Red Cross, 245 N.C. 116, 95 S.E.2d 559 (1956); Evans v. Asheville Citizens Times Co., 246 N.C. 669, 100 S.E.2d 75 (1957); Inman v. Meares, 247 N.C. 661, 101 S.E.2d 692 (1958); McDowell v. Town of Kure Beach, 251 N.C. 818, 112 S.E.2d 390 (1960); Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966); Morgan v. Thomasville Furn. Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968); Mabe v. North Carolina Granite Corp., 15 N.C. App. 253, 189 S.E.2d 804 (1972); Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976); Schofield v. Great Atl. & Pac. Tea Co., 32 N.C. App. 508, 232 S.E.2d 874 (1977); Sebastian v. Mona Watkins Hair Styling, 40 N.C. App. 30, 251 S.E.2d 872 (1979); Hundley v. Fieldcrest Mills, 58 N.C. App. 184, 292 S.E.2d 766 (1982); Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983); Fleming v. K-Mart Corp., 67 N.C. App. 669, 313 S.E.2d 890 (1984); McDonald v. Brunswick Elec. Membership Corp., 77 N.C. App. 753, 336 S.E.2d 407 (1985); Lumley v. Dancy Constr. Co., 79 N.C. App. 114, 339 S.E.2d 9 (1986); Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986); Joyner v. Rocky Mount Mills, 85 N.C. App. 606, 355 S.E.2d 161 (1987); Vandiford v. Stewart Equip. Co., 98 N.C. App. 458, 391 S.E.2d 193 (1990); Wall v. North Carolina Dep't of Human Resources, 99 N.C. App. 330, 393 S.E.2d 109 (1990); Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994); Benavides v. Summit Structures, Inc., 118 N.C. App. 645, 456 S.E.2d 339 (1995); Brown v. S & N Communications, Inc., 124 N.C. App. 320, 477 S.E.2d 197 (1996); Bullins v. Abitibi-Price Corp., 124 N.C. App. 530, 477 S.E.2d 691 (1996); Timmons v. North Carolina DOT, 351 N.C. 177, 522 S.E.2d 62 (1999); Davis v. Weyerhaeuser Co., 132 N.C. App. 771, 514 S.E.2d 91 (1999); Lanning v. Fieldcrest-Cannon, Inc., 352 N.C. 98, 530 S.E.2d 54, 2000 N.C. LEXIS 434 (2000); Austin v. Continental Gen. Tire, 141 N.C. App. 397, 540 S.E.2d 824, 2000 N.C. App. LEXIS 1415 (2000), rev'd on other grounds, 354 N.C. 344, 553 S.E. 2d 680 (2001); Russos v. Wheaton Indus., 145 N.C. App. 164, 551 S.E.2d 456, 2001 N.C. App. LEXIS 567 (2001); Dial v. Cozy Corner Rest., Inc., 161 N.C. App. 694, 589 S.E.2d 146, 2003 N.C. App. LEXIS 2261 (2003); Ward v. Floors Perfect, — N.C. App. —, 645 S.E.2d 109, 2007 N.C. App. LEXIS 1179 (2007).

II. THUMB OR FINGERS.

Loss of Use of Thumb. — Where the distal portion of an employee's left thumb was amputated, the rate of compensation for permanent partial disability was not limited to 25 percent under Industrial Commission Rule XV(1) for partial loss of the thumb itself, and the employee could be compensated at a higher rate under subdivision (1) and (19) of this section for loss of use of the thumb. Caesar v. Piedmont Publishing Co., 46 N.C. App. 619, 265 S.E.2d 474 (1980).

Loss of More Than One Phalange Due to Surgical Procedure. — Fact that amputation of part of plaintiff's middle phalange of the fourth finger was necessitated by surgical procedure rather than amputated during the accident itself did not affect plaintiff's recovery under subdivision (7). Gaddy v. Anson Wood Prods., 92 N.C. App. 483, 374 S.E.2d 477 (1988).

III. HANDS.

"Hand," as used in subdivision (12), refers to the fingers and thumb, the hand proper and the wrist. Thompson v. Frank IX & Sons, 33 N.C. App. 350, 235 S.E.2d 250 (1977), aff'd, 294 N.C. 358, 240 S.E.2d 783 (1978).

Consideration of Other Sections. — The Industrial Commission erred when it awarded permanent disability compensation solely for plaintiff's scheduled hand injury under this section without assessing whether G.S. 97-29 or G.S. 97-30 would provide him a more munificent remedy. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

Award for 75% impairment of use of left hand upheld. See Pridmore v. McCrary, 245 N.C. 544, 96 S.E.2d 843 (1957).

Compensation for Injury to Hand and Finger Allowed. — Where plaintiff asserted that she was entitled to compensation under subsection (12) for disability to her hand, in addition to compensation she had already received for disability to her second finger under subsection (3), the claim was not based on unfounded litigiousness; therefore, the awarding of attorney's fees was unwarranted. Evans v. Young-Hinkle Corp., 123 N.C. App. 693, 474 S.E.2d 152 (1996), cert. denied, 346 N.C. 177, 486 S.E.2d 203 (1997).

IV. LEGS.

Injury to "Hip". — For purposes of this section, an injury to the "hip" will be considered an injury to the "leg." See Gasperson v. Buncombe County Pub. Schools, 52 N.C. App. 154, 277 S.E.2d 872 (1981).

Lifetime Benefits for Loss of Legs. — Subsection (17) provides that the loss of both legs constitutes total and permanent disability to be compensated according to G.S. 97-29, which provides for lifetime benefits. Timmons v. North Carolina DOT, 123 N.C. App. 456, 473 S.E.2d 356 (1996), aff'd, 346 N.C. 173, 484 S.E.2d 551 (1997).

Resumption of Work. — Although plaintiff, who had lost both legs, returned to full-time employment, he was entitled to on-going benefits. Timmons v. North Carolina DOT, 123 N.C. App. 456, 473 S.E.2d 356 (1996), aff'd, 346 N.C. 173, 484 S.E.2d 551 (1997).

Competent evidence supported the Commission's finding that plaintiff was temporarily and totally disabled from February 16, 1995, until July 7, 1995, where plaintiff's primary care physician since 1989 testified that each of her three prior ankle injuries aggravated her pre-existing condition and were significant contributing factors in her continuing problems with non-healing ulcer that spontaneously erupted in February, 1995. Royce v. Rushco Food Stores, Inc., 139 N.C. App. 322, 533 S.E.2d 284, 2000 N.C. App. LEXIS 898 (2000).

V. EYES.

"Total Loss" of Vision. — Prior to 1943, "total loss" of vision was taken in its ordinary meaning, that being "total destruction" of vision. Logan v. Johnson, 218 N.C. 200, 10 S.E.2d 653 (1940). By the 1943 amendment to this section, "total loss" was enlarged to include "industrial blindness, " which is 85% or more loss of vision in one eye. See Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

Amount Awarded for Loss of Vision. — Under this section, a worker who suffers a total loss of an eye is entitled to 60% (now 66⅔%) of his average weekly wages during 120 weeks in addition to the compensation paid during the healing period. If, however, the injury produces only a partial loss of vision, he is entitled to receive that portion of the compensation provided in subdivision (16) that the percentage of loss of vision bears to a total loss. Watts v. Brewer, 243 N.C. 422, 90 S.E.2d 764 (1956).

Compensation for partial loss of vision by a claimant should be awarded on the basis of the vision remaining without the use of corrective lenses. Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

Loss of 95% of Vision of Each Eye. — Upon evidence showing that claimant had suffered permanent loss of 95% of the vision of each eye, it was held that, under the 1943 amendment to this section, an award for permanent and total loss of vision of each eye was proper. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

Prior Astigmatism Not Bar to Recovery. — For case in which claimant was held entitled to full compensation for total loss of vision of an eye by this section, and in which it was held error to first deduct 40% loss due to astigmatism and award claimant only 60% of the amount recoverable for total loss of vision, see Schrum v. Catawba Upholstering Co., 214 N.C. 353, 199 S.E. 385 (1938).

Continuance of Disability from Loss of Eye. — In case of the loss of an eye, the Commission must conclusively presume and adjudge that the disability resulting therefrom continued or will continue for 120 weeks beyond the healing period. Watts v. Brewer, 243 N.C. 422, 90 S.E.2d 764 (1956).

Eye Injury with Significant Risk of Future Vision Impairment. — While an employee who suffered a laceration of his cornea when a piece of metal hit his eye, presenting a clear danger of retinal detachment in the future, unquestionably sustained a permanent injury to his eye, he did not lose the injured eye or suffer any loss of vision. Since his injury was not specifically encompassed by subdivisions (16) or (19) of this section, or any other subdivision, subdivision (24) was the appropriate basis for the Commission's award. Little v. Penn Ventilator Co., 75 N.C. App. 92, 330 S.E.2d 276, aff'd in part and rev'd in part, 317 N.C. 206, 345 S.E.2d 204 (1986).

While the evidence tended to support the claim of an employee suffering an eye injury that his risk of some form of future vision impairment was significantly increased, the statutory scheme allowed him to be compensated for "permanent injury," but made no provision for an additional recovery because the claimant could be subject to a greater risk of permanent disability as a result of his accident. Consequently, the amount awarded — $2,500 — was supported by the evidence. Little v. Penn Ventilator Co., 75 N.C. App. 92, 330 S.E.2d 276, aff'd in part and rev'd in part, 317 N.C. 206, 345 S.E.2d 204 (1986).

Eye Injury Without Immediate Loss of Vision Compensated Under Subdivision (24). — Where plaintiff received a serious, permanent eye injury which placed him at great risk for future complications, although he had not yet suffered any loss of vision nor any decrease in earning ability, and the extent of his future complications as well as his prognosis if they should arise lay outside the realm of certainty, the Commission's award of $2,500.00 for plaintiff's eye injury under subdivision (24) of this section would be affirmed. Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

A 7% loss of field of vision in plaintiff's right eye was compensable under subdivisions (16) and (19) of this section. Gupton v. Builders Transp., 83 N.C. App. 1, 348 S.E.2d 601 (1986), rev'd on other grounds, 320 N.C. 38, 357 S.E.2d 674 (1987).

VI. PARTIAL LOSS OR PARTIAL LOSS OF USE.

Effect of 1957 Amendment to Subdivision (19). — Before the 1957 amendment to subdivision (19) of this section, an award for partial disability was to be based on a percentage of the weekly wage for the entire period, rather than a percentage of the number of weekly payments. Kellams v. Carolina Metal Prods., Inc., 248 N.C. 199, 102 S.E.2d 841 (1958).

Compensation for Partial Loss of Member of or Use Thereof. — When plaintiff can prove a case of either partial loss of a member subject to Industrial Commission Rule XV or partial loss of the use of that member he is entitled to compensation under either heading. This interpretation is consistent with the plain and explicit language of subdivision (19) of this section. Caesar v. Piedmont Publishing Co., 46 N.C. App. 619, 265 S.E.2d 474 (1980).

Award for Partial Disability Under Subdivision (19) Is Subject to Minimum Provided in § 97-29. — Under the provisions of subdivision (20) of this section, awards for partial loss or partial loss of use of a member under subdivision (19) were subject to the minimum fixed in G.S. 97-29 in like manner as awards for total disability, and therefore the weekly payments of an award for partial disability should not have been less than the minimum fixed by G.S. 97-29. Kellams v. Carolina Metal Prods., Inc., 248 N.C. 199, 102 S.E.2d 841 (1958).

Commission Only Required to Find Percentage of Disability of Member Affected. — Where an award is properly made under specific schedules and the Commission has found as a fact that the employee is not totally and permanently disabled, the commission is only required to find the percentage of disability of the member or members affected. Perry v. Hibriten Furn. Co., 296 N.C. 88, 249 S.E.2d 397 (1978).

VII. DISFIGUREMENT.

Provision as to Bodily Disfigurement Is Constitutional. — This section, authorizing the Industrial Commission to award compensation for bodily disfigurement, is sufficiently certain and prescribes the standard for the computation of an award thereunder with sufficient definiteness. Thus, the provision is valid and constitutional and is not void as a delegation of legislative power in contravention of N.C. Const., Art. I, § 8 (now N.C. Const., Art. I, § 6). Baxter v. W.H. Arthur Co., 216 N.C. 276, 4 S.E.2d 621 (1939).

Provisions as to Disfigurement Are Not Invalid for Failure to Provide Guide or Standard. — The fact that there exists a broad area in which the judgment of the Commission with reference to the particular factual situation is determinative does not invalidate the statutory provision on grounds of failure to provide an intelligible guide or standard for the award of compensation for serious disfigurement causing impairment of future earning power. Davis v. Sanford Constr. Co., 247 N.C. 332, 101 S.E.2d 40 (1957).

Recovery for Disfigurement Is in Addition to Other Recovery. — Subdivision (21) of this section, when properly read, means that a person may recover for serious facial and head disfigurement in addition to recovery under other parts of the section. Griffin v. Red & White Supermarket, 78 N.C. App. 617, 337 S.E.2d 657 (1985).

Separate Awards to Be Entered in Cases Involving Facial and Bodily Disfigurement. — Under this section prior to amendment in 1987, in cases where there was both facial and bodily disfigurement, where Commission did not specify in its opinion separate award amounts for each category of disfigurement, but made one award to compensate the injured worker for both types of disfigurement, would be upheld. However, in view of the 1987 amendment, in future cases, separate awards should be entered in cases involving both types of disfigurement. Crews v. North Carolina DOT, 103 N.C. App. 372, 405 S.E.2d 595 (1991).

Disfigurement must be evidenced by an outward observable blemish, scar or mutilation, under the act, and it must be so permanent and serious as to hamper or handicap the person in his earnings or in securing employment. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

A disfigurement is a blemish, a blot, a scar or a mutilation that is external and observable, marring the appearance. Arrington v. Stone & Webster Eng'g Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

There is a serious disfigurement in law only when there is a serious disfigurement in fact. A serious disfigurement in fact is a disfigurement that mars and hence adversely affects the appearance of the injured employee to such extent that it may be reasonably presumed to lessen his opportunities for remunerative employment and so reduces his future earning power. No present loss of wages need be established; but to be serious, the disfigurement must be of such nature that it may be fairly presumed that the injured employee has suffered a diminution of his future earning power. Davis v. Sanford Constr. Co., 247 N.C. 332, 101 S.E.2d 40 (1957); Arrington v. Stone & Webster Eng'g Corp., 264 N.C. 38, 140 S.E.2d 759 (1965); Wilhite v. Liberty Veneer Co., 303 N.C. 281, 278 S.E.2d 234 (1981); Liles v. Charles Lee Byrd Logging Co., 309 N.C. 150, 305 S.E.2d 523 (1983); Locklear v. Canal Wood Corp., 63 N.C. App. 185, 303 S.E.2d 825 (1983).

One who is so disfigured as to be considered "repulsive" to others is less likely to be hired and thus is hampered or handicapped in his earning or securing employment. Liles v. Charles Lee Byrd Logging Co., 309 N.C. 150, 305 S.E.2d 523 (1983).

What Disfigurement Is Compensable. — Disfigurement alone is not made compensable by the act. Before it is compensable it must be not only (1) marked disfigurement, but also one which (2) impairs the future usefulness or occupational opportunities of the injured employee. Wilhite v. Liberty Veneer Co., 47 N.C. App. 434, 267 S.E.2d 566, rev'd on other grounds, 303 N.C. 281, 278 S.E.2d 234 (1981).

To warrant compensation for disfigurement it must be so permanent and serious that in some manner it hampers or handicaps the person in his earning or in securing employment, or it must be such as to make the person repulsive to other people. Liles v. Charles Lee Byrd Logging Co., 309 N.C. 150, 305 S.E.2d 523 (1983).

Compensation Under Subdivision (21) for Loss of or Permanent Injury to Important Organ of Face or Head. — While subdivision (21) does not refer in express terms to the loss of or permanent injury to any important organ of the face or head, such loss, if in fact a "serious facial or head disfigurement," is compensable thereunder. Davis v. Sanford Constr. Co., 247 N.C. 332, 101 S.E.2d 40 (1957); Arrington v. Stone & Webster Eng'g Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

Enucleation where artificial eye cannot be fitted and used is a type of facial disfigurement under subdivision (21). No other type of eye injury is a compensable disfigurement. Griffin v. Red & White Supermarket, 78 N.C. App. 617, 337 S.E.2d 657 (1985).

Applicability of Subdivision (22). — Subdivision (22) of this section applies only to serious bodily disfigurements which are not accompanied by any other disability which would already have been compensated for under another provision of the Workers' Compensation Act. Liles v. Charles Lee Byrd Logging Co., 309 N.C. 150, 305 S.E.2d 523 (1983).

Compensation of Disfigurement Under Subdivision (22). — The Workers' Compensation Act deals with compensation for reduced capacity for work. A bodily disfigurement, other than facial or head disfigurements which are governed by subdivision (21) of this section, is serious and compensable under subdivision (22) of this section only when it is of such a nature that it may be fairly presumed that it causes to the injured employee a diminution of his future earning capacity. Liles v. Charles Lee Byrd Logging Co., 59 N.C. App. 330, 296 S.E.2d 485 (1982), modified and aff'd, 309 N.C. 150, 305 S.E.2d 523 (1983).

Natural physical handicap resulting from the disfigurement, and the age, training, experience, education, occupation and adaptability of the employee to obtain and retain employment are factors to be used in arriving at the diminution of earning power — the amount of an award. It follows, however, that these same factors are to be used as well to determine if any award is to be made, that is, whether the disfigurement is in fact serious and thus compensable under subdivision (22) of this section because it is such as to give rise to the presumption that the worker has suffered a diminution of his future earning power. Liles v. Charles Lee Byrd Logging Co., 309 N.C. 150, 305 S.E.2d 523 (1983).

In order to be compensated for a bodily disfigurement under subsection (22), the injury must be of such a nature that it may be fairly presumed that the injured employee has suffered a diminution of his future earning power. Blackwell v. Multi Foods Mgt., Inc., 126 N.C. App. 189, 484 S.E.2d 815 (1997), cert. denied, 346 N.C. 544, 488 S.E.2d 796 (1997).

Scars Not Visible During Normal Employment. — Evidence did not support the Industrial Commission's award for serious disfigurement affecting plaintiff's future earning capacity where plaintiff's scars on the top of one of her breasts were not visible during her normal employment, plaintiff had affirmatively testified that she would not want a type of job where the scars might show, and she had returned to her former job without reduction in pay or apparent incident. Anderson v. Shoney's, 76 N.C. App. 158, 332 S.E.2d 93 (1985).

Commission Has Discretion in Awarding Compensation for Bodily Disfigurement. — Compensation for "serious bodily disfigurement" is not required by the act. Its allowance or disallowance is within the legal discretion of the Industrial Commission. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943); Davis v. Sanford Constr. Co., 247 N.C. 332, 101 S.E.2d 40 (1957).

Where serious bodily disfigurement is involved, an award of compensation therefor is not required by this section, but may be allowed in the discretion of the Industrial Commission. Wilhite v. Liberty Veneer Co., 303 N.C. 281, 278 S.E.2d 234 (1981).

But Compensation for Serious Facial or Head Disfigurement Is Mandatory. — The statute makes it mandatory on the Commission to award proper and equitable compensation in case of serious facial or head disfigurement. This is not the case in regard to disfigurement of other parts of the body. Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942); Davis v. Sanford Constr. Co., 247 N.C. 332, 101 S.E.2d 40 (1957).

The General Assembly made provision for compensation for disfigurement of the head and body in separate subdivisions, and made compensation for head disfigurement mandatory and compensation for bodily disfigurement discretionary. Arrington v. Stone & Webster Eng'g Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

Subdivision (21) is mandatory in providing that the Industrial Commission shall award proper and equitable compensation, not to exceed $3,500 (now $20,000.00), for serious facial or head disfigurement. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

Determining Award for Serious Disfigurement. — In awarding compensation for serious disfigurement and arriving at the consequent diminution of earning power, the Commission should consider the natural physical handicap resulting and the age, training, experience, education, occupation and adaptability of the employee to obtain and retain employment. Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942); Davis v. Sanford Constr. Co., 247 N.C. 332, 101 S.E.2d 40 (1957); Wilhite v. Liberty Veneer Co., 303 N.C. 281, 278 S.E.2d 234 (1981).

Award for Disfigurement Is Separate. — Weekly compensation under the schedules cannot be increased by the inclusion of compensation for disfigurement. Compensation for disfigurement, if allowed, must be a separate award and the aggregate awards in no case may exceed the total compensation fixed in the act. Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942).

No Award for Disfigurement If One Is Made for Total Permanent Disability. — No award can be made for disfigurement where an award has been made for total permanent disability. Likewise, disfigurement must be serious in order that compensation may be allowed therefor. Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942).

No Award for Disfigurement for Period Covered by Temporary Total Disability Award. — There can be no recovery for disfigurement during the period in which an award was made for temporary total disability payment; otherwise there would, in effect, be a double recovery for the same injury. Wilhite v. Liberty Veneer Co., 47 N.C. App. 434, 267 S.E.2d 566, rev'd on other grounds, 303 N.C. 281, 278 S.E.2d 234 (1981).

Award for both partial incapacity under § 97-30 and for disfigurement under subdivision (22) of this section is now permissible for injuries occurring since July 1, 1963. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Disfigurement and Partial Loss of Arm. — Under this section, the Industrial Commission had authority to award compensation for facial and bodily disfigurement, in this case resulting from scar tissue from burns, and to award compensation for partial loss of the use of the arm resulting from such scar tissue, when such awards were supported by competent evidence, provided the award for the disfigurement did not exceed the maximum provided by the act, and provided that the aggregate of all awards did not exceed the maximum total compensation prescribed by G.S. 97-29. Baxter v. W.H. Arthur Co., 216 N.C. 276, 4 S.E.2d 621 (1939). See Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942).

Loss of Two Front Teeth. — If the loss of two upper front teeth constitutes serious disfigurement within the meaning of this section, it would be a "serious facial or head disfigurement" compensable under subdivision (21) of this section, rather than a "serious bodily disfigurement" compensable under subdivision (22). In such case, plaintiff would be entitled under subdivision (21) to an award as a matter of right. Davis v. Sanford Constr. Co., 247 N.C. 332, 101 S.E.2d 40 (1957), construing the former statute.

Whether an injured employee has suffered a "serious facial or head disfigurement" in the loss of two upper front teeth is a question of fact to be determined by the Commission, after taking into consideration the factors involved, in relation to whether it may be fairly presumed to cause a diminution of his future earning power, construing the former statute. Davis v. Sanford Constr. Co., 247 N.C. 332, 101 S.E.2d 40 (1957).

Employee's chipped teeth and tooth abscess did not diminish her future earning capacity and, thus, did not rise to the level of a serious disfigurement entitling her to compensation under G.S. 97-31(21). Russell v. Lab. Corp. of Am., 151 N.C. App. 63, 564 S.E.2d 634, 2002 N.C. App. LEXIS 644 (2002), cert. denied, 356 N.C. 304, 570 S.E.2d 111 (2002).

Disfigurement of Forearm and Permanent Partial Disability of Hand. — An employee who had received compensation for the permanent partial disability of his left hand was entitled under subdivision (22) of this section to additional compensation for serious disfigurement because of surgical scars on his left forearm above the wrist. While a double recovery for a single injury compensated pursuant to this section is not authorized, since the settlement related only to partial loss of use of plaintiff's hand, and there was no evidence indicating that the scars extended to the wrist, plaintiff was entitled to the additional compensation. Thompson v. Frank IX & Sons, 33 N.C. App. 350, 235 S.E.2d 250 (1977), aff'd, 294 N.C. 358, 240 S.E.2d 783 (1978).

Injury to Finger Not Serious Bodily Disfigurement. — In an action to recover an award for "serious bodily disfigurement" resulting from a cut finger sustained by an accident arising out of and in the course of plaintiff's employment with the defendant-employer, where plaintiff's finger was scarred and the nail had a roughish appearance and was deformed and where plaintiff suffered no pain or embarrassment as a result of the injury, there was no evidence in the record to support a finding by the Industrial Commission that the injury to plaintiff's finger resulted in "serious bodily disfigurement." Weidle v. Cloverdale Ford, 50 N.C. App. 555, 274 S.E.2d 263 (1981).

Burns. — Findings that plaintiff's injury which was caused by a severe burn, looked repulsive, required massage after periods of standing or walking, and limited his employment choices, were sufficient to support finding of disfigurement. Blackwell v. Multi Foods Mgt., Inc., 126 N.C. App. 189, 484 S.E.2d 815 (1997), cert. denied, 346 N.C. 544, 488 S.E.2d 796 (1997).

Post Mortem Award to Employee's Dependents. — Generally speaking, a lump sum award made prior to decedent's death is deemed to be an accrued benefit, but logic compels the conclusion that if, pursuant to subdivision (22) of this section, no determination of the lump sum award for disfigurement had been made prior to death, then such entitlements are unaccrued until such time as they are determined, and, for that reason, the payment of the lump sum award for disfigurement would pass to the worker's dependents pursuant to this section rather than to the deceased worker's estate. Wilhite v. Liberty Veneer Co., 47 N.C. App. 434, 267 S.E.2d 566, rev'd on other grounds, 303 N.C. 281, 278 S.E.2d 234 (1981).

Dependents of an employee who suffers a serious bodily disfigurement due to an accident covered by the Workers' Compensation Act, but who dies due to an unrelated cause, are entitled to a post mortem award for serious bodily disfigurement. Bridges v. McCrary Stone Servs., Inc., 48 N.C. App. 185, 268 S.E.2d 559 (1980).

When an employee suffers serious bodily disfigurement due to an accident covered by the Workers' Compensation Act and dies from unrelated causes while drawing compensation for temporary total disability, his dependents are entitled to a postmortem award for serious bodily disfigurement. Wilhite v. Liberty Veneer Co., 303 N.C. 281, 278 S.E.2d 234 (1981).

VIII. BACK.

Compensation under subdivision (23) is made without regard to the loss of wage-earning power. Crawley v. Southern Devices, Inc., 31 N.C. App. 284, 229 S.E.2d 325 (1976), cert. denied, 292 N.C. 467, 234 S.E.2d 2 (1977).

Injury to Spinal Cord Held Not Limited to Award Under Subdivision (23). — Where physicians indicated that an injury to plaintiff's spinal cord resulted in weakness in all of her extremities and numbness or loss of sensation throughout her body, and the doctors further testified that she suffered diminished mobility and had difficulty with position sense and with recognition of things in her hands when objects were placed in her hands, the commission could not limit plaintiff to an award under subdivision (23) of this section. Little v. Anson County Schools Food Serv., 295 N.C. 527, 246 S.E.2d 743 (1978).

When an injury to the back causes referred pain to the extremities of the body, and this pain impairs the use of the extremities, then the award of workers' compensation must take into account such impairment. Harmon v. Public Serv. of N.C., Inc., 81 N.C. App. 482, 344 S.E.2d 285, cert. denied, 318 N.C. 415, 349 S.E.2d 595 (1986).

When an injury to the back causes referred pain to the extremities of the body, and this pain impairs the use of the extremities, then the award of workers' compensation must take into account such impairment; furthermore, a disabled plaintiff suffering from chronic back and leg pain as a result of a work-related injury to the back cannot be fully compensated under subdivision (23) of this section and is entitled to compensation under G.S. 97-29. Therefore, the Industrial Commission's failure to make findings as to disability to the plaintiff's legs caused by the arachnoiditis was error and required a remand to the Commission for appropriate findings. McKenzie v. McCarter Elec. Co., 86 N.C. App. 619, 359 S.E.2d 249 (1987).

The Full Industrial Commission erred in concluding that plaintiff was entitled to total and permanent disability benefits where the plaintiff did not meet his burden of showing, as required unless a presumption has been established through the filing of a Form 21, pursuant to G.S. 97-82, that he was totally disabled and therefore unable to earn any of the wages he was receiving at the time of his injury in the same or any other employment. Demery v. Converse, Inc., 138 N.C. App. 243, 530 S.E.2d 871, 2000 N.C. App. LEXIS 599 (2000).

Findings of Fact Insufficient to Support Award. — Industrial Commission's opinion and award concluding that plaintiff was entitled to temporary total disability benefits from May 15 through Nov. 29, 2000, under G.S.

97-29, and was limited to benefits thereafter under G.S. 97-31 based on a five percent impairment rating, was remanded for additional findings of fact, because the Commission determined the existence of plaintiff's disability, but did not determine the extent of plaintiff's disability because it failed to address whether plaintiff was capable of earning the same wages he was earning at the time of his injury. Outerbridge v. Perdue Farms, Inc., — N.C. App. —, 638 S.E.2d 564, 2007 N.C. App. LEXIS 40 (2007).

IX. IMPORTANT ORGANS.

Sections 97-29 and 97-30 Compared. — Often an award under G.S. 97-29, and by implication G.S. 97-30, better fulfills the policy of the Workers' Compensation Act than an award under this section. Strickland v. Burlington Indus., Inc., 87 N.C. App. 507, 361 S.E.2d 394 (1987).

Proof Required for Claim Under Subdivision (24). — In order for plaintiff to be entitled to workers' compensation pursuant to subdivision (24) of this section, he must show from medical evidence that he has sustained loss of or permanent injury to an important external or internal organ or part of his body for which no compensation is payable under any other subdivision of this section. Porterfield v. RPC Corp., 47 N.C. App. 140, 266 S.E.2d 760 (1980).

Awards under subdivision (24) are equitable in nature and within the Industrial Commission's discretion. Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Discretion of Commission. — By employing the word "may" in subdivision (24) of this section, the legislature intended to give the Industrial Commission discretion whether to award compensation under that section. Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

The decision regarding the amount of compensation under subdivision (24) of this section should be left to the sound discretion of the Industrial Commission. Its decision will not be overturned on appeal absent an abuse of discretion on its part. Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

Amount of Award Is Within Commission's Discretion. — While the amount of compensation for most injuries under this section is determined according to a statutory formula, compensation for injuries under subdivision (24) appears to be within the discretion of the Commission, provided that the amount of the award does not exceed the $10,000 (now $20,000) ceiling. Little v. Penn Ventilator Co., 75 N.C. App. 92, 330 S.E.2d 276, aff'd in part and rev'd in part, 317 N.C. 206, 345 S.E.2d 204 (1986).

Consideration of Earning Capacity. — Although the courts have not explicitly stated that earning capacity can be considered in an award under subdivision (24) of this section, two cases, Shuler v. Talon Div. of Textron, 30 N.C. App. 570, 227 S.E.2d 627 (1976), overruled on other grounds, Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993), and Arrington v. Stone & Webster Eng'g Corp., 264 N.C. 38, 140 S.E.2d 759 (1965), support such a holding. Key v. McLean Trucking, 61 N.C. App. 143, 300 S.E.2d 280 (1983).

An employee is not required to establish a diminution of wage earning capacity under subdivision (24) of this section, although it may be considered in setting the amount of the award. Little v. Penn Ventilator Co., 75 N.C. App. 92, 330 S.E.2d 276, aff'd in part and rev'd in part, 317 N.C. 206, 345 S.E.2d 204 (1986).

Loss of Senses of Taste and Smell Is Compensable Under Subdivision (24). — Under subdivision (24) of this section, an award of compensation for loss of sense of taste or smell would unquestionably be sustained, where from the circumstances it could be reasonably presumed that the worker suffered diminution of his future earning power by reason of such loss. Arrington v. Stone & Webster Eng'g Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

The loss of sense of taste and smell is compensable as the loss of an important internal organ. Cloutier v. State, 57 N.C. App. 239, 291 S.E.2d 362, cert. denied, 306 N.C. 555, 294 S.E.2d 222 (1982).

Claimant who lost the senses of taste and smell was entitled to compensation for permanent damage to the olfactory organ and not for compensation for two separate compensable injuries. Bess v. Tyson Foods, Inc., 125 N.C. App. 698, 482 S.E.2d 26 (1997).

But Not Under Subdivision (21). — Loss of the senses of taste and smell is not compensable under subdivision (21) of this section, which is applicable to head disfigurement. Arrington v. Stone & Webster Eng'g Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

"Loss" as Used in Subdivision (24) Includes Loss of Use. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Sinuses. — Sinuses are important internal organs under subdivision (24) of this section. Cloutier v. State, 57 N.C. App. 239, 291 S.E.2d 362, cert. denied, 306 N.C. 555, 294 S.E.2d 222 (1982).

"Loss" as used in subdivision (24) includes loss of use. — Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Loss of Sense of Smell and Damage to

Nerves and Muscles of Face. — It is true that no provision of the Act specifies the payment of benefits due to the loss of a sense of smell or damages to the nerves and muscles of an employee's face. However, benefits are awarded under subdivision (24) for loss of a permanent injury to important external or internal organs or parts of the body, and the Commission properly used subdivision (24) in awarding benefits. Proof of diminished wage-earning capacity is not required under subdivision (24). Stanley v. Gore Bros., 82 N.C. App. 511, 347 S.E.2d 49 (1986).

Claim for compensation due to an alleged loss of the sense of smell and damage to the nerves and muscles in the right side of face was not barred by the passage of time and the doctrine of res judicata, where these symptoms did not manifest themselves immediately after the accident, and the first opinion and award filed in the matter covered only claimant's loss of vision and the disfigurement of his face. Stanley v. Gore Bros., 82 N.C. App. 511, 347 S.E.2d 49 (1986).

The following organs were important within the meaning of this section and the amounts awarded for each were proper and equitable: Pancreas $20,000.00; Lungs ($20,000 for each lung) $40,000.00; Abdominal wall $15,000.00; Omentum $10,000.00; Intestines $12,000.00; Stomach $5,000.00; Reproductive organs $15,000.00. Aderholt v. A.M. Castle Co., 137 N.C. App. 718, 529 S.E.2d 474, 2000 N.C. App. LEXIS 492 (2000).

Lungs. — An award for damage to the lungs may be made under subdivision (24) of this section. But such an award, by the express terms of the statute, would be in lieu of all other compensation. Such award may also be based on G.S. 97-29, as has been done in many other reported cases involving byssinosis disability. West v. Bladenboro Cotton Mills, Inc., 62 N.C. App. 267, 302 S.E.2d 645 (1983).

An award for partial loss of lung function falls within the scope of subdivision (24) of this section. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

There is no statutory justification for excluding loss of or permanent injury to the lungs resulting from occupational disease from the coverage of subdivision (24) of this section, and no statutory justification for making a specific finding of disability a condition precedent for recovery thereunder. Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

There was no abuse of discretion in awarding an employee $20,000 for each of his lungs under G.S. 97-31(24) caused by asbestos exposure because the North Carolina Industrial Commission deemed each lung an "important organ." Childress v. Fluor Daniel, Inc., 162 N.C. App. 524, 590 S.E.2d 893, 2004 N.C. App. LEXIS 185 (2004).

Uterus. — Where plaintiff was permanently deprived of her uterus, an important organ, due to accidental injury, award of $15,000 for permanent loss of her uterus was held to be a proper exercise of discretion by the Industrial Commission. Alva v. Charlotte Mecklenburg Hosp. Auth., 118 N.C. App. 76, 453 S.E.2d 871 (1995).

Bladder. — Award of $11,000 for permanent damage to plaintiff's bladder was proper where there was credible and competent evidence that plaintiff's bladder, an important organ, was permanently damaged. Alva v. Charlotte Mecklenburg Hosp. Auth., 118 N.C. App. 76, 453 S.E.2d 871 (1995).

Spleen. — The commission did not err in awarding plaintiff $20,000.00 for the loss of his spleen. The defendants incorrectly asserted that "the spleen does not serve as an 'important' organ" and that its "function to the human body is somewhat illusive;" and that the award of $20,000.00 was "excessive and constituted an abuse of discretion." Aderholt v. A.M. Castle Co., 137 N.C. App. 718, 529 S.E.2d 474, 2000 N.C. App. LEXIS 492 (2000).

Occupational Diseases. — As to the applicability of subdivision (24) of this section to occupational diseases, see Cook v. Bladenboro Cotton Mills, Inc., 61 N.C. App. 562, 300 S.E.2d 852 (1983).

The Legislature intended for this section to apply to occupational disease. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

The Legislature must have intended for occupational disease to be compensable under the schedule in this section or it would not have expressly provided that medical treatments be provided both in cases of disability and in cases of damage to organs. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Remand for Findings as to Capacity for Other Employment. — Where the Commission found that plaintiff had chronic obstructive pulmonary disease caused in part by her exposure to respirable cotton dust during her employment, but that her impairment was not sufficient to render plaintiff incapable of performing types of employment which did not require very strenuous activity or exposure to cotton dust, but the Commission's findings did not address evidence that due to plaintiff's education, age and experience she was probably not capable of earning wages in any employment which did not require substantial physical exertion, the case would be remanded for appropriate findings and conclusions of plaintiff's capacity to earn wages in employment for which she might be qualified. Webb v. Pauline

Knitting Indus., 78 N.C. App. 184, 336 S.E.2d 645 (1985).

Remand for Findings as to Wage Earning Capacity. — Where plaintiff suffered a permanent disability to her lungs, the Industrial Commission committed error in compensating her under this section, but failing to consider or make findings of fact as to whether her disability affected her wage earning capacity under either G.S. 97-29 or G.S. 97-30, as this prevented plaintiff from electing to recover under either G.S. 97-29 or G.S. 97-30 if she was so entitled. Strickland v. Burlington Indus., Inc., 87 N.C. App. 507, 361 S.E.2d 394 (1987).

Remand for Determination of Whether Venous Thrombosis Is Injury to Legs or Other Important Organ. — Medical testimony that there was a reasonable possibility that employee's deep venous thrombosis resulted from an injury which the employee sustained at work was sufficient to support North Carolina Industrial Commission's decision awarding workers' compensation benefits, but the appellate court remanded the case to the Commission for further proceedings because the record did not establish that the Commission considered and rejected an award of benefits under G.S. 97-31(15) before it awarded benefits under G.S. 97-31(24). Holley v. ACTS, Inc., 152 N.C. App. 369, 567 S.E.2d 457, 2002 N.C. App. LEXIS 924 (2002).

Denial of Claim Under Subdivision (24) Held Proper. — Finding that worker had sustained no permanent injury to his kidney and thus was not entitled to compensation under subdivision (24) of this section was supported by doctor's competent testimony that defendant's renal difficulty had apparently cleared up and that the outlook for his kidney was excellent. Fowler v. B.E. & K. Constr., Inc., 92 N.C. App. 237, 373 S.E.2d 878 (1988).

Given the lack of any objective testing, such as x-rays, CT scans, MRI and EEG tests, showing that the employee had any injury to her brain, combined with her active lifestyle, enrollment in college, and articulate and alert demeanor at the hearing, the Industrial Commission's decision that she had not suffered an impairment to an important organ, entitling her to compensation under G.S. 97-31(24), was adequately supported. Russell v. Lab. Corp. of Am., 151 N.C. App. 63, 564 S.E.2d 634, 2002 N.C. App. LEXIS 644 (2002), cert. denied, 356 N.C. 304, 570 S.E.2d 111 (2002).

§ 97-31.1. Effective date of legislative changes in benefits.

Every act of the General Assembly that changes the benefits enumerated in this Chapter shall become law no later than June 1 and shall have an effective date of no earlier than January 1 of the year after which it is ratified. (1981, c. 521, s. 3; 1995, c. 20, s. 11.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 10.1, "The Workers' Compensation Reform Act of 1994," provides: "G.S. 97-31.1 does not apply to this act [c. 679, which amended the Workers' Compensation Act.]"

Session Laws 1995, c. 20, s. 17 provided that sections 1 through 16 of this act would become effective only if the constitutional amendments proposed by Session Laws 1995, c. 5, ss. 1-2 were approved as provided by Session Laws 1995, c. 5, ss. 3-4, and if so approved, sections 1 through 16 would become effective with respect to bills and joint resolutions passed in either house of the General Assembly on or after January 1, 1997. The proposed constitutional amendments were approved.

§ 97-32. Refusal of injured employee to accept suitable employment as suspending compensation.

If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified. (1929, c. 120, s. 32.)

CASE NOTES

The purpose of this section is to guard against the possibility that an injured employee may refuse to work when, in fact, he is able to work and earn wages, and thus increase or attempt to increase the amount of his compensation. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

One purpose of this section is to prevent a partially disabled employee from refusing employment within the employee's capacity in an effort to increase the amount of compensation payable to the employee. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

When an employee resigns in the face of imminent termination of his or her employment, the North Carolina Industrial Commission may conclude that the employee's employment ended involuntarily; it is not, however, required to do so if it does not believe that the resignation was in fact forced by the employer's termination decision. White v. Weyerhaeuser Co., 167 N.C. App. 658, 606 S.E.2d 389, 2005 N.C. App. LEXIS 5 (2005).

Justifiable Rejection of Employment Offer Shown. — The post-injury water meter reader job offered by defendant to former police officer was not suitable to plaintiff's capacity pursuant to this section and related statutes and case law; thus, plaintiff was justified in rejecting it. Dixon v. City of Durham, 128 N.C. App. 501, 495 S.E.2d 380 (1998), cert. denied, 348 N.C. 496, 510 S.E.2d 381 (1998).

Plaintiff was justified in refusing the employer's offered wipe glaze job, which consisted of highly repetitive motion involving the hand and wrist and was in direct conflict with her doctor's recommendation. Oliver v. Lane Co., 143 N.C. App. 167, 544 S.E.2d 606, 2001 N.C. App. LEXIS 220 (2001).

Commission properly found that maintenance worker position which employer offered employee, who could no longer drive a truck, was "make work" that did not exist in the marketplace and was not suitable employment for the employee, and that employee's refusal thereof was justified and did not disqualify him from benefits. Moore v. Concrete Supply Co., 149 N.C. App. 381, 561 S.E.2d 315, 2002 N.C. App. LEXIS 195 (2002).

Considering the employee's physical restrictions, which her doctor opined prevented her from working, and the vague description of the temporary, modified position her employer offered her, her rejection of the position was reasonable and did not preclude her from receiving wage compensation. Bailey v. W. Staff Servs., 151 N.C. App. 356, 566 S.E.2d 509, 2002 N.C. App. LEXIS 747 (2002).

Finding that a worker's refusal to accept employment offered by the employer was justified was proper under circumstances in which, even though there was evidence that the worker was able to return to full-duty work status, the worker's testimony that he was unable to do the work required because of pain was competent to support the finding. Byrd v. Ecofibers, Inc., — N.C. App. —, 645 S.E.2d 80, 2007 N.C. App. LEXIS 784 (2007).

Unjustifiable Refusal of Employment. — If an employer shows that the employee has unjustifiably refused employment procured for the employee that is suitable to the employee's capacity and the evidence is accepted by the Industrial Commission, the employee is not entitled to any benefits pursuant to G.S. 97-29 or G.S. 97-30. Franklin v. Broyhill Furn. Indus., 123 N.C. App. 200, 472 S.E.2d 382 (1996).

The Commission properly concluded that the employment offered to plaintiff employee by defendant employer, following his release to return to work was "suitable" and was unjustifiably refused by plaintiff, although the employer did not offer plaintiff, who was robbed and shot while working as a night auditor, lodging worth $100.00 per week as he received prior to the shooting, and although the employee had since moved to California; plaintiff's testimony regarding the job offer was centered on how he "felt" physically, not the location of the job, and the evidence he offered did not support his theory that he refused the offer because he was frightened to return to the job. Shah v. Johnson, 140 N.C. App. 58, 535 S.E.2d 577, 2000 N.C. App. LEXIS 1089 (2000).

Proffered Employment Must Be Suitable. — The plain language of this section requires that the proffered employment be suitable to the employee's capacity; if not, it cannot be used to bar compensation for which an employee is otherwise entitled. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

Inapplicability of Section. — Where an employee is properly determined to be totally and permanently disabled under G.S. 97-29, this section has no application. Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

North Carolina Industrial Commission erroneously applied G.S. 97-32 because that provision only applied where an employer sought to discontinue disability payments, and here the employer had denied all benefits and the matter was in litigation; thus, even if the claimant had accepted the employer's job, he was receiving no benefits that could have resumed. Plott v. Bojangle's Rests., Inc., — N.C. App. —, 638 S.E.2d 571, 2007 N.C. App. LEXIS 88 (2007).

Constructive Refusal to Accept Suitable Employment. — For misconduct that causes a claimant to be discharged from employment to amount to "constructive refusal" to accept suitable employment that renders him ineligible for worker's compensation, the misconduct need not occur during working hours or at the workplace, and it need not amount to a crime, but it must have been conduct for which a nondisabled employee ordinarily would have been terminated. Williams v. Pee Dee Elec. Membership Corp., 130 N.C. App. 298, 502 S.E.2d 645 (1998).

If a terminated-for-misconduct employee fails to show by the greater weight of the evidence that his or her inability to find or perform comparable employment is due to work-related injuries, the employer is then freed of further benefit responsibilities. Under such circumstances, the employee would be held accountable for his or her misconduct, which would be deemed tantamount to a constructive refusal to perform suitable work duties and, as a consequence of such refusal, the employee would forfeit the right to benefits. McRae v. Toastmaster, Inc., 358 N.C. 488, 597 S.E.2d 695, 2004 N.C. LEXIS 656 (2004).

Industrial Commission erred by determining that plaintiff's refusal to accept the job offered by defendant was unjustified without making additional findings regarding the impact plaintiff's psychological injuries had on his wage-earning capacity. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

Workers' compensation claimant did not refuse suitable employment by submitting his resignation upon the advice of union representatives, who told him that he was to be fired; the Commission found that the claimant's resignation was involuntary, applied the Seagraves test, and found that the claimant was not terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee ordinarily would have been terminated. White v. Weyerhaeuser Co., 167 N.C. App. 658, 606 S.E.2d 389, 2005 N.C. App. LEXIS 5 (2005).

No Compensation After Unjustifiable Refusal. — Because the express terms of this section prohibit an employee from receiving any compensation during the continuance of his refusal to accept employment suitable to his capacity, plaintiff employee who was robbed and shot during his shift as a night auditor was not entitled to $66.67 per week (two-thirds of $100.00) for his loss of earnings after he unjustifiably rejected an offer to return to his position, which offer amounted to $100.00-worth-of-lodging less per week than what he had earned prior to the shooting. Shah v. Johnson, 140 N.C. App. 58, 535 S.E.2d 577, 2000 N.C. App. LEXIS 1089 (2000).

The deputy commissioner rightly entered an order affirming the Form 24 application to stop temporary total disability payments to plaintiff where the defendant-employer presented evidence that plaintiff was offered a light duty position and unjustifiably refused the position and where the plaintiff-employee failed to support his claim of a continuing disability. Allen v. Roberts Elec. Contractors, 143 N.C. App. 55, 546 S.E.2d 133, 2001 N.C. App. LEXIS 216 (2001).

Employee Did Not Constructively Refuse Suitable Employment. — Contrary to defendant employer's contention, there was no evidence that plaintiff employee, who was injured while working as a firefighter, constructively refused suitable employment procured by the employer so as to render the employee ineligible for benefits pursuant to G.S. 97-32; the employee chose medical disability retirement rather than resignation or termination after the employee was deemed medically disqualified to perform the work of a firefighter, and there was no evidence that the employer ever offered the employee other suitable employment after the employee's temporary light duty employment ended. Gordon v. City of Durham, 153 N.C. App. 782, 571 S.E.2d 48, 2002 N.C. App. LEXIS 1257 (2002).

North Carolina Industrial Commission's finding that an injured employee did not constructively refuse suitable employment within the meaning of G.S. 97-32 when he refused to work without the use of a cane was affirmed; there was evidence that the work the employee was instructed to do did not fall within the restrictions placed on him and that he was physically unable to perform the job offered to him. Lowery v. Duke Univ., 167 N.C. App. 714, 609 S.E.2d 780, 2005 N.C. App. LEXIS 7 (2005).

No Compensation After Unjustifiable Refusal. — Industrial commission properly determined that an employee was not entitled to workers' compensation benefits after the date of her termination, as the employee's termination was justified under G.S. 97-32 based on the employee's misconduct, as the employee had failed to perform a job to which the employee was assigned and was capable of performing. McRae v. Toastmaster, Inc., 158 N.C. App. 70, 579 S.E.2d 913, 2003 N.C. App. LEXIS 951 (2003).

Findings Held Inadequate to Establish Disability. — Employer need not show that the employee was specifically offered a job by some other employer in order to prove that the employee was capable of obtaining suitable employment, but instead, the crucial question is whether the employee can obtain a job; the testimony of a vocational counselor that identified approximately 12 jobs that were suitable for the employee and which detailed the employee's failure to keep appointments and his balky behavior at the job interviews raised an issue of fact with respect to the compensability of the employee's injury, and, thus, the industrial commission's findings were inadequate to establish that the employee was disabled. Johnson v. Southern Tire Sales & Serv., 358 N.C. 701, 599 S.E.2d 508, 2004 N.C. LEXIS 915 (2004).

Substantial Evidence. — Employee, who was terminated after he injured his knee at work, was not entitled to additional compensation under G.S. 97-32 because competent evidence supported the North Carolina industrial commission's findings and conclusion that the employee failed to establish disability due to physical restrictions caused by the employee's knee injury as the employee was capable of doing sedentary work; moreover, the employee failed to show that the employee's anxiety disorder and depression were causally related to compensable injury. Adams v. Frit Car, Inc., — N.C. App. —, 649 S.E.2d 651, 2007 N.C. App. LEXIS 1946 (2007).

Applied in Barbour v. Regis Corp., 167 N.C. App. 449, 606 S.E.2d 119, 2004 N.C. App. LEXIS 2336 (2004).

Cited in Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952); Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993); Benavides v. Summit Structures, Inc., 118 N.C. App. 645, 456 S.E.2d 339 (1995); Smith v. Sealed Air Corp., 127 N.C. App. 359, 489 S.E.2d 445 (1997); Lewis v. Sonoco Prods. Co., 137 N.C. App. 61, 526 S.E.2d 671, 2000 N.C. App. LEXIS 257 (2000).

§ 97-32.1. Trial return to work.

Notwithstanding the provisions of G.S. 97-32, an employee may attempt a trial return to work for a period not to exceed nine months. During a trial return to work period, the employee shall be paid any compensation which may be owed for partial disability pursuant to G.S. 97-30. If the trial return to work is unsuccessful, the employee's right to continuing compensation under G.S. 97-29 shall be unimpaired unless terminated or suspended thereafter pursuant to the provisions of this Article. (1993 (Reg. Sess., 1994), c. 679, s. 4.1.)

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

CASE NOTES

Presumption of Continuing Disability. — The employer failed to rebut the presumption of continuing disability with medical evidence or with evidence that the claimant was capable of obtaining a suitable job in the competitive marketplace, where the claimant temporarily and unsuccessfully returned to work, the modified roller picker position offered to claimant was temporary, there was no evidence that this position was a real position that existed in the marketplace and was not "made" work, and the only medical evidence supported the claimant's claims of shoulder pain. Stamey v. North Carolina Self-Insurance Guar. Ass'n, 131 N.C. App. 662, 507 S.E.2d 596 (1998).

Right to Continuing Compensation. — Where a trial return to work is unsuccessful, the employee's right to continuing compensation under G.S. 97-29 is unimpaired unless terminated or suspended thereafter pursuant to the provisions of the Workers' Compensation Act. Burchette v. E. Coast Millwork Distribs., Inc., 149 N.C. App. 802, 562 S.E.2d 459, 2002 N.C. App. LEXIS 302 (2002).

Return to Work Assertion Does Not Necessarily Raise Wage Earning Capacity Issue. — Where defendants did not assert any other reason for termination of plaintiff's benefits besides "return to work" on the Form 28T, the record revealed that the plaintiff denied that she ever attempted a "trial return to work" and that she, therefore, was not required to file a Form 28U, and it was undisputed that defendants did not file a Form 24 seeking to terminate plaintiff's compensation on grounds other than plaintiff's "return to work", the only issue before the Full Commission was whether or not plaintiff had returned to work, warranting termination of benefits pursuant to N.C. Gen. Stat. G.S. 97-18.1(b); thus it did not consider the issue of whether or not plaintiff had wage earning capacity and neither would the Court of Appeals. Lewis v. Sonoco Prods. Co., 137 N.C. App. 61, 526 S.E.2d 671, 2000 N.C. App. LEXIS 257 (2000).

Failure to Submit Properly Completed Form Held Not Reversible Error. — Where Industrial Commission found, based on competent evidence in the record, that plaintiff's return to work was "a failed return to work" due to his work-related compensable injury, defendant's claim that plaintiff's Form 28U was not signed by the appropriate party was valid, but the error was not reversible at that stage of the proceedings. Jenkins v. Public Serv. Co. of N.C., 134 N.C. App. 405, 518 S.E.2d 6, 1999 N.C. App. LEXIS 805 (1999), cert. granted, 351 N.C. 106, 541 S.E.2d 147 (1999).

Cited in Oliver v. Lane Co., 143 N.C. App. 167, 544 S.E.2d 606, 2001 N.C. App. LEXIS 220 (2001).

§ 97-33. Prorating in event of earlier disability or injury.

If any employee is an epileptic, or has a permanent disability or has sustained a permanent injury in service in the army or navy of the United States, or in another employment other than that in which he received a subsequent permanent injury by accident, such as specified in G.S. 97-31, he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed. (1929, c. 120, s. 33; 1975, c. 832.)

Legal Periodicals. — For note discussing limitations on the apportionment of disabilities, see 54 N.C.L. Rev. 1123 (1976).

For comment on Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981), see 4 Campbell L. Rev. 107 (1981).

CASE NOTES

This section is designed to prevent double recoveries. Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975), rev'd on other grounds, 289 N.C. 254, 221 S.E.2d 355 (1976); Wilder v. Barbour Boat Works, 84 N.C. App. 188, 352 S.E.2d 690 (1987).

Inapplicability of Section to Noncompensable Injury or Damage. — Neither this section nor G.S. 97-35 were applicable where plaintiff received no compensation for his earlier injury, which arose out of a noncompensable automobile accident separate and apart from any employment. Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975), rev'd on other grounds, 289 N.C. 254, 221 S.E.2d 355 (1976).

When prior damage to an eye was not due to an accident, recovery would be allowed for the complete loss of sight, as this section is not applicable in instances of this sort. Schrum v. Catawba Upholstering Co., 214 N.C. 353, 199 S.E. 385 (1938).

Where plaintiff's condition stemmed neither from epilepsy nor from an injury received in the armed services or in the course of other employment, and where plaintiff had received no compensation for the injury, his case did not fall within the provisions of this section. Wilder v. Barbour Boat Works, 84 N.C. App. 188, 352 S.E.2d 690 (1987).

Compensation for Separate and Distinct Injuries. — Under this section, it was proper to compensate employee for a 20 percent disability of the back when he had previously been compensated by the same employer for a 15 percent disability due to a prior injury, where the second injury was separate and distinct from the first injury. Bailey v. Smoky Mt. Enters., Inc., 65 N.C. App. 134, 308 S.E.2d 489 (1983), cert. denied, 311 N.C. 303, 317 S.E.2d 678 (1984).

When Apportionment Not Permitted. — Apportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's nondisabling, pre-existing disease or infirmity. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

An employee is also entitled to full compensation for total disability without apportionment when the nature of the employee's total disability makes any attempt at apportionment between work-related and non-work-related causes speculative. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

Cited in Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1963).

§ 97-34. Employee receiving an injury when being compensated for former injury.

If an employee receives an injury for which compensation is payable, while he is still receiving or entitled to compensation for a previous injury in the same employment, he shall not at the same time be entitled to compensation for both injuries, unless the later injury be a permanent injury such as specified in G.S. 97-31; but he shall be entitled to compensation for that injury and from the time of that injury which will cover the longest period and the largest amount payable under this Article. (1929, c. 120, s. 34.)

CASE NOTES

Restricted Application. — Application of this section and § 97-35 is restricted to those instances where the employee (1) receives an injury for which compensation is payable while he is still receiving or entitled to compensation for a previous injury in the same employment, or (2) receives a permanent injury specified in § 97-31 after having sustained another permanent injury in the same employment. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

Application When Lump Sum Benefits Paid. — The correct interpretation of G.S. 97-34 is that a lump sum payment should be treated as if an employee received weekly payments for the applicable payment period covered by the lump sum in order to prevent double recovery. Farley v. North Carolina Dep't of Labor, 146 N.C. App. 584, 553 S.E.2d 231, 2001 N.C. App. LEXIS 983 (2001).

Cited in Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983).

§ 97-35. How compensation paid for two injuries; employer liable only for subsequent injury.

If any employee receives a permanent injury as specified in G.S. 97-31 after having sustained another permanent injury in the same employment, he shall be entitled to compensation for both injuries, but the total compensation shall be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding 500 weeks.

If an employee has previously incurred permanent partial disability through the loss of a hand, arm, foot, leg, or eye, and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only. (1929, c. 120, s. 35.)

Cross References. — As to additional payments to be made out of the Second Injury Fund in certain hardship cases, see G.S. 97-40.1.

Legal Periodicals. — For note discussing limitations on the apportionment of disabilities, see 54 N.C.L. Rev. 1123 (1976).

For comment on Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981), see 4 Campbell L. Rev. 107 (1981).

CASE NOTES

Restricted Application. — Application of this section and § 97-35 is restricted to those instances where the employee (1) receives an injury for which compensation is payable while he is still receiving or entitled to compensation for a previous injury in the same employment, or (2) receives a permanent injury specified in § 97-31 after having sustained another permanent injury in the same employment. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

Neither § 97-33 nor this section were applicable where plaintiff received no compensation for his earlier injury, which arose out of a noncompensable automobile accident separate and apart from any employment. Pruitt v. Knight Publishing Co., 27 N.C. App. 254, 218 S.E.2d 876 (1975), rev'd on other grounds, 289 N.C. 254, 221 S.E.2d 355 (1976).

When Apportionment Not Permitted. — Apportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's nondisabling, pre-existing disease or infirmity. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

An employee is also entitled to full compensation for total disability without apportionment when the nature of the employee's total disability makes any attempt at apportionment between work-related and non-work-related causes speculative. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

Cited in Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983); Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 414 S.E.2d 102 (1992).

§ 97-36. Accidents taking place outside State; employees receiving compensation from another state.

Where an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him or his dependents or next of kin to compensation if it had happened in this State, then the employee or his dependents or next of kin shall be entitled to compensation (i) if the contract of employment was made in this State, (ii) if the employer's principal place of business is in this State, or (iii) if the employee's principal place of employment is within this State; provided, however, that if an employee or his dependents or next of kin shall receive compensation or damages under the laws of any other state nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Article. (1929, c. 120, s. 36; 1963, c. 450, s. 2; 1967, c. 1229, s. 3; 1973, c. 1059; 1991, c. 284, s. 1.)

Legal Periodicals. — For discussion of this section, see 8 N.C.L. Rev. 427 (1930).

For note on the application of full faith and credit to workers' compensation statutes and awards, see 34 N.C.L. Rev. 501 (1956).

For case law survey on conflict of laws, see 43 N.C.L. Rev. 895 (1965).

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

CASE NOTES

For case holding former § 97-36 to be constitutional prior to the 1963 amendment thereto, see Reaves v. Earle-Chesterfield Mill Co., 216 N.C. 462, 5 S.E.2d 305 (1939).

Employee No Longer Required to Be Resident of State. — The 1963 amendment to former G.S. 97-36 struck out the requirement that the employee should be a resident of this State. Rice v. Uwharrie Council Boy Scouts of Am., 263 N.C. 204, 139 S.E.2d 223 (1964).

The "last act" test employed under the long-arm statute and under the choice of laws doctrine is the appropriate test to be applied in determining whether the contract of employment was made in North Carolina. Thomas v. Overland Express, Inc., 101 N.C. App. 90, 398 S.E.2d 921 (1990), discretionary review denied, 328 N.C. 576, 403 S.E.2d 522 (1991).

For an employment contract to be made in North Carolina such that the Industrial Commission would have jurisdiction over a workers' compensation claim, the final act necessary to make a binding obligation must be done in North Carolina. Murray v. Ahlstrom Indus. Holdings, Inc., 131 N.C. App. 294, 506 S.E.2d 724 (1998).

Plaintiff's principal place of employment was within North Carolina where plaintiff was assigned to operate a tractor-trailer in an area consisting of twelve to thirteen southern states but no state, standing alone, had the same degree of significant contacts to plaintiff's employment as North Carolina. Furthermore, the "Policies, Procedures and Agreement" form signed by plaintiff upon being hired was an invalid attempt to limit plaintiff's rights to those enumerated under Arkansas workers' compensation law as well as a violation of G.S. 97-6. Perkins v. Arkansas Trucking Servs., 351 N.C. 634, 528 S.E.2d 902, 2000 N.C. LEXIS 356 (2000).

Contract of Employment Formed in North Carolina. — The Industrial Commission had jurisdiction over an employee's claim, where the employee was injured in another state and the employer's principal place of business was outside North Carolina, but the last act necessary for formation of the contract occurred in this state when the employer called the employee in North Carolina and offered the job at a specific hourly rate, the employee accepted the offer, and the employer responded that he was "hired." Murray v. Ahlstrom Indus. Holdings, Inc., 131 N.C. App. 294, 506 S.E.2d 724 (1998).

G.S. 97-36 conferred jurisdiction on the North Carolina Industrial Commission, even though a workers' compensation claimant was injured in South Carolina, as the claimant's contract for employment was created in North Carolina since: (1) the employer's operations head made the final decision to hire the claimant in Massachusetts; (2) the operations head telephoned an employer's representative in North Carolina, and informed the representative that the operations head had the claimant set up to work; (3) the employer offered the claimant a job when the representative in Raleigh, North Carolina telephoned the claimant at the claimant's home in Durham, North Carolina; (4) the claimant reported to work in Raleigh, North Carolina and was dispatched to

Roanoke, Virginia by the representative; and (5) the claimant's acceptance of employment in North Carolina was the "last act" that created the contract for employment with the employer. Washington v. Traffic Markings, Inc., — N.C. App. —, 643 S.E.2d 44, 2007 N.C. App. LEXIS 785 (2007).

Commission did not have jurisdiction over a claim arising from a tractor-trailer driver's out-of-state injury, where, although the trucking company which employed him had business contacts with North Carolina sufficiently substantial to meet minimum due process requirements, the company's principal place of business was in Indiana. Thomas v. Overland Express, Inc., 101 N.C. App. 90, 398 S.E.2d 921 (1990), discretionary review denied, 328 N.C. 576, 403 S.E.2d 522 (1991).

Industrial commission properly determined that it lacked jurisdiction to hear a truck driver's workers' compensation action, as pursuant to G.S. 97-36, Virginia, rather than North Carolina, was the driver's principle place of employment, as the worker was hired in Virginia, was paid in Virginia, and made the majority of his deliveries in Virginia. Davis v. Great Coastal Express, 169 N.C. App. 607, 610 S.E.2d 276, 2005 N.C. App. LEXIS 689 (2005).

The Court of Appeals erred in applying the "any competent evidence" standard of review to the Industrial Commission's jurisdictional determination under this section; the court should have made its own independent findings of jurisdictional fact. Perkins v. Arkansas Trucking Servs., 351 N.C. 634, 528 S.E.2d 902, 2000 N.C. LEXIS 356 (2000).

Commission Had Jurisdiction. — Sufficient evidence existed to support the Industrial Commission's conclusion that plaintiff/truck driver's principal place of employment was within North Carolina and its conclusion that the North Carolina Industrial Commission had jurisdiction over claim between foreign corporation/employer and plaintiff, whose residence was in North Carolina, who conducted various aspects of his business including receipt of assignments, storage and maintenance of truck, receipt of paychecks, etc., in North Carolina, and who made 18-20% of his pick-up stops in North Carolina. Perkins v. Arkansas Trucking Servs., Inc., 134 N.C. App. 490, 518 S.E.2d 36 (1999). But see Hyde v. Chesney Glen Homeowners Ass'n, Inc., 137 N.C. App. 605, 529 S.E.2d 499, 2000 N.C. App. LEXIS 504 (2000).

Applied in Leonard v. Johns-Manville Sales Corp., 59 N.C. App. 454, 297 S.E.2d 147 (1982).

§ 97-37. Where injured employee dies before total compensation is paid.

When an employee receives or is entitled to compensation under this Article for an injury covered by G.S. 97-31 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made: First, to the surviving whole dependents; second, to partial dependents, and, if no dependents, to the next of kin as defined in the Article; if there are no whole or partial dependents or next of kin as defined in the Article, then to the personal representative, in lieu of the compensation the employee would have been entitled to had he lived.

Provided, however, that if the death is due to a cause that is compensable under this Article, and the dependents of such employee are awarded compensation therefor, all right to unpaid compensation provided by this section shall cease and determine. (1929, c. 120, s. 37; 1947, c. 823; 1971, c. 322.)

Legal Periodicals. — For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

CASE NOTES

Recovery Where Employee Died After Filing Claim. — Where a claimant dies after a claim has been filed, the claimant's estate may recover all accrued but unpaid benefits, and all unaccrued benefits to which the employee would have been entitled had he lived are payable to decedent's dependents pursuant to this section. Wilhite v. Liberty Veneer Co., 47 N.C. App. 434, 267 S.E.2d 566, rev'd on other grounds, 303 N.C. 281, 278 S.E.2d 234 (1981).

Recovery Where Employee Died Without Filing Claim. — Allowing a dependent widow of a deceased worker to recover that to which her husband would have been entitled is consistent with the statutory purpose of this section, and a widow's claim will not be denied because her husband had not filed a worker's compensation claim for disfigurement before he died. Wilhite v. Liberty Veneer Co., 47 N.C. App. 434, 267 S.E.2d 566, rev'd on other grounds, 303 N.C. 281, 278 S.E.2d 234 (1981).

Basis for Award. — The dependents of a deceased employee who suffered a serious bodily disfigurement due to an accident covered by the Workers' Compensation Act but who died due to an unrelated cause were entitled to a post mortem award for serious bodily disfigurement based on the best possible medical estimate as to the probable residual disability that would have remained had the employee lived to complete his healing period, notwithstanding the fact that the employee had not filed a workers' compensation claim for disfigurement before he died. Wilhite v. Liberty Veneer Co., 47 N.C. App. 434, 267 S.E.2d 566, rev'd on other grounds, 303 N.C. 281, 278 S.E.2d 234 (1981).

An award inadvertently entered by the Industrial Commission after the death of the claimant on appeal from the award is irregular, but not void, and the proceedings do not abate. Butts v. Montague Bros., 204 N.C. 389, 168 S.E. 215 (1933).

Applied in Bridges v. McCrary Stone Servs., Inc., 48 N.C. App. 185, 268 S.E.2d 559 (1980).

Cited in Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963); McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966); Wilhite v. Liberty Veneer Co., 303 N.C. 281, 278 S.E.2d 234 (1981).

§ 97-38. Where death results proximately from compensable injury or occupational disease; dependents; burial expenses; compensation to aliens; election by partial dependents.

If death results proximately from a compensable injury or occupational disease and within six years thereafter, or within two years of the final determination of disability, whichever is later, the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation equal to sixty-six and two-thirds percent (66 2/3%) of the average weekly wages of the deceased employee at the time of the accident, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29, nor less than thirty dollars ($30.00), per week, and burial expenses not exceeding three thousand five hundred dollars ($3,500), to the person or persons entitled thereto as follows:

(1) Persons wholly dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. If there be only one person wholly dependent, then that person shall receive the entire compensation payable.

(2) If there is no person wholly dependent, then any person partially dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive a weekly payment of compensation computed as hereinabove provided, but such weekly payment shall be the same proportion of the weekly compensation provided for a whole dependent as the amount annually contributed by the deceased employee to the support of such partial dependent bears to the annual earnings of the deceased at the time of the accident.

(3) If there is no person wholly dependent, and the person or all persons partially dependent is or are within the classes of persons defined as "next of kin" in G.S. 97-40, whether or not such persons or such classes of persons are of kin to the deceased employee in equal degree, and all so elect, he or they may take, share and share alike, the commuted value of the amount provided for whole dependents in (1) above instead of the proportional payment provided for partial dependents in (2) above; provided, that the election herein provided may be exercised on behalf of any infant partial dependent by a duly qualified guardian; provided, further, that the Industrial Commission may, in its discretion, permit a parent or person standing in loco parentis to

such infant to exercise such option in its behalf, the award to be payable only to a duly qualified guardian except as in this Article otherwise provided; and provided, further, that if such election is exercised by or on behalf of more than one person, then they shall take the commuted amount in equal shares.

When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments. Compensation payments due on account of death shall be paid for a period of 400 weeks from the date of the death of the employee; provided, however, after said 400-week period in case of a widow or widower who is unable to support herself or himself because of physical or mental disability as of the date of death of the employee, compensation payments shall continue during her or his lifetime or until remarriage and compensation payments due a dependent child shall be continued until such child reaches the age of 18.

Compensation payable under this Article to aliens not residents (or about to become nonresidents) of the United States or Canada, shall be the same in amounts as provided for residents, except that dependents in any foreign country except Canada shall be limited to surviving spouse and child or children, or if there be no surviving spouse or child or children, to the surviving father or mother. (1929, c. 120, s. 38; 1943, c. 163; c. 502, s. 5; 1947, c. 823; 1951, c. 70, s. 3; 1953, c. 53, s. 1; 1955, c. 1026, s. 8; 1957, c. 1217; 1963, c. 604, s. 3; 1967, c. 84, s. 4; 1969, c. 143, s. 4; 1971, c. 281, s. 3; 1973, c. 515, s. 4; c. 759, s. 4; c. 1308, ss. 3, 4; c. 1357, ss. 1, 2; 1977, c. 409; 1981, c. 276, s. 1; c. 378, s. 1; c. 379; 1983, c. 772, s. 1; 1987, c. 729, s. 9; 1997-301, s. 1; 2001-232, s. 1.)

Cross References. — As to division od death benefits among whole and partial dependents, see G.S. 97-39.

Legal Periodicals. — For discussion of this section, see 8 N.C.L. Rev. 427 (1930).

For comment on the 1943 amendment to this section, see 21 N.C.L. Rev. 384 (1943).

For brief comment on the 1953 amendment, which rewrote this section, see 31 N.C.L. Rev. 451 (1953).

For survey of 1977 workers' compensation law, see 56 N.C.L. Rev. 1166 (1978).

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note on occupational disease under workers' compensation statutes, see 16 Wake Forest L. Rev. 288 (1980).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

For note, "Winstead v. Derreberry: Stepchildren and the Presumption of Dependence Under the North Carolina Workers' Compensation Act," see 64 N.C.L. Rev. 1548 (1986).

CASE NOTES

I. In General.
II. Dependents.

I. IN GENERAL.

Editor's Note. — *Most of the annotations under this section were decided prior to the 1987 amendment, which, inter alia, changed the time limit provisions in the first paragraph.*

Constitutionality. — The court would not consider the constitutionality of this section where the issue was not presented at the hearing before the full Commission. McPherson v. Henry Motor Sales Corp., 201 N.C. 303, 160 S.E. 283 (1931), appeal dismissed, 286 U.S. 527, 52 S. Ct. 499, 76 L. Ed. 1269 (1932).

Court of Appeals of North Carolina holds that the time limitation in the fourth paragraph of G.S. 97-61.6 violates the Equal Protection Clauses of U.S. Const., Amend. XIV and N.C. Const., Art. I, § 19 under the rational basis test because the statute imposes an additional burden for recovery — a shorter time frame for death benefits claims — for asbestosis or silicosis, and no rational basis exists for treating such occupational diseases differently from other latent occupational diseases; as the claim by a deceased employee's administratrix was within the applicable time limitation for other occupational diseases, under G.S. 97-38, the claim for death benefits was timely filed. Payne v. Charlotte Heating & Air Conditioning, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

This section classifies those persons eligible to receive, and determines the amount of, death benefits payable under the act to persons wholly or partially dependent upon the earnings of a deceased employee. Stevenson v. City of Durham, 281 N.C. 300, 188 S.E.2d 281 (1972).

The express language of this section fixes the rights and liabilities at the time of the employee's death, providing that where there is only one wholly dependent person at the time of decedent's death, all of the death benefits be paid to that person. Allen v. Piedmond Transp. Servs., Inc., 116 N.C. App. 234, 447 S.E.2d 835 (1994).

"Disability". — The definition of the word "disability," as it is defined in subdivision (9) of G.S. 97-2, must be read into this section in lieu of the word "disability" therein. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

Under the act "disability" refers not to physical infirmity but to a diminished capacity to earn money. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

When Death Is Compensable. — In order for a claimant to recover workers' compensation benefits for death, he must prove that death resulted from an injury (1) by accident; (2) arising out of his employment; and (3) in the course of the employment. Pickrell v. Motor Convoy, Inc., 322 N.C. 363, 368 S.E.2d 582 (1988).

To recover death benefits under the Workers Compensation Act, a claimant bears the burden of proving that the decedent sustained a fatal injury (1) by accident, (2) arising out of his employment, and (3) during the course of his employment. Westbrooks v. Bowes, 130 N.C. App. 517, 503 S.E.2d 409 (1998).

North Carolina Industrial Commission properly concluded that a truck driver's injury and death following a road rage incident with another driver, in which the other driver ran over the decedent when the decedent exited his vehicle to confront the other driver, resulted from an injury by accident arising out of and in the course of his employment. Dodson v. Dubose Steel, Inc., 159 N.C. App. 1, 582 S.E.2d 389, 2003 N.C. App. LEXIS 1419 (2003).

When Disability or Death Resulting from Disease Is Compensable. — Disability caused by, or death resulting from, a disease is compensable only when the disease is an occupational disease, or is aggravated or accelerated by causes and conditions characteristic of and peculiar to the claimant's employment. Goodman v. Cone Mills Corp., 75 N.C. App. 493, 331 S.E.2d 261 (1985).

The employer is required to pay compensation for the death of an employee only when the death results proximately from injury by accident arising out of and in the course of employment. Gilmore v. Hoke County Bd. of Educ., 222 N.C. 358, 23 S.E.2d 292 (1942).

The act authorizes the Industrial Commission to make an award of compensation on account of the death of an employee only in the event that death results proximately from the accident and within two years thereafter, or while total disability still continues and within six years after the accident. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967), decided prior to the 1983 amendment to this section.

This section contemplates only one accident leading to death when it states "the accident." Death benefits accrue only if death occurs within the maximum statutorily set time after "the accident." It would defy legislative intent to hold that subsequent changes in disability status arising from the same occupational disease created new "accidents," thereby renewing the time limit for claiming benefits under G.S. 97-38. Joyner v. J.P. Stevens & Co., 71 N.C. App. 625, 322 S.E.2d 636 (1984).

The rule limiting occupational disease victims to a single claim for purposes of the statute of limitations in G.S. 97-58(c) applies by analogy to allow occupational disease victims to claim only one "accident" under this section. Joyner v. J.P. Stevens & Co., 71 N.C. App. 625, 322 S.E.2d 636 (1984).

This section may sometimes have the effect of barring an otherwise valid and provable claim simply because the employee did not die within the requisite period of time. The remedy for any inequities arising from the statute, however, lies not with the courts but with the legislature. Joyner v. J.P. Stevens & Co., 71 N.C. App. 625, 322 S.E.2d 636 (1984).

Continuing Total Disability Is Condition Precedent to Award for Death After Two Years. — A continuing total disability from the time of the accident to the time of the death is a condition precedent to the making of an award of death benefits where the death occurred more than two years after the accident. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

An award of compensation, on account of a death occurring more than two years after the accident, is authorized only if there is evidence to support a finding that, from the accident to the death, the employee had a continuing incapacity, because of the injury, to earn the wages which he was receiving at the time of his accident. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

Widow seeking death benefits under this section not collaterally estopped to litigate the issue of decedent's total permanent disability on grounds that he had previously been found temporarily totally disabled, where she was not a party to the claim for her husband's lifetime benefits, nor was she in privity with a party to that claim, and she was not in control of the prosecution of that claim and did not have a mutual interest in the same property rights, even though she continued to pursue decedent's claim for lifetime benefits and subsequently withdrew the appeal of that claim. Goins v. Cone Mills Corp., 90 N.C. App. 90, 367 S.E.2d 335, cert. denied, 323 N.C. 173, 373 S.E.2d 108 (1988).

For case impliedly criticizing this section insofar as its application may sometimes bar an otherwise valid and provable claim simply because the employee did not die within the requisite period of time, see Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

Death from Preexisting Heart Condition Aggravated by Injury. — Findings to the effect that the employee suffered an injury arising out of and in the course of the employment, which injury aggravated a preexisting heart condition and caused death, would support an award for compensation and burial expenses. Wyatt v. Sharp, 239 N.C. 655, 80 S.E.2d 762 (1954).

Suicide Due to Derangement Caused by Pain and Suffering from Compensable Injury. — If an employee receives an injury which is compensable under this Chapter and as a result of pain and suffering from this injury he becomes so deranged that he commits suicide, the death is compensable. Fayne v. Fieldcrest Mills, Inc., 54 N.C. App. 144, 282 S.E.2d 539 (1981), cert. denied, 304 N.C. 725, 288 S.E.2d 380 (1982).

Maximum Weekly Benefit. — The 1973 amendment to G.S. 97-29, governing the maximum weekly workers' compensation benefit, applies to this section. Andrews v. Nu-Woods, Inc., 43 N.C. App. 591, 259 S.E.2d 306 (1979), aff'd, 299 N.C. 723, 264 S.E.2d 99 (1980).

Statute in Effect at Time of Death Controls Award. — Where an employee died of serum hepatitis, which was found to be a disease characteristic of and peculiar to his occupation of lab technician, the commission did not err in awarding compensation according to the statute in effect when the employee died rather than the statute in effect at the time he contracted the disease. Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

Date of "Accident" in Occupational Disease Case. — Where employee died 15 months after he became totally disabled by serum hepatitis, the claim of deceased employee's dependents for death benefits was not barred by this section providing compensation if death results from an accident within two years or, while total disability continues, within six years after the accident, since the date of the "accident" in cases involving occupational disease is treated as the date on which disablement occurs and not as the date on which employee contracted the disease. Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

Part-Time Employees. — Appellate court reversed the North Carolina Industrial Commission's award of workers' compensation benefits in the amount of $129 per week to the widow of a part-time employee who died due to a work-related accident because the Commission had not identified the method it used to calculate the employee's average weekly wage; on remand, the Commission could use the fifth method allowed by G.S. 97-2(5) for calculating the employee's average weekly wage if it found that the second method allowed by G.S. 97-2(5) was unfair because of the employee's part-time status. Boney v. Winn Dixie, Inc., 163 N.C. App. 330, 593 S.E.2d 93, 2004 N.C. App. LEXIS 371 (2004).

Applied in Willingham v. Bryan Rock & Sand Co., 240 N.C. 281, 82 S.E.2d 68 (1954); Painter v. Mead Corp., 258 N.C. 741, 129 S.E.2d 482 (1963); Lovette v. Reliable Mfg. Co., 262 N.C. 288, 136 S.E.2d 685 (1964); Bass v. Mooresville Mills, 15 N.C. App. 206, 189 S.E.2d 581 (1972); Lucas v. Li'l Gen. Stores, 25 N.C. App. 190, 212 S.E.2d 525 (1975); Williams v. Insurance Repair Specialists of N.C., Inc., 32 N.C. App. 235, 232 S.E.2d 5 (1977); Chinault v. Floyd S. Pike Elec. Contractors, 306 N.C. 286, 293 S.E.2d 147 (1982); Baldwin v. Piedmont Woodyards, Inc., 58 N.C. App. 602, 293 S.E.2d 814 (1982); Jones v. Service Roofing & Sheet Metal Co., 63 N.C. App. 772, 306 S.E.2d 460 (1983); Cockrell v. Evans Lumber Co., 103 N.C. App. 359, 407 S.E.2d 248 (1991).

Cited in Smith v. Collins-Aikman Corp., 198 N.C. 621, 152 S.E. 809 (1930); Early v. W.H. Basnight & Co., 214 N.C. 103, 198 S.E. 577 (1938); Roth v. McCord, 232 N.C. 678, 62 S.E.2d 64 (1950); Wilson v. Utah Constr. Co., 243 N.C. 96, 89 S.E.2d 864 (1955); McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957); Inman v. Meares, 247 N.C. 661, 101 S.E.2d 692 (1958); Fetner v. Rocky Mount Marble & Granite Works, 251 N.C. 296, 111 S.E.2d 324 (1959); Shealy v. Associated Transp., 252 N.C. 738, 114 S.E.2d 702 (1960); Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963); Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966); Petty v. Associated Transp., 4 N.C. App. 361, 167 S.E.2d 38 (1969); Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972); Allred v. Piedmont Woodyards, Inc., 32 N.C. App. 516, 232 S.E.2d 879 (1977); Britt v. Colony Constr. Co., 35 N.C. App. 23, 240 S.E.2d 479 (1978); Hensley v. Caswell Action Comm., Inc., 296 N.C. 527, 251 S.E.2d 399 (1979); In re Annexation Ordinance, 300 N.C. 337, 266 S.E.2d 661 (1980); Thompson v. Lenoir Transf. Co., 48 N.C. App. 47, 268 S.E.2d 534 (1980); Carpenter v. Hawley, 53 N.C. App. 715, 281 S.E.2d 783 (1981); Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (1982); Elmore v. Broughton Hosp., 76 N.C. App. 582, 334 S.E.2d 231 (1985); Costner v. A.A. Ramsey & Sons, 81 N.C. App. 121, 343 S.E.2d 607 (1986); Montgomery v. Bryant Supply Co., 91 N.C. App. 734, 373 S.E.2d 299 (1988); Brimley v. Logging, 93 N.C. App. 467, 378 S.E.2d 52 (1989); Harvey v. Raleigh Police Dep't, 96 N.C. App. 28, 384 S.E.2d 549 (1989); Christian v. Riddle & Mendenhall Logging, 117 N.C. App. 261, 450 S.E.2d 510 (1994); Johnson v. Barnhill Contracting Co., 121 N.C. App. 55, 464 S.E.2d 313 (1995); Jordan v. Central Piedmont Community College, 124 N.C. App. 112, 476 S.E.2d 410 (1996); Shaw v. Smith & Jennings, Inc., 130 N.C. App. 442, 503 S.E.2d 113 (1998), cert. denied, 349 N.C. 363, 525 S.E.2d 175 (1998).

II. DEPENDENTS.

Percentage of Survivors' Benefits Fixed by Subdivision (1). — Paragraph fixing the period of time for which benefits are to be paid as 400 weeks for the widow and for each minor child until he reaches age 18 is not intended to fix the percentage of survivors' benefits; that is done by subdivision (1) of this section. Chinault v. Floyd S. Pike Elec. Contractors, 53 N.C. App. 604, 281 S.E.2d 460 (1981), aff'd, 306 N.C. 286, 293 S.E.2d 147 (1982).

Shares of Partial Dependents Fixed by Subdivisions (2) and (3). — Subdivisions (2) and (3) of this section fix the share each survivor is to receive if there are no persons wholly dependent on decedent at the date of his death. Chinault v. Floyd S. Pike Elec. Contractors, 53 N.C. App. 604, 281 S.E.2d 460 (1981), aff'd, 306 N.C. 286, 293 S.E.2d 147 (1982).

Recipients' Shares Fixed at Date of Death. — General Assembly intended to fix each recipient's share of death benefits at the date of decedent's death. Chinault v. Floyd S. Pike Elec. Contractors, 53 N.C. App. 604, 281 S.E.2d 460 (1981), aff'd, 306 N.C. 286, 293 S.E.2d 147 (1982).

Effect of 18th Birthday of Minor Dependent. — Decedent's wife was not entitled to a reapportionment of death benefits upon her daughter's 18th birthday. Friday v. Carolina Steel Corp., 139 N.C. App. 802, 534 S.E.2d 648, 2000 N.C. App. LEXIS 1029 (2000).

If there is a decrease in the dependent beneficiary pool during the 400 weeks following the employee's death, there must be a corresponding reapportionment of the full award payable for that set period among the remaining eligible members of the pool. That is only situation in which there will be an increase in the amount of the individual shares paid to the dependents still partaking of the compensation fund. Deese v. Southern Lawn & Tree Expert Co., 306 N.C. 275, 293 S.E.2d 140, rehearing denied, 306 N.C. 753, 303 S.E.2d 83 (1982).

Section does not permit reapportionment of entire compensation award among eligible dependents after 400 weeks have elapsed. Deese v. Southern Lawn & Tree Expert Co., 306 N.C. 275, 293 S.E.2d 140, rehearing denied, 306 N.C. 753, 303 S.E.2d 83 (1982).

Death or Remarriage of Widow Before All Installments Paid. — This section places no limitation by way of forfeiture on compensation receivable where a widow who has been awarded compensation for her husband's death dies or remarries before all installments have been paid. Hill v. Cahoon, 252 N.C. 295, 113 S.E.2d 569 (1960).

Where a widow who has been properly awarded compensation as the sole dependent of her deceased husband dies before all the installments of compensation have been paid, the commuted value of such future installments is properly paid to her personal representative, and the next of kin of the deceased employee, who are not dependents, are not entitled thereto. Hill v. Cahoon, 252 N.C. 295, 113 S.E.2d 569 (1960).

Where an employee has lost his life in the course of his employment and thereafter an award has been made by the Industrial Commission to his widow, as his sole dependent, and within a few months after the award is made his widow dies intestate, her administrator is entitled to the benefits of the award as made to her. Queen v. Champion Fibre Co., 203 N.C. 94, 164 S.E. 752 (1932).

No Finding of Permanent Disability Required For Disabled Widow. — The provision of this section for compensation for life or until remarriage for the disabled widow of an employee who dies under compensable circumstances does not on its face require a finding of permanent disability. Hendrick v. Southland Corp., 41 N.C. App. 431, 255 S.E.2d 198, cert. denied, 298 N.C. 296, 259 S.E.2d 912 (1979).

Duration of Payment of Compensation to Dependent Children Under Age 18. — The provision of the second paragraph of this section, as amended, which relates to dependent children under the age of 18 years, should be read in conjunction with the introductory proviso. When so read, it means "as provided, however, after said 400-week period compensation payments due a dependent child shall be continued until such child reaches the age of 18." Caldwell v. Marsh Realty Co., 32 N.C. App. 676, 233 S.E.2d 594, cert. denied, 292 N.C. 728, 235 S.E.2d 782 (1977).

Stepchildren must be substantially dependent upon the deceased employee. This result is derived from the wording of the various dependency tests employed by the act. Winstead v. Derreberry, 73 N.C. App. 35, 326 S.E.2d 66 (1985); Capps v. Standard Trucking Co., 77 N.C. App. 448, 335 S.E.2d 357 (1985).

The substantial dependency standard is a question of fact to be determined under the facts of each case, the burden of proof being on the stepchild under the evidentiary standards normally employed in workers' compensation cases. The factors to be considered are the actual amount and consistency of the support derived by the stepchild from (1) the deceased stepparent, (2) the natural parent married to the stepparent, (3) the estranged natural parent, whether such support is voluntary or required by law, (4) the income of the stepchild, and (5) any other funds regularly received for the support of the stepchild. Winstead v. Derreberry, 73 N.C. App. 35, 326 S.E.2d 66 (1985).

A stepchild must be factually "substantially" dependent upon the deceased in order to qualify as a child dependent on deceased under G.S. 97-39 and, therefore, be entitled to a share of death benefits under this section. Capps v. Standard Trucking Co., 77 N.C. App. 448, 335 S.E.2d 357 (1985).

Courts determine substantial dependency of stepchildren for purposes of death benefits under G.S. 97-39 under the facts of each case by considering the amount and consistency of support a stepchild receives from: (1) the deceased stepparent; (2) the natural parent married to the stepparent; (3) the estranged natural parent, whether such support is voluntary or required by law; (4) the income of the stepchild; and (5) any other funds regularly received for the support of the stepchild; it was found that stepchildren were substantially dependent on a deceased employee where he financially supported their household, and thus, they were conclusively presumed to have been wholly dependent on him under G.S. 97-39 and were entitled to benefits under G.S. 97-38. Goodrich v. R.L. Dresser, Inc., 161 N.C. App. 394, 588 S.E.2d 511, 2003 N.C. App. LEXIS 2204 (2003).

Allocation of Compensation to Widow and Children Upheld. — The Industrial Commission properly held that the entire compensation to which survivors, a widow and three minor children, were entitled should be divided into four equal parts, with the widow to receive weekly payments for 400 weeks, and each of the three minor children to receive only its share of weekly compensation beyond the 400-week period and until such child reached 18 years of age. Chinault v. Floyd S. Pike Elec. Contractors, 53 N.C. App. 604, 281 S.E.2d 460 (1981), aff'd, 306 N.C. 286, 293 S.E.2d 147 (1982).

Legal Adoption Not Finalized. — Where adoption proceedings had begun but were not finalized, the minor plaintiff was not a child legally adopted prior to the injury of the employee. Lennon v. Cumberland County, 119 N.C. App. 319, 458 S.E.2d 240 (1995).

Total Dependency Shown. — Where the evidence tended to show that the mother of the deceased employee lived with him, that he had paid the rent, bought groceries and supported her for a period of years, but that for two months prior to his death she did washing and nominal services for, and stayed with, an aged bedridden person and earned $5.75 per week thereby, which she deposited in a bank or used to buy small luxuries, the fact that the mother earned small amounts of money in temporary and casual employment did not indicate any dependable source of income other than that she received from her son and the conclusion of the Industrial Commission that she was totally dependent upon her son within the meaning of the Workers' Compensation Act was sustained. Thomas v. Raleigh Gas Co., 218 N.C. 429, 11 S.E.2d 297 (1940).

Finding as to Dependency Binding on Appeal. — While it may be admitted that in some instances the question of dependency may be a mixed question of fact and law, where the facts admitted or found by the Commission upon competent evidence support the conclusion of the Commission in regard thereto, its award is binding on the court. Thomas v. Raleigh Gas Co., 218 N.C. 429, 11 S.E.2d 297 (1940).

When Employee Has No Dependents. — Where the Commission has found that the deceased employee left no one who was dependent upon him, wholly or partially, G.S. 97-40 determines the person or persons entitled to receive the death benefits provided in this act, but the amount payable to the person or persons entitled thereto is determined by this section, commuted to its present, lump sum value. Smith v. Allied Exterminators, Inc., 279 N.C. 583, 184 S.E.2d 296 (1971).

Section 97-40 determines the person or persons entitled to receive the death benefits in the absence of dependents, but the amount payable to the person or persons entitled thereto is determined by this section, commuted to its present, lump sum value. Stevenson v. City of Durham, 281 N.C. 300, 188 S.E.2d 281 (1972).

If the deceased employee leaves neither whole nor partial dependents, then G.S. 97-40 provides for the commutation and payment of compensation to the "next of kin" as therein defined. Stevenson v. City of Durham, 281 N.C.

300, 188 S.E.2d 281 (1972).

Proper Plaintiffs in Action for Failure to Procure Compensation Insurance. — An action against insurance agents for breach of their agreement with an employer to procure compensation coverage for an employee may be maintained only by those who would have been entitled to payments had the policy been issued, and when it appears that the employee died as the result of injury received during the employment, and that the employee left a widow surviving him, such action may be maintained only by the widow; thus, an action instituted by the employee's administrator and the employer, who advanced the insurance premium, must be dismissed. Crawford v. General Ins. & Realty Co., 266 N.C. 615, 146 S.E.2d 651 (1966).

§ 97-39. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent.

A widow, a widower and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. In all other cases questions of dependency, in whole or in part shall be determined in accordance with the facts as the facts may be at the time of the accident, but no allowance shall be made for any payment made in lieu of board and lodging or services, and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident. If there is more than one person wholly dependent, the death benefit shall be divided among them, the persons partly dependent, if any, shall receive no part thereof. If there is no one wholly dependent, and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

The widow, or widower and all children of deceased employees shall be conclusively presumed to be dependents of deceased and shall be entitled to receive the benefits of this Article for the full periods specified herein. (1929, c. 120, s. 39.)

Cross References. — For definition of terms "widow," "widower," and "child," see G.S. 97-2. As to dependents, see also G.S. 97-38.

Legal Periodicals. — As to determination of the extent of the dependency of partial dependents, see 8 N.C.L. Rev. 426 (1930).

For note, "Winstead v. Derreberry: Stepchildren and the Presumption of Dependence Under the North Carolina Workers' Compensation Act," see 64 N.C.L. Rev. 1548 (1986).

CASE NOTES

Only widows who come within the definition in subdivision (14) of § 97-2 are entitled to the presumption provided by this section. Bass v. Mooresville Mills, 11 N.C. App. 631, 182 S.E.2d 246 (1971).

Presumption of Dependency. — By statute, a widow is conclusively presumed to be wholly dependent for support upon the deceased employee, and shall receive benefits under the Workers' Compensation Act. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

The common-law wife of a deceased employee is not entitled to compensation under the provisions of this act. Reeves v. Parker-Graham-Sexton, Inc., 199 N.C. 236, 154 S.E. 66 (1930).

Widow Was Entitled To Support. — By using the word "or" before the second of the three listed methods in which a person can qualify as a widow under G.S. 97-39, the General Assembly intended that a wife can qualify as a widow if she is actually dependent on decedent whether or not living with him, and in method three, she qualifies if she is living apart for justifiable cause or desertion, whether or not dependent; accordingly, where evidence in the record before the Industrial Commission showed that a widow was dependent on the deceased employee for support, that she was a responsible person and was competent with money, she should have been found to be his widow under G.S. 97-2(14) and granted benefits. Goodrich v. R.L. Dresser, Inc., 161 N.C.

App. 394, 588 S.E.2d 511, 2003 N.C. App. LEXIS 2204 (2003).

There was some competent evidence to support the North Carolina Industrial Commission's award of total disability benefits and death benefits, pursuant to G.S. 97-39, to an estate administratrix on behalf of her deceased husband, who had been an employee of the employer for a period of time, where it was determined that the employer was the place where the employee had his last injurious exposure to asbestos, pursuant to G.S. 97-57, and further, that he in fact had "asbestosis," as that term was defined under G.S. 97-62; credibility determinations were within the province of the Commission, and not for the court to redetermine. Payne v. Charlotte Heating & Air Conditioning, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

The term "in all other cases," in the connection in which it appears in this section, means in all cases other than those of widows, widowers, and children, claiming to be dependents of the deceased employee, dependency shall be determined in accordance with the facts as the facts may be at the time of the accident. Manifestly, a woman living in cohabitation with a man to whom she is not married is not within the purview of the term "in all other cases." Fields v. Hollowell, 238 N.C. 614, 78 S.E.2d 740 (1953).

A woman who was living with an employee as his common-law wife at the time of his death and who was actually wholly dependent upon him for support for some years prior to his death by accident arising out of and in the course of his employment was not a dependent of the deceased employee within the purview of this section, and was not entitled to any part of the compensation payable under the provisions of the act. Fields v. Hollowell, 238 N.C. 614, 78 S.E.2d 740 (1953).

Wife separated by mutual agreement evidenced by legally executed separation agreement is not widow. Bass v. Mooresville Mills, 11 N.C. App. 631, 182 S.E.2d 246 (1971); Sloop v. Williams Exxon Serv., 24 N.C. App. 129, 210 S.E.2d 111 (1974).

Surrender of Right to Support. — There is no reason why a separated wife who has surrendered all right to look to the husband for support while he is living should, upon his death, receive benefits that are intended to replace in part the support which the husband was providing or should have been providing. Bass v. Mooresville Mills, 11 N.C. App. 631, 182 S.E.2d 246 (1971); Sloop v. Williams Exxon Serv., 24 N.C. App. 129, 210 S.E.2d 111 (1974).

Spouse's Adultery Does Not Create an Exception to Statutes. — It is not within the authority of courts to create an exception to G.S. 97-2(14) and this section based upon adultery by a spouse. To find that the legislature intended such an exception, it must be apparent in the statute. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

A wife's adulterous affair did not bar her from qualifying as her husband's widow under G.S. 97-2(14) or this section. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

Divorce and Remarriage in Another State. — On the conflict of laws question raised where there has been a divorce and remarriage in another state and a subsequent controversy develops as to who is the "widow," see Rice v. Rice, 336 U.S. 674, 69 S. Ct. 751, 93 L. Ed. 957 (1949); 28 N.C.L. Rev. 265, 286.

A second or subsequent marriage is presumed legal until the contrary is proved, and the burden of the issue is upon a plaintiff who attempts to establish a property right which is dependent upon the invalidity of such a marriage. Kearney v. Thomas, 225 N.C. 156, 33 S.E.2d 871 (1945).

Illegitimate Child Acknowledged by Father. — An illegitimate child born after the death of its father, who before his death had acknowledged his paternity of the child, is a dependent of its deceased father within the meaning of this section, and such child is entitled to share with the children of its deceased father who were born of his marriage to their mother, from whom their father had been divorced prior to his death, in compensation awarded under this act to his dependents. Lippard v. Southeastern Express Co., 207 N.C. 507, 177 S.E. 801 (1935).

Illegitimate Child Must Be Acknowledged. — To qualify for survivor's benefits under the act, an illegitimate child must be acknowledged in sufficient fashion by the father. Tucker v. City of Clinton, 120 N.C. App. 776, 463 S.E.2d 806 (1995).

Stepchildren must be substantially dependent upon the deceased employee. This result is derived from the wording of the various dependency tests employed by the act. Winstead v. Derreberry, 73 N.C. App. 35, 326 S.E.2d 66 (1985); Capps v. Standard Trucking Co., 77 N.C. App. 448, 335 S.E.2d 357 (1985).

The substantial dependency standard is a question of fact to be determined under the facts of each case, the burden of proof being on the stepchild under the evidentiary standards normally employed in workers' compensation cases. The factors to be considered are the actual amount and consistency of the support derived by the stepchild from (1) the deceased stepparent, (2) the natural parent married to the stepparent, (3) the estranged natural parent, whether such support is voluntary or required by law, (4) the income of the stepchild, and (5) any other funds regularly received for the support of the stepchild. Winstead v.

Derreberry, 73 N.C. App. 35, 326 S.E.2d 66 (1985).

A stepchild must be factually "substantially" dependent upon the deceased in order to qualify as a child dependent on deceased under this section and, therefore, be entitled to a share of death benefits under G.S. 97-38. Capps v. Standard Trucking Co., 77 N.C. App. 448, 335 S.E.2d 357 (1985).

Courts determine substantial dependency of stepchildren for purposes of death benefits under G.S. 97-39 under the facts of each case by considering the amount and consistency of support a stepchild receives from: (1) the deceased stepparent; (2) the natural parent married to the stepparent; (3) the estranged natural parent, whether such support is voluntary or required by law; (4) the income of the stepchild; and (5) any other funds regularly received for the support of the stepchild; it was found that stepchildren were substantially dependent on a deceased employee where he financially supported their household, and thus, they were conclusively presumed to have been wholly dependent on him under G.S. 97-39 and were entitled to benefits under G.S. 97-38. Goodrich v. R.L. Dresser, Inc., 161 N.C. App. 394, 588 S.E.2d 511, 2003 N.C. App. LEXIS 2204 (2003).

Children of employee's common-law wife who were not the children of the employee were not entitled to share compensation with the employee's legal widow and their children, even though they had been supported by the employee, since his act of maintenance was voluntary and was not a legal obligation. Wilson v. Utah Constr. Co., 243 N.C. 96, 89 S.E.2d 864 (1955).

A child born to employee's common-law wife shortly after his death was not entitled to compensation where there was no evidence that employee had acknowledged the child. Wilson v. Utah Constr. Co., 243 N.C. 96, 89 S.E.2d 864 (1955).

Father Held Not a Dependent. — Where deceased employee had lived at his father's home, buying food and other supplies for the house from time to time, but when he was away from home, he made no contribution, the Commission's finding that the father of deceased was not a dependent would be affirmed. Scott v. Auman, 209 N.C. 853, 184 S.E. 830 (1936).

Applied in Wyatt v. Sharp, 239 N.C. 655, 80 S.E.2d 762 (1954); Bass v. Mooresville Mills, 15 N.C. App. 206, 189 S.E.2d 581 (1972); Lucas v. Li'l Gen. Stores, 25 N.C. App. 190, 212 S.E.2d 525 (1975); Jones v. Service Roofing & Sheet Metal Co., 63 N.C. App. 772, 306 S.E.2d 460 (1983).

Cited in Smith v. Collins-Aikman Corp., 198 N.C. 621, 152 S.E. 809 (1930); McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957); Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968); Hewett v. Garrett, 1 N.C. App. 234, 161 S.E.2d 157 (1968); Cobb v. Eastern Clearing & Grading, Inc., 1 N.C. App. 327, 161 S.E.2d 612 (1968); Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972); Britt v. Colony Constr. Co., 35 N.C. App. 23, 240 S.E.2d 479 (1978); Carpenter v. Hawley, 53 N.C. App. 715, 281 S.E.2d 783 (1981); Coleman v. City of Winston-Salem, 57 N.C. App. 137, 291 S.E.2d 155 (1982); Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 293 S.E.2d 196 (1982); Johnson v. Barnhill Contracting Co., 121 N.C. App. 55, 464 S.E.2d 313 (1995); Setzer v. Boise Cascade Corp., 123 N.C. App. 441, 473 S.E.2d 431 (1996).

§ 97-40. Commutation and payment of compensation in absence of dependents; "next of kin" defined; commutation and distribution of compensation to partially dependent next of kin; payment in absence of both dependents and next of kin.

Subject to the provisions of G.S. 97-38, if the deceased employee leaves neither whole nor partial dependents, then the compensation which would be payable under G.S. 97-38 to whole dependents shall be commuted to its present value and paid in a lump sum to the next of kin as herein defined. For purposes of this section and G.S. 97-38, "next of kin" shall include only child, father, mother, brother or sister of the deceased employee, including adult children or adult brothers or adult sisters of the deceased, but excluding a parent who has willfully abandoned the care and maintenance of his or her child and who has not resumed its care and maintenance at least one year prior to the first occurring of the majority or death of the child and continued its care and maintenance until its death or majority. For all such next of kin who are neither wholly nor partially dependent upon the deceased employee and who take under this section, the order of priority among them shall be governed by the general law applicable to the distribution of the personal estate of persons dying intestate. In the event of exclusion of a parent based on abandonment, the claim for compensation benefits shall be treated as though the abandoning parent had predeceased the employee. For all such next of kin who were also partially dependent on the deceased employee but who exercise the election provided for partial dependents by G.S. 97-38, the general law applicable to the distribution of the personal estate of persons dying intestate shall not apply and such person or persons upon the exercise of such election, shall be entitled, share and share alike, to the compensation provided in G.S. 97-38 for whole dependents commuted to its present value and paid in a lump sum.

If the deceased employee leaves neither whole dependents, partial dependents, nor next of kin as hereinabove defined, then no compensation shall be due or payable on account of the death of the deceased employee, except that the employer shall pay or cause to be paid the burial expenses of the deceased employee not exceeding three thousand five hundred dollars ($3,500) to the person or persons entitled thereto. (1929, c. 120, s. 40; 1931, c. 274, s. 5; c. 319; 1945, c. 766; 1953, c. 53, s. 2; c. 1135, s. 2; 1963, c. 604, s. 4; 1965, c. 419; 1967, c. 84, s. 5; 1971, c. 1179; 1981, c. 379; 1987, c. 729, s. 10; 2001-232, s. 3.1.)

Legal Periodicals. — For discussion of the original section, see 8 N.C.L. Rev. 427 (1930).

As to the 1931 amendments, see 9 N.C.L. Rev. 406 (1931).

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Function of Section. — Where the Commission has found that the deceased employee left no one who was dependent upon him, wholly or partially, this section determines the person or persons entitled to receive the death benefits provided in this act, but the amount payable to the person or persons entitled thereto is determined by G.S. 97-38, commuted to its present, lump sum value. Smith v. Allied Exterminators, Inc., 279 N.C. 583, 184 S.E.2d 296 (1971); Stevenson v. City of Durham, 281 N.C. 300, 188 S.E.2d 281 (1972).

This Section Is Not Limited by § 97-2(12). — The doctrine of pari materia does not apply, and the provisions of this section should not be construed with the provisions of G.S. 97-2(12). Stevenson v. City of Durham, 281 N.C. 300, 188 S.E.2d 281 (1972).

The imposition of the restrictions of dependency and age contained in G.S. 97-2(12) upon this section would result in a narrow and technical interpretation of the act. Stevenson v. City of Durham, 281 N.C. 300, 188 S.E.2d 281 (1972).

By the 1971 amendment, which includes adult children or adult brothers and adult sisters in the definition of "next of kin" contained in this section, the General Assembly evidenced its intent that the definition of "next of kin" should not be narrowly and strictly limited by the provisions of G.S. 97-2(12). Stevenson v. City of Durham, 281 N.C. 300, 188 S.E.2d 281 (1972).

Removal of Requirements of Dependency, Age and Marital Status from Definition of "Next of Kin". — The General Assembly has shown a clear intent to remove the requirements of dependency, age and marital status from the definition of "next of kin" who are entitled to death benefits under this section. Stevenson v. City of Durham, 281 N.C. 300, 188 S.E.2d 281 (1972).

Married Siblings over 18 Are "Next of Kin". — Brothers and sisters who are 18 years of age or older and who are married are "next of kin" as defined in this section. Stevenson v. City of Durham, 281 N.C. 300, 188 S.E.2d 281 (1972).

Adult Illegitimate Children Were Not "Next of Kin". — Adult illegitimate children, who cannot show compliance with the requirements of G.S. 29-19 of the intestate succession act, are not "next of kin" as defined in this section. Brimley v. Logging, 93 N.C. App. 467, 378 S.E.2d 52 (1989).

Abandoning Parent Loses Share of Death Benefits of Child. — Where the father wilfully abandoned the care and maintenance of the deceased during the latter's minority, under G.S. 31A-2 the father loses all right to intestate succession in the distribution of the personal estate of the deceased child; consequently, he does not share in the death benefits for which the employer or its carrier is liable under G.S. 97-38. Smith v. Allied Exterminators, Inc., 279 N.C. 583, 184 S.E.2d 296 (1971).

Words "care and maintenance" were not to be read separately but instead combined to define a parent's overall responsibilities; in order to rehabilitate, a parent had to resume the care and maintenance of the child, not just one or the other. Davis v. Trus Joist MacMillan, 148 N.C. App. 248, 558 S.E.2d 210, 2002 N.C. App. LEXIS 3 (2002), cert. denied, 355 N.C. 490, 563 S.E.2d 564 (2002).

Operative language in G.S. 31A-2, precluding an abandoning parent from inheriting from an abandoned child, is nearly identical to that in G.S. 97-40, precluding the receipt of workers' compensation benefits by an abandoning parent due to the death of an abandoned child, as both statutes provide that a parent who has abandoned the "care and maintenance" of a child loses the right to receive a specified benefit upon the child's death, and both provide an exception when the parent has resumed the "care and maintenance" of the child at least one year prior to the child's death or majority. In re Estate of Lunsford, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

Benefits do not become part of assets of estate of decedent. Smith v. Allied Exterminators, Inc., 279 N.C. 583, 184 S.E.2d 296 (1971).

Order of Priority for Benefits among Next of Kin. — Where the deceased leaves surviving him a person or persons in two or more of these categories of relationship, the benefits are not distributed among all of such surviving "next of kin." In that event, this section directs the Commission to "the general law applicable to the distribution of the personal estate of persons dying intestate" to determine "the order of priority" among these several persons. Smith v. Allied Exterminators, Inc., 279 N.C. 583, 184 S.E.2d 296 (1971).

The Commission is directed to the general law governing intestate succession simply because, for this purpose only, the general law of intestate succession is incorporated by reference into this section. Smith v. Allied Exterminators, Inc., 279 N.C. 583, 184 S.E.2d 296 (1971).

When the legislature, in former G.S. 28-173, provided that the proceeds of an action for wrongful death "shall be disposed of as provided in the Intestate Succession Act," and when it provided in this section that the order of priority among claimants to death benefits payable under the act "shall be governed by the general law applicable to the distribution of the personal estate of persons dying intestate," it had in mind the same law; i.e., the Intestate Succession Act as modified by Chapter 31A, entitled, "Acts Barring Property Rights." Williford v. Williford, 288 N.C. 506, 219 S.E.2d 220 (1975).

The meaning of an "order of priority" is that the person or persons in one category takes to the exclusion of the others. Smith v. Allied Exterminators, Inc., 279 N.C. 583, 184 S.E.2d 296 (1971).

Amount Payable Not Reduced Where Employee Leaves No Dependent. — Where the deceased employee leaves no dependent, whole or partial, the amount payable is not reduced from the amount which would have been payable had the deceased employee left a person wholly dependent upon him, unless there is no person surviving who falls within the term "next of kin" as defined in this section. Smith v. Allied Exterminators, Inc., 279 N.C. 583, 184 S.E.2d 296 (1971); Stevenson v. City of Durham, 281 N.C. 300, 188 S.E.2d 281 (1972).

Only Future Payments Subject to Commutation or Reduction. — By definition it is only those payments due in the future that are subject to commutation or reduction to a discounted present value. Strickland v. Carolina Classics Catfish, Inc., 127 N.C. App. 615, 492 S.E.2d 362 (1997), cert. denied, 347 N.C. 585, 502 S.E.2d 617 (1998).

For cases decided prior to the 1963 amendment, which rewrote this section, see Jones' Adm'r v. E.H. Clement Co., 201 N.C. 768, 161 S.E. 403 (1931); Hunt v. State, 201 N.C. 37, 158 S.E. 703 (1931), followed in Slade v. Willis Hosiery Mills, 209 N.C. 823, 184 S.E. 844 (1936); Hamby v. Cobb, 214 N.C. 813, 1 S.E.2d 101 (1939); Parsons v. Swift & Co., 234 N.C. 580, 68 S.E.2d 296 (1951); Green v. Briley, 242 N.C. 196, 87 S.E.2d 213 (1955); Fields v. Hollowell, 238 N.C. 614, 78 S.E.2d 740 (1953).

Applied in Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966); Deese v. Southern Lawn & Tree Expert Co., 306 N.C. 275, 293 S.E.2d 140 (1982).

Cited in Bass v. Mooresville Mills, 11 N.C. App. 631, 182 S.E.2d 246 (1971); Martin v. Bonclarken Ass'y, 296 N.C. 540, 251 S.E.2d 403 (1979); Locust v. Pitt County Mem'l Hosp., Inc., 358 N.C. 113, 591 S.E.2d 543, 2004 N.C. LEXIS 20 (2004).

§ 97-40.1. Second Injury Fund.

(a) There is hereby created a fund to be known as the "Second Injury Fund," to be held and disbursed by the Industrial Commission as hereinafter provided.

For the purpose of providing money for said fund the Industrial Commission may assess against the employer or its insurance carrier the payment of not to exceed two hundred fifty dollars ($250.00) for the loss, or loss of use, of each minor member in every case of a permanent partial disability where there is such loss, and shall assess not to exceed seven hundred fifty dollars ($750.00) for fifty percent (50%) or more loss or loss of use of each major member, defined as back, foot, leg, hand, arm, eye, or hearing.

(b) The Industrial Commission shall disburse moneys from the Second Injury Fund in unusual cases of second injuries as follows:

(1) To pay additional compensation in cases of second injuries referred to in G.S. 97-33; provided, however, that the original injury and the subsequent injury were each at least twenty percent (20%) of the entire member; and, provided further, that such additional compensation, when added to the compensation awarded under said section, shall not exceed the amount which would have been payable for both injuries had both been sustained in the subsequent accident.

(2) To pay additional compensation to an injured employee who has sustained permanent total disability in the manner referred to in the second paragraph of G.S. 97-35, which shall be in addition to the compensation awarded under said section; provided, however, that such additional compensation, when added to the compensation awarded under said section, shall not exceed the compensation for permanent total disability as provided for in G.S. 97-29.

(3) To pay compensation and medical expense in cases of permanent and total disability resulting from an injury to the brain or spinal cord in the manner and to the extent hereinafter provided.

The additional compensation and treatment expenses herein provided for shall be paid out of the Second Injury Fund exclusively and only to the extent to which the assets of such fund shall permit.

(c) In addition to payments for the purposes hereinabove set forth, the Industrial Commission may, in its discretion, make payments from said fund for the following purposes and under the following conditions:

(1) In any case in which total and permanent disability due to paralysis or loss of mental capacity has resulted from an injury to the brain or spinal cord, the Industrial Commission may, in its discretion enter an award and pay compensation and reasonable and necessary medical, nursing, hospital, institutional, equipment, and other treatment expenses from the Second Injury Fund during the life of the injured employee in cases where the injury giving rise to such disability occurred prior to July 1, 1953, and the last payment of compensation has been made subsequent to January 1, 1941. Such compensation and medical expense shall be paid only from April 4, 1947, and after the employer's liability for compensation and treatment expense has ended, and in every case in which the injury resulting in paralysis due to injury to the spinal cord occurred subsequent to April 4, 1947, and prior to July 1, 1953, the liability of the employer and his insurance carrier to pay compensation and medical expense during the life of the injured employee shall not be affected by this section.

(2) When compensation is allowed from the fund in any case under subdivision (1) of subsection (c), the Commission may in its discretion authorize payment of medical, nursing, hospital, equipment, and other treatment expenses incurred prior to the date compensation is allowed and after the employer's liability has ended if funds are reasonably available in the Second Injury Fund for such purpose after paying claims in cases of second injuries as specified in G.S. 97-33 and 97-35. Should the fund be insufficient to pay both compensation and treatment expenses, then the said expenses may, in the discretion of the Commission, be paid first and compensation thereafter according to the reasonable availability of funds in the fund. (1953, c. 1135, s. 2; 1957, c. 1396, s. 4; 1963, c. 450, s. 3; 1977, c. 457; 1991, c. 703, s. 11; 1993 (Reg. Sess., 1994), c. 679, s. 6.1.)

Editor's Note. — The word "section" at the end of subdivision (1) of subsection (c) appears in the printed act as "amendment."

Legal Periodicals. — For note discussing limitations on the apportionment of disabilities, see 54 N.C.L. Rev. 1123 (1976).

For comment on Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981), see 4 Campbell L. Rev. 107 (1981).

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Cited in Harris v. Lee Paving Co., 47 N.C. App. 348, 267 S.E.2d 381 (1980).

§ 97-41: Repealed by Session Laws 1973, c. 1308, s. 5.

§ 97-42. Deduction of payments.

Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment. Unless otherwise provided by the plan, when payments are made to an injured employee pursuant to an employer-funded salary continuation, disability or other income replacement plan, the deduction shall be calculated from payments made by the employer in each week during which compensation was due and payable, without any carry-forward or carry-back of credit for amounts paid in excess of the compensation rate in any given week. (1929, c. 120, s. 42; 1993 (Reg. Sess., 1994), c. 679, s. 3.7.)

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The laudable purpose of this section is to encourage voluntary payments to workers while their claims to compensation are being disputed and they are receiving no wages. Evans v. AT & T Technologies, 103 N.C. App. 45, 404 S.E.2d 183, rev'd on other grounds, 332 N.C. 78, 418 S.E.2d 503 (1992).

The only authority for allowing an employer in this state any credit against workers' compensation payments due an injured employee is this section. Evans v. AT & T Technologies, 103 N.C. App. 45, 404 S.E.2d 183, rev'd on other grounds, 332 N.C. 78, 418 S.E.2d 503 (1992).

Scope of Commission's Authority. — The Industrial Commission only has the authority to disallow credit for the employer's workers' compensation payments to an employee so long as the payments did not exceed the amount determined by statute or by the Commission to compensate the employee for his injuries. Tucker v. Workable Co., 129 N.C. App. 695, 501 S.E.2d 360 (1998).

A deduction from the amount of the award to be paid is not required to be granted. The decision of whether to grant a credit is within the sound discretion of the Industrial Commission. Such decision to grant or deny the credit will not be disturbed in the absence of an abuse of discretion. Moretz v. Richards & Assocs., 74 N.C. App. 72, 327 S.E.2d 290 (1985), modified on other grounds, 316 N.C. 539, 342 S.E.2d 844 (1986).

This section permits, but does not require, the Commission to deduct from a compensation award to an injured employee any payments made by the employer before the employee's right to compensation under the terms of the Workers' Compensation Act was established. Johnson v. IBM, Inc., 97 N.C. App. 493, 389 S.E.2d 121, cert. denied, 327 N.C. 429, 395 S.E.2d 679 (1990).

Deduction Granted in Case of Indefinite Period of Benefits. — Where the employer and insurer paid workers' compensation benefits to the employee while he was incarcerated to which the employee was not entitled, the employer and insurer were entitled to credit under G.S. 97-42; because the award was for an indefinite period, the employer and insurer were permitted to reduce the amount of the employee's payments, as shortening the period of benefits was not possible because the employee's benefits were to terminate pursuant to G.S. 97-30, G.S. 97-31 when the employee returned to work and there would be no opportunity to shorten the period of disability. Easton v. J.D. Denson Mowing, 173 N.C. App. 439, 620 S.E.2d 201, 2005 N.C. App. LEXIS 2014 (2005).

Less Than 100% Credit Was Within Commission's Authority. — Where the Commission's award allowed the defendant credit for payments that they had already made through their private insurer less the plaintiff's reasonable attorney's fees calculated and based upon the amount of the entire worker's compensation award, the award was authorized by the statute since all credit given by the Commission in these circumstances is "subject to the approval" of the Industrial Commission. Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

The Industrial Commission acted within its discretion, pursuant to this section, in reducing defendants' credit for payments made under a disability insurance policy fully funded by defendants by 25% to provide plaintiff's counsel additional fees, although the record on appeal contained no copy of a fee award filed with the Commission as required by G.S. 97-90(c). Cole v. Triangle Brick, 136 N.C. App. 401, 524 S.E.2d 79, 2000 N.C. App. LEXIS 11 (2000).

Criteria Is Whether Payments Were "Due and Payable". — The analysis of whether an employer is entitled to credit under this section is limited to a determination of whether the payments for which the employer seeks credit were "due and payable" when made. Estes v. North Carolina State Univ., 89 N.C. App. 55, 365 S.E.2d 160 (1988).

Due and Payable Benefits Are Not Deductible. — This section expressly provides that payments made by the employer which were "due and payable" when made are not deductible. Once the employer has accepted an injury as compensable, benefits are "due and payable." Moretz v. Richards & Assocs., 316 N.C. 539, 342 S.E.2d 844 (1986).

If payments are "due and payable when made" they may not be deducted from the amount to be paid employee as compensation; if they are not then due and payable the Commission has authority in its discretion to deduct them. Johnson v. IBM, Inc., 97 N.C. App. 493, 389 S.E.2d 121, cert. denied, 327 N.C. 429, 395 S.E.2d 679 (1990).

When an employer paid retirement disability benefits to an employee to whom it was paying workers' compensation, these benefits were "due and payable" to the employee, so the employer was not entitled to a credit under G.S. 97-42, but might be entitled to an offset for them if they were found to have been paid pursuant to a wage-replacement program equivalent to workers' compensation, and the employee was not separately entitled to them above his workers' compensation payments. Rice v. City of Winston-Salem, 154 N.C. App. 680, 572 S.E.2d 794, 2002 N.C. App. LEXIS 1517 (2002).

As a carrier and employer accepted the employee's claim as compensable and the employer initiated payment of partial benefits, the payments were considered "due and payable" under G.S. 97-42, and the carrier was not entitled to a credit for them. Smith v. First Choice Servs., 158 N.C. App. 244, 580 S.E.2d 743, 2003 N.C. App. LEXIS 1039 (2003), cert. denied, 357 N.C. 461, 586 S.E.2d 99 (2003).

Payments a professional football team made to an injured football player were payments that were due and payable prior to the player's injury, so the North Carolina Industrial Commission proprerly denied the team a credit under G.S. 97-42 for those payments against a workers' compensation award; however, because the Commission failed to make findings regarding whether one payment was due and payable when the injury occurred and because one of the payments was from an employee funded benefit plan, remand for findings on those payments was necessary. Smith v. Richardson Sports Ltd. Partners, 168 N.C. App. 410, 608 S.E.2d 342, 2005 N.C. App. LEXIS 348 (2005).

Employer and an insurance company could not seek a credit for a $47,059 payment to a professional football player because it was due and payable when made; the North Carolina Industrial Commission's conclusion that the payment reflected the player's earnings for playing in a football game the day before was supported by competent evidence, as the players were paid after the weekly football game. Smith v. Richardson Sports Ltd. Partners, 172 N.C. App. 200, 616 S.E.2d 245, 2005 N.C. App. LEXIS 1440 (2005), cert. denied, 360 N.C. 536, 633 S.E.2d 824 (2006), cert. dismissed, 360 N.C. 536, 633 S.E.2d 824 (2006).

Employer and an insurance company could not seek a credit for a $1 million roster bonus payment to a professional football player because it was due and payable when made, and the general manager's testimony indicated that the roster bonus was neither paid as a result of the player's workers' compensation claim nor was it a part of a wage replacement plan for employees unable to work; rather, the player was contractually entitled to the bonus because the employer decided to place him on the roster, and the North Carolina Industrial Commission's finding that the bonus should be classified as earnings was supported by competent evidence. Smith v. Richardson Sports Ltd. Partners, 172 N.C. App. 200, 616 S.E.2d 245, 2005 N.C. App. LEXIS 1440 (2005), cert. denied, 360 N.C. 536, 633 S.E.2d 824 (2006), cert. dismissed, 360 N.C. 536, 633 S.E.2d 824 (2006).

Employer and an insurance company could not seek a credit for payments made to a professional football player for mini-camps, workouts, and an appearance fee, as the payments were due and payable when made, and according to the player's contract, he was obligated to participate in mini-camps, workouts, and to make appearances on behalf of the team; as the player's payment history indicated, the payments were for participating in these activities, and the North Carolina Commission's conclusion that these were post-injury earnings was supported by competent evidence. Smith v. Richardson Sports Ltd. Partners, 172 N.C. App. 200, 616 S.E.2d 245, 2005 N.C. App. LEXIS 1440 (2005), cert. denied, 360 N.C. 536, 633 S.E.2d 824 (2006), cert. dismissed, 360 N.C. 536, 633 S.E.2d 824 (2006).

Employer and an insurance company could not seek a credit for a $4.5 million signing bonus payment to a professional football player because it was due and payable when made; the player became entitled to the signing bonus upon signing his contract, which occurred preinjury. Smith v. Richardson Sports Ltd. Partners, 172 N.C. App. 200, 616 S.E.2d 245, 2005 N.C. App. LEXIS 1440 (2005), cert. denied, 360 N.C. 536, 633 S.E.2d 824 (2006), cert. dismissed, 360 N.C. 536, 633 S.E.2d 824 (2006).

While the North Carolina Industrial Commission correctly determined that an employer was not entitled to credit for bonus and appearance fees paid to a professional athlete who suffered an injury during a game, as these payments were due and payable under the employee's contract when made; furthermore, the Commission correctly found that the employee was entitled to 300 weeks of compensation. However, remand was necessary as to other payments made by the employer to determine whether the employer was entitled to credit regarding injury protection payments that were paid out of an employee-funded plan and injured reserve pay paid to the employee one year. Smith v. Richardson Sports Ltd., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 908 (May 3, 2005).

Employer Should Not Be Denied Full Credit for Payments Under Private Benefit Plan. — An employer who has paid an employee wage-replacement benefits under a private benefit plan at the time of that employee's greatest need should not be penalized by being denied full credit for the amount paid as against the amount which was subsequently determined to be due the employee under the Workers' Compensation Act; to do so would inevitably cause employers to be less generous, and the result would be that the employee would lose his or her full salary at the very moment he or she needs it most. Foster v. Western-Electric Co., 320 N.C. 113, 357 S.E.2d 670 (1987), expressing no opinion as to whether payments made to a claimant under a plan to which the claimant contributed would be within the purview of this section.

In order for an employer to receive full credit for voluntary payments made to an injured employee, this section must be interpreted to mean that the amount of the deduction to which an employer, subject to the approval of the Commission, is entitled is the amount of the gross before-tax payments. Evans v. AT & T Technologies, Inc., 331 N.C. 78, 418 S.E.2d 503 (1992).

The ordinary meaning of the language of this section allows an employer, subject to Commission approval, to receive a full dollar-for-dollar credit for all such payments. Evans v. AT & T Technologies, Inc., 331 N.C. 78, 418 S.E.2d 503 (1992).

Payments a professional football team made to an injured football player were payments that were due and payable prior to the player's injury, so the North Carolina Industrial Commission proprerly denied the team a credit under G.S. 97-42 for those payments against a workers' compensation award; however, because the Commission failed to make findings regarding whether one payment was due and payable when the injury occurred and because one of the payments was from an employee funded benefit plan, remand for findings on those payments was necessary. Smith v. Richardson Sports Ltd. Partners, 168 N.C. App. 410, 608 S.E.2d 342, 2005 N.C. App. LEXIS 348 (2005).

The defendant employer was entitled to a credit for disability benefits where the disability compensation plan was entirely funded by the employer and no evidence indicated that the employee contributed to it. Peagler v. Tyson Foods, Inc., 138 N.C. App. 593V, 532 S.E.2d 207, 2000 N.C. App. LEXIS 786 (2000).

There was no basis for denying first employer a credit for benefits overpaid to an employee where the employee's disability was attributable to the exacerbation of his occupational disease, first contracted while working for the first employer, while working for a second employer. Shockley v. Cairn Studios Ltd., 149 N.C. App. 961, 563 S.E.2d 207, 2002 N.C. App. LEXIS 363 (2002), cert. dismissed, 356 N.C. 678, 577 S.E.2d 887 (2003), cert. denied, 356 N.C. 678, 577 S.E.2d 888 (2003).

Limited Time Credit Was Not Abuse of Discretion. — North Carolina Industrial Commission did not abuse its discretion by awarding a time credit of one week rather than a dollar-for-dollar credit for payments made to a former professional football player by his employer and its insurance carrier after the player was injured in the next to last game of the season because the player returned to professional football for one week in the next season and exhibited earning capacity comparable to his average weekly wage. Further, dollar-for-dollar credits were precluded by North Carolina law as a payment that the player received for the last game of the season that he missed was made by the player's union under the terms of a collective bargaining agreement, and the agreement could not relieve the employer, in whole or in part, from its obligation to pay the player workers' compensation. Swift v. Richardson Sports, Inc., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 725 (Apr. 5, 2005).

Employer was entitled to a dollar-for-dollar credit for amounts paid after football player's injury under the terms of the NFL Collective Bargaining Agreement; the football player's severance pay was earned and was not subject to a credit. Swift v. Richardson Sports, Ltd., 173 N.C. App. 134, 620 S.E.2d 533, 2005 N.C. App. LEXIS 1898 (2005).

Evidence Insufficient to Sustain Commission's Decision That Municipal Employer Was Entitled to a Credit. — Although evidence in the record supported the North Carolina Industrial Commission's judgment that an employee's cancer was accelerated by injuries the employee sustained in a work-related accident, and the appellate court affirmed the Commission's decision to award temporary total disability benefits to the employee, the court remanded the case to the Commission for further proceedings because the record did not explain how the Commission determined the employee's average weekly wage, a determination that was central to its award of benefits, and because there was conflicting evidence in the record which raised questions about the Commission's findings that a city which employed the employee was entitled to a credit for long-term disability benefits it paid the employee, and that the employee was not entitled to an award of attorney's fees. Cox v. City of Winston-Salem, 157 N.C. App. 228, 578 S.E.2d 669, 2003 N.C. App. LEXIS 535 (2003).

Credits for Payments Sent to Wrong Party. — Employer, who failed to send every fourth award payment to injured employee's counsel, as ordered by the North Carolina Industrial Commission, was not entitled to receive credit for payments sent instead to the injured employee. Thomas v. B.F. Goodrich, 144 N.C. App. 312, 550 S.E.2d 193, 2001 N.C. App. LEXIS 431 (2001).

Payments made by employer's medical disability plan before it was determined that employee, who had previously received compensation for permanent partial disability, had become totally disabled, were not due and payable under the Workers' Compensation Act "when made" and their deduction from the compensation awarded the employee for total permanent disability was authorized by this section. Johnson v. IBM, Inc., 97 N.C. App. 493, 389 S.E.2d 121, cert. denied, 327 N.C. 429, 395 S.E.2d 679 (1990).

An employer's entitlement to a credit under this section is governed in the first instance by the determination of whether the payments for which the employer seeks credit were due and payable when made. Estes v. North Carolina State Univ., 102 N.C. App. 52, 401 S.E.2d 384 (1991).

Where defendant had not accepted claimant's injury as compensable under workers' compensation at the time the payments were made, nor had there been a determination of compensability by the Industrial Commission, the employer should be awarded a credit for these payments under this section. Lowe v. BE & K Constr. Co., 121 N.C. App. 570, 468 S.E.2d 396 (1996).

Employer Entitled to Dollar-for-Dollar Credit. — Decision to award a dollar-for-dollar credit of $35,294 to an employer for an injury grievance settlement received by the employee, a professional football player, was upheld on appeal as supported by competent evidence because the player's contract modified the provisions of G.S. 97-42 and allowed for such a credit and plainly stated that the credit shall be the amount of the payment made under the contract; because the player's plan provided for a credit based upon the payment itself, pursuant to G.S. 97-42, the credit was not based upon the number of weeks for which the player was paid, but rather the employer was entitled to a credit for the $35,294 settlement paid to the player on a dollar-for-dollar basis. Renfro v. Richardson Sports, Ltd. Partners, 172 N.C. App. 176, 616 S.E.2d 317, 2005 N.C. App. LEXIS 1435 (2005), cert. denied, 360 N.C. 535, 633 S.E.2d 821 (2006), cert. dismissed, 360 N.C. 535, 633 S.E.2d 821 (2006).

Carrier Not Entitled to Credit. — G.S. 97-42 does not provide for the insurance carrier to receive a credit for payments made by the employer. Smith v. First Choice Servs., 158 N.C. App. 244, 580 S.E.2d 743, 2003 N.C. App. LEXIS 1039 (2003), cert. denied, 357 N.C. 461, 586 S.E.2d 99 (2003).

Credit Denied to a Self-Insured City for Disability Retirement Payments. — North Carolina Industrial Commission's decision to deny a city credit for disability retirement payments that were made to an injured city employee from a public employee benefits program was not an abuse of discretion under G.S. 97-42 because the city and the employee jointly contributed to the plan, and competent evidence, in the form of testimony as to the funding of the disability benefits plan, existed to support the Commission's findings of fact and conclusions of law. Cox v. City of Winston-Salem, 171 N.C. App. 112, 613 S.E.2d 746, 2005 N.C. App. LEXIS 1161 (2005).

Employer was not entitled to use accumulated sick and vacation leave to offset its obligations as determined by the Industrial Commission. Under G.S. 97-6 and 97-7, employers, including the State, are prohibited from providing benefits in lieu of paying workers' compensation. Estes v. North Carolina State Univ., 102 N.C. App. 52, 401 S.E.2d 384 (1991).

Where injured employees had the option of taking accumulated sick and vacation leave, or any portion of either, and then go on workers' compensation leave and begin drawing workers' compensation, this option did not operate as a wage-replacement program tantamount to workers' compensation. The Industrial Commission erred in concluding as a matter of law that the payments were not due and payable under the Workers' Compensation Act when paid for purposes of a setoff or credit pursuant to this section. Estes v. North Carolina State Univ., 102 N.C. App. 52, 401 S.E.2d 384 (1991).

Severance Payments Made to Terminated Employee Not Deductible. — North Carolina Industrial Commission's decision to credit an employer for severance payments made to a terminated employee was reversed and remanded, because: (1) the employee's severance pay was an earned benefit of a contractual nature, which was due and payable when received; and (2) the employee's severance pay was not compensation for his disability. Meares v. Dana Corporation/Wix Div., 172 N.C. App. 291, 615 S.E.2d 912, 2005 N.C. App. LEXIS 1433 (2005).

Defendants Held Not Entitled to Deduction. — Where temporary total disability payments for stress-induced depression resulting from injury were to begin approximately six months after the final payment on the scheduled award for permanent partial disability, the defendants would not be given credit on award for temporary total disability for compensation previously awarded under G.S. 97-31(15). Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1 (1986), aff'd in part, rev'd in part, 319 N.C. 167, 353 S.E.2d 392 (1987).

Where employer and carrier accepted plaintiff's injury as compensable, and initiated the payment of benefits, those payments were due and payable and were not deductible under the provisions of this section, so long as the payments did not exceed the amount determined by statute or by the Commission to compensate plaintiff for his injuries. Moretz v. Richards & Assocs., 316 N.C. 539, 342 S.E.2d 844 (1986).

Defendant insurer was not entitled to a credit under this section, where the deputy commissioner's opinion required another defendant insurer to pay "at least fifty percent of the compensation due" and rendered such payment "due and payable" before the $3,500.00 was paid to plaintiff. Royce v. Rushco Food Stores, Inc., 139 N.C. App. 322, 533 S.E.2d 284, 2000 N.C. App. LEXIS 898 (2000).

Employer was not entitled to a credit against the workers' compensation that employer was obligated to pay an employee for royalty income employee received from another source. Jenkins v. Piedmont Aviation Servs., 147 N.C. App. 419, 557 S.E.2d 104, 2001 N.C. App. LEXIS 1192 (2001).

"Fringe Benefit" Rationale No Longer Appropriate. — The "fringe benefit" rationale followed by the court in Ashe v. Barnes, 255 N.C. 310, 121 S.E.2d 549 (1961), in determining the issue of credit under this section is no longer the appropriate basis for decision in view of Foster v. Western-Electric Co., 320 N.C. 113, 357 S.E.2d 670 (1987). Estes v. North Carolina State Univ., 89 N.C. App. 55, 365 S.E.2d 160 (1988).

Credit Held "Week-by-Week". — In paying plaintiff employee workers' compensation awarded, the credit due to the defendant employer for the payments it made to plaintiff while she was unable to work and her right to workers' compensation was being contested was a "week-by-week" credit, not "dollar-for-dollar." Evans v. AT & T Technologies, 103 N.C. App. 45, 404 S.E.2d 183, rev'd, 332 N.C. 78, 418 S.E.2d 503 (1992).

Credits against worker's compensation that a professional football team was entitled to for payments the team made to one of its professional football players after the player sustained a football related injury were properly ordered on a time basis by reducing the number of weeks of compensation the player received rather than a dollar-for-dollar reduction of the weekly amount the player would receive in workers' compensation. Smith v. Richardson Sports Ltd. Partners, 168 N.C. App. 410, 608 S.E.2d 342, 2005 N.C. App. LEXIS 348 (2005).

Offsetting Sickness and Disability Plan Payments Against Compensation Authorized. — Since the wage payments under employee Sickness and Disability Plan belonged to claimant, using them to offset employer's obligations to pay her compensation for other weeks is not authorized by G.S. 97-42 and would be confiscatory if it was. But though the wage payments were hers, offsetting them against compensation awarded her for the same weeks is authorized for two reasons: First, no compensation is due claimant for the weeks that her wages were paid because disability under the Workers' Compensation Act is based upon decreased earnings, and she had sustained no wage loss; and second, the claimant cannot collect workers' compensation for the weeks that her wages were paid because of the policy against employees receiving duplicating payments at the employers' expense. Evans v. AT & T Technologies, 103 N.C. App. 45, 404 S.E.2d 183, rev'd, 332 N.C. 78, 418 S.E.2d 503 (1992).

Failure to Determine the Amount of the Credit When Sufficient Evidence to do so Was Presented. — North Carolina Industrial

Commission erred in failing to determine the amount of credit owed by a worker to a self-insured employer and administering agency pursuant to G.S. 97-42, as there was sufficient evidence to determine the amount owed, and the worker faced a potential double liability for the credit and a subrogation requirement under a disability policy. Moore v. Fed. Express, 162 N.C. App. 292, 590 S.E.2d 461, 2004 N.C. App. LEXIS 127 (2004).

Applied in Loflin v. Loflin, 13 N.C. App. 574, 186 S.E.2d 660 (1972); Davis v. Weyerhaeuser Co., 96 N.C. App. 584, 386 S.E.2d 740 (1989); Palmer v. Jackson, 157 N.C. App. 625, 579 S.E.2d 901, 2003 N.C. App. LEXIS 930 (2003).

Cited in Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983); Watson v. Winston-Salem Transit Auth., 92 N.C. App. 473, 374 S.E.2d 483 (1988); Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996); Gordon v. City of Durham, 153 N.C. App. 782, 571 S.E.2d 48, 2002 N.C. App. LEXIS 1257 (2002).

§ 97-42.1. Credit for unemployment benefits.

If an injured employee has received unemployment benefits under the Employment Security Law for any week with respect to which he is entitled to workers' compensation benefits for temporary total or permanent and total disability, the employment benefits paid for such weeks may be deducted from the award to be paid as compensation. If an injured employee has received unemployment benefits for any week with respect to which he is entitled to workers' compensation benefits for partial disability as provided in G.S. 97-30, the unemployment benefits paid for such weeks may be deducted from the award to be paid only to the extent that the sum of the unemployment benefits and workers' compensation payable for such week exceeds two-thirds of the injured employee's average weekly wages as determined by the Commission in accordance with G.S. 97-2(5). Benefits payable under G.S. 97-31 for permanent partial disability or other permanent injury shall not be subject to reduction because of the receipt of unemployment benefits. (1985, c. 616, s. 1.)

§ 97-43. Commission may prescribe monthly or quarterly payments.

The Industrial Commission, upon application of either party, may, in its discretion, having regard to the welfare of the employee and the convenience of the employer, authorize compensation to be paid monthly or quarterly instead of weekly. (1929, c. 120, s. 43.)

§ 97-44. Lump sums.

Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, in unusual cases, where the Industrial Commission deems it to be to the best interest of the employee or his dependents, or where it will prevent undue hardships on the employer or his insurance carrier, without prejudicing the interests of the employee or his dependents, be redeemed, in whole or in part, by the payment by the employer of a lump sum which shall be fixed by the Commission, but in no case to exceed the uncommuted value of the future installments which may be due under this Article. The Commission, however, in its discretion, may at any time in the case of a minor who has received permanently disabling injuries either partial or total provide that he be compensated, in whole or in part, by the payment of a lump sum, the amount of which shall be fixed by the Commission, but in no case to exceed the uncommuted value of the future installments which may be due under this Article. (1929, c. 120, s. 44; 1963, c. 450, s. 4; 1975, c. 255.)

Legal Periodicals. — For discussion of this section, see 8 N.C.L. Rev. 427 (1930).

CASE NOTES

Lump Sum Payable Only in Unusual Cases. — The general statutory scheme for periodic payment of income benefits can be changed to a lump sum payment only in unusual cases and when the commissioner deems it to be in the best interest of the employee or his dependents. Harris v. Lee Paving Co., 47 N.C. App. 348, 267 S.E.2d 381, cert. denied, 301 N.C. 88, 273 S.E.2d 297 (1980).

The maximum amount of the lump sum under this section is not its commuted value or its commutable value but rather its uncommuted value. Harris v. Lee Paving Co., 47 N.C. App. 348, 267 S.E.2d 381, cert. denied, 301 N.C. 88, 273 S.E.2d 297 (1980).

Applied in Montgomery v. Bryant Supply Co., 91 N.C. App. 734, 373 S.E.2d 299 (1988).

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992).

§ 97-45. Reducing to judgment outstanding liability of insurance carriers withdrawing from State.

Upon the withdrawal of any insurance carrier from doing business in the State that has any outstanding liability under the Workers' Compensation Act, the Insurance Commissioner shall immediately notify the North Carolina Industrial Commission, and thereupon the said North Carolina Industrial Commission shall issue an award against said insurance carrier and commute the installments due the injured employee or employees, and immediately have said award docketed in the superior court of the county in which the claimant resides, and the said North Carolina Industrial Commission shall then cause suit to be brought on said judgment in the state of the residence of any such insurance carrier, and the proceeds from said judgment after deducting the cost, if any, of the proceeding, shall be turned over to the injured employee, or employees, taking from such employee, or employees, the proper receipt in satisfaction of his claim. (1933, c. 474; 1979, c. 714, s. 2.)

§ 97-46. Lump sum payments to trustee; receipt to discharge employer.

Whenever the Industrial Commission deems it expedient any lump sum, subject to the provisions of G.S. 97-44, shall be paid by the employer to some suitable person or corporation appointed by the superior court in the county wherein the accident occurred, as trustee, to administer the same for the benefit of the person entitled thereto, in the manner provided by the Commission. The receipt of such trustee for the amount as paid shall discharge the employer or anyone else who is liable therefor. (1929, c. 120, s. 45.)

§ 97-47. Change of condition; modification of award.

Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article, except that in cases in which only medical or other treatment bills are paid, no such review shall be made after 12 months from the date of the last payment of bills for medical or other treatment, paid pursuant to this Article. (1929, c. 120, s. 46; 1931, c. 274, s. 6; 1947, c. 823; 1973, c. 1060, s. 2.)

Legal Periodicals. — For note on the range of compensable consequences of a work-related injury, see 49 N.C.L. Rev. 583 (1971).

For survey of 1976 case law on workers' compensation, see 55 N.C.L. Rev. 1116 (1977).

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For note, "The Fairness Requirement for a Workers' Compensation Agreement — The Effect of Vernon v. Steven L. Mabe Builders," see 17 Campbell L. Rev. 521 (1995).

CASE NOTES

I. In General.
II. Change of Condition.
III. Time Limitations.

I. IN GENERAL.

This section cannot apply unless there has been a previous award of the Commission. Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953).

The Industrial Commission's authority under this statute is limited to review of prior awards, and the statute is inapplicable in instances where there has been no previous final award. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971). See also, Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960).

This section has no application except where it is made to appear that a previous award was made by the Industrial Commission. Where the record on appeal to the superior court from an award of the Industrial Commission does not disclose a previous award made to claimant, defendant's contention that the award appealed from cannot be sustained in the absence of a finding of change of condition is untenable. Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

The Industrial Commission's authority under this section is limited to the review of prior awards; thus the statute is inapplicable unless there has been a previous final award. Weaver v. Swedish Imports Maintenance, Inc., 319 N.C. 243, 354 S.E.2d 477 (1987).

The "award" referred to in this section, which the Industrial Commission may not review after two years from the date of the last payment of compensation thereunder, is a final award, and this section does not apply to an interlocutory award. Beard v. Blumenthal Jewish Home, 87 N.C. App. 58, 359 S.E.2d 261 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 918 (1988).

This section establishes conditions under which otherwise final disability evaluations can be reviewed and revised when changes occur; it does not establish either a procedure or a limitations period for processing unresolved claims for permanent disability. Beard v. Blumenthal Jewish Home, 87 N.C. App. 58, 359 S.E.2d 261 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 918 (1988).

And it does not apply if the Commission has no jurisdiction of the claim. Hart v. Thomasville Motors, Inc., 244 N.C. 84, 92 S.E.2d 673 (1956).

Continuing Jurisdiction. — It was the purpose of the General Assembly that the Industrial Commission should have a continuing jurisdiction of all proceedings begun before the Commission for compensation in accordance with its terms. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Implicit in the authority accorded the Commission to order additional compensation under this section and further medical treatment is the requirement that the supplemental compensation and future treatment be directly related to the original compensable injury. Peeler v. Piedmont Elastic, Inc., 132 N.C. App. 713, 514 S.E.2d 108 (1999).

Proceeding Is Pending Until All Disabilities Are Considered. — Until all of an injured employee's compensable injuries and disabilities have been considered and adjudicated by the Commission, the proceeding pends for the purpose of evaluation, absent laches or some statutory time limitation. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Absent Previous Award, Jurisdiction Is Retained by Commission. — In cases where there has been no previous final award, jurisdiction is retained by and remains in the Industrial Commission pending a termination of the case by final award, and no statute runs against a litigant while his case is pending in court. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

This section is inapplicable in cases in which there has been no previous final award. In such cases, jurisdiction remains in the Commission pending termination of the case by a final award. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1 (1986), aff'd in part, rev'd in part, 319 N.C. 167, 353 S.E.2d 392 (1987).

Section Not Applicable to Claims for Medical Expenses. — This section does not apply to an employee's right to claim medical payments under the Workers' Compensation Act. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

Nothing in the language of G.S. 97-25 implies that the "change of condition" requirement of this section applies to any request by an employee for the payment of his medical expenses by his employer. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

The Commission must concern itself with the claimant's level of disability as it exists prior to and at the time of hearing. If a change occurs in the future rendering plaintiff capable of earning some wages, the statute affords defendants a remedy. Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

The proper procedure to end, diminish or increase a compensation award previously issued is a motion to the Industrial Commission under this section. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1 (1986), aff'd in part, rev'd in part, 319 N.C. 167, 353 S.E.2d 392 (1987).

Where plaintiff's initial compensation award for temporary total disabilities was determined by agreement prior to the time plaintiff became fully aware of the extent of his injuries, and plaintiff's initial claim was closed upon the filing of Form 28B, the proper procedure for presenting plaintiff's claim for his alleged permanent disabilities was through the statutorily prescribed procedure for compensation for substantial change of condition. Chisholm v. Diamond Condominium Constr. Co., 83 N.C. App. 14, 348 S.E.2d 596 (1986), cert. denied, 319 N.C. 103, 353 S.E.2d 106 (1987).

Where the Industrial Commission established an administrative procedure which allowed and condoned the termination of compensation by an employer and the employer's insurance carrier by the mere filing of an Industrial Commission created form (Form 24) notifying the Commission and the employee that compensation was being terminated, the Commission exceeded its authority. Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

Power of Commission to Grant Rehearing. — The Industrial Commission has the power, in a proper case, and in accordance with its rules and regulations, to grant a rehearing of a proceeding pending before it, and in which it has made an award, on the ground of newly discovered evidence. Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970), cert. denied, 277 N.C. 726, 178 S.E.2d 831 (1971).

The Effect of Litigation of Earning Capacity on Review of Form 26 Agreement. — Where plaintiff's earning capacity was actually litigated and necessary to the outcome of his hearing under this section, the Industrial Commission was bound by that finding in determining if a Form 26 agreement was fair and just; therefore, its finding that the agreement was "improvidently approved" on the grounds that plaintiff had no earning capacity, thus qualifying him for benefits under G.S. 97-29, would be reversed. Lewis v. Craven Reg'l Med. Ctr., 134 N.C. App. 438, 518 S.E.2d 1 (1999).

The fact that evidence claimed as the basis of a motion to open a compensation award was not newly discovered and might have been offered at the original hearing in the exercise of due diligence and that counsel, through inadvertence, failed to present a ground upon which compensation might have been allowed did not prevent the Industrial Commission from granting such a motion. Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970), cert. denied, 277 N.C. 726, 178 S.E.2d 831 (1971).

The Commission has the power to order a rehearing on the basis of newly discovered evidence. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Reopening Award Where Change Would Necessitate Award in Different Category. — The fact that the change necessitates making an award in an entirely different category, as when an original award was one of temporary benefits for time loss and the award on reopening would be for total permanent disability, is no obstacle to reopening. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Discretion of Commission over Motion for Rehearing. — Ordinarily, a motion for further hearing on the grounds of introducing additional or newly discovered evidence rests in the sound discretion of the Industrial Commission, but this principle is not applicable where the Commission declines to consider such a motion under a misapprehension of applicable principles of law. Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970), cert. denied, 277 N.C. 726, 178 S.E.2d 831 (1971).

Improper Denial of Rehearing. — An employee's application for a rehearing on the ground that he has additional evidence to establish his claim of disability by silicosis is improperly dismissed by the Industrial Commission, where (1) the employee's application is timely made and (2) the Commission acted under a misapprehension of the law in denying the application. Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970), cert. denied, 277 N.C. 726, 178 S.E.2d 831 (1971).

Power to Set Aside Judgment. — The Industrial Commission has inherent power analogous to that conferred on courts by G.S. 1A-1, Rule 60(b)(6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a workers' compensation claim requires it. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Because the power to set aside a former judgment is vital to the proper functioning of the judiciary, the Legislature impliedly vested such power in the Commission in conjunction with the judicial power which the Legislature granted it to administer the Workers' Compensation Act. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

The Industrial Commission possesses such judicial power as is necessary to administer the Workers' Compensation Act. The Commission's judicial power includes the power to set aside a former judgment on the grounds of mutual mistake, misrepresentation, or fraud. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

As to application seeking modification of settlement agreement, see Morgan v. Norwood, 211 N.C. 600, 191 S.E. 345 (1937).

Agreement to pay compensation, when approved by the Commission, is the equivalent of an award. White v. Shoup Boat Corp., 261 N.C. 495, 135 S.E.2d 216 (1964); Gantt v. Hickory Motor Sales, Inc., 8 N.C. App. 559, 174 S.E.2d 624 (1970); Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130, rev'd on other grounds, 279 N.C. 132, 181 S.E.2d 588 (1971).

A validly executed Industrial Commission Form 21 agreement ("Agreement for Compensation for Disability") constitutes an "award" under the North Carolina Workers' Compensation Act. Apple v. Guilford County, 84 N.C. App. 679, 353 S.E.2d 641, rev'd on other grounds, 321 N.C. 98, 361 S.E.2d 588 (1987).

A closing receipt purports to be a final settlement and indicates that no further compensation will be paid unless a request for a hearing for a change of condition is timely made. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Award Retaining Jurisdiction in Commission for Future Adjustments. — Claimant, following a back injury, returned to the same employer and was paid the same wages as before his injury although he was doing lighter work. The award of the Commission found as a fact that claimant was being paid wages "in lieu of compensation" and retained jurisdiction for 300 weeks from the date of injury so that future adjustments might be made in compensation payable should employee suffer any wage loss due to his injury within that period. The Supreme Court affirmed this action, saying that the Commission did not exceed its authority in thus retaining jurisdiction to protect the employee against imposition by the employer. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

There is nothing in the act that contemplates or authorizes an anticipatory finding by the Commission that a physical impairment may develop into a compensable disability. Neither does the act vest in the Commission the power to retain jurisdiction of a claim, after compensation has been awarded, merely because some physical impairment suffered by the claimant may, at some time in the future, cause a loss of wages. The Commission is concerned with conditions existing prior to and at the time of the hearing. If such conditions change in the future, to the detriment of the claimant, this section affords the claimant a remedy and fixes the time within which he must seek it. Dail v. Kellex Corp., 233 N.C. 446, 64 S.E.2d 438 (1951).

Claimant suffered multiple injuries in a wreck. After hearing, the Commission found as a fact that he had suffered 20 percent permanent partial disability. However, it also found that he was suffering no wage loss as a result of injury at the time of hearing. It did not appear that he was being paid wages in lieu of compensation. On the further finding that the physical impairment might cause loss of wages in the future, the Commission attempted to retain jurisdiction during 300 weeks from the date of injury. This was held to be error by the Supreme Court. Dail v. Kellex Corp., 233 N.C. 446, 64 S.E.2d 438 (1951).

A change of theory in the application for review in the superior court from that pursued before the hearing commissioner and the full commission is not permissible. McGinnis v. Old Fort Finishing Plant, 253 N.C. 493, 117 S.E.2d 490 (1960).

Failure to Appeal from Adverse Finding Bars Claim for Change of Condition. — A plaintiff who failed to appeal from the Industrial Commission's finding that there was no causal relation between the immobility in his right leg and an accident arising out of his employment was barred from asserting a subsequent claim for change of condition with respect to the right leg. West v. J.P. Stevens Co., 12 N.C. App. 456, 183 S.E.2d 876 (1971).

Avenue of Review Where Appeal Not Taken. — Where the plaintiff did not perfect an appeal from the Industrial Commission's order denying her claim for workers' compensation based upon an accident which arose out of and in the course of her employment, she was not entitled to a hearing de novo, and the only avenue of review open to her was an application for review based on a change of condition pursuant to the provisions of this section. Smith v. Carolina Footware, Inc., 50 N.C. App. 460, 274 S.E.2d 386 (1981).

Review by Court of Appeals. — Conclusions of law, including whether there has been a change of condition pursuant to this section, are reviewable de novo by the Court of Appeals.

Grantham v. R.G. Barry Corp., 127 N.C. App. 529, 491 S.E.2d 678 (1997), cert. denied, 347 N.C. 671, 500 S.E.2d 86 (1998).

Applied in Harris v. Asheville Contracting Co., 240 N.C. 715, 83 S.E.2d 802 (1954); Campbell v. Superior Yarn Mills, Inc., 265 N.C. 384, 144 S.E.2d 149 (1965); Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968); Tucker v. FCX, Inc., 36 N.C. App. 438, 245 S.E.2d 77 (1978); McLean v. Roadway Express, Inc., 56 N.C. App. 451, 289 S.E.2d 58 (1982); Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983); Burrow v. Hanes Hosiery, Inc., 66 N.C. App. 418, 311 S.E.2d 30 (1984); Hill v. Hanes Corp., 102 N.C. App. 46, 401 S.E.2d 768 (1991); Viergegge v. North Carolina State Univ., 105 N.C. App. 633, 414 S.E.2d 771 (1992); Jones v.Candler Mobile Village, 118 N.C. App. 719, 457 S.E.2d 315 (1995).

Cited in Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994); Russell v. Western Oil Co., 206 N.C. 341, 174 S.E. 101 (1934); Butts v. Montague Bros., 208 N.C. 186, 179 S.E. 799 (1935); Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1948); Green v. Briley, 242 N.C. 196, 87 S.E.2d 213 (1955); Gay v. Northampton County Schools, 5 N.C. App. 221, 168 S.E.2d 57 (1969); Hartsell v. Pickett Cotton Mills, 4 N.C. App. 67, 165 S.E.2d 792 (1969); Barham v. Kayser-Roth Hosiery Co., 15 N.C. App. 519, 190 S.E.2d 306 (1972); Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976); Schofield v. Great Atl. & Pac. Tea Co., 32 N.C. App. 508, 232 S.E.2d 874 (1977); Lucas v. Burlington Indus., 57 N.C. App. 366, 291 S.E.2d 360 (1982); Hogan v. Cone Mills Corp., 63 N.C. App. 439, 305 S.E.2d 213 (1983); Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986); Calloway v. Mills, 78 N.C. App. 702, 338 S.E.2d 548 (1986); Hill v. Hanes Corp., 319 N.C. 167, 353 S.E.2d 392 (1987); Nelson v. Food Lion, Inc., 92 N.C. App. 592, 375 S.E.2d 162 (1989); Wall v. North Carolina Dep't of Human Resources, 99 N.C. App. 330, 393 S.E.2d 109 (1990); Johnson v. IBM, Inc., 97 N.C. App. 493, 389 S.E.2d 121 (1990); Garrett v. Winfree, 120 N.C. App. 689, 463 S.E.2d 411 (1995); Lanning v. Fieldcrest-Cannon, Inc., 352 N.C. 98, 530 S.E.2d 54, 2000 N.C. LEXIS 434 (2000); Pomeroy v. Tanner Masonry, 151 N.C. App. 171, 565 S.E.2d 209, 2002 N.C. App. LEXIS 709 (2002); Renfro v. Richardson Sports, Ltd. Partners, 172 N.C. App. 176, 616 S.E.2d 317, 2005 N.C. App. LEXIS 1435 (2005), cert. denied, 360 N.C. 535, 633 S.E.2d 821 (2006), cert. dismissed, 360 N.C. 535, 633 S.E.2d 821 (2006); Smith v. Richardson Sports Ltd. Partners, 172 N.C. App. 200, 616 S.E.2d 245, 2005 N.C. App. LEXIS 1440 (2005), cert. denied, 360 N.C. 536, 633 S.E.2d 824 (2006), cert. dismissed, 360 N.C. 536, 633 S.E.2d 824 (2006).

II. CHANGE OF CONDITION.

The language of this section is clear. White v. Shoup Boat Corp., 261 N.C. 495, 135 S.E.2d 216 (1964).

And Provides Only Basis for Altering Final Award. — There is no basis for altering a final award of compensation, other than that provided by this section. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130, rev'd on other grounds, 279 N.C. 132, 181 S.E.2d 588 (1971).

Commission May Alter Compensation Only upon a "Change in Condition". — The Industrial Commission is given authority to review an award and to end, diminish or increase the compensation previously awarded only when there has been a "change in condition" of the claimant, as provided in this section. Murray v. Nebel Knitting Co., 214 N.C. 437, 199 S.E. 609 (1938).

When an award had been entered for total disability for a certain length of time, and for partial disability thereafter for a total of 30 weeks under G.S. 97-30, the Industrial Commission could not, upon a review of the award on claimant's application prior to the payment of the last installment of the award, increase the award of compensation to that allowed for total disability under G.S. 97-29, upon its finding that claimant was unable to earn any appreciable sum by his labor, when the Commission also found that at the time of the review of the award claimant's condition was unchanged and that he was at that time only 50 percent disabled. Murray v. Nebel Knitting Co., 214 N.C. 437, 199 S.E. 609 (1938).

North Carolina Industrial Commission erred by awarding a workers' compensation claimant additional disability compensation as the claimant did not prove the claimant had sustained a change of condition under G.S. 97-47, and the only way an award could be modified under G.S. 97-29 was if the claimant showed a change in condition. Ward v. Floors Perfect, — N.C. App. —, 645 S.E.2d 109, 2007 N.C. App. LEXIS 1179 (2007).

The Commission was not required to give weight to potentially damaging evidence elicited by the cross-examination of plaintiff's doctor regarding the etiology of fibromyalgia, nor did it fail to give proper weight to the opinion testimony of another doctor who indicated that plaintiff's current complaints were "not causally related to [her] prior compensable injury." Young v. Hickory Bus. Furn., 137 N.C. App. 51, 527 S.E.2d 344, 2000 N.C. App. LEXIS 263 (2000).

A change of condition under this section is a substantial change in physical capacity to earn wages, occurring after a final award of compensation, different from that existing when the award was made. Bailey v. Sears Roebuck & Co., 131 N.C. App. 649, 508 S.E.2d 831 (1998).

A change in physical capacity to earn wages alone is sufficient to support an award of additional compensation for change of condition. Dinkins v. Federal Paper Bd. Co., 120 N.C. App. 192, 461 S.E.2d 909 (1995).

The primary factor in determining if a change of condition has occurred is whether the employee's physical capacity to earn wages has been affected. Grantham v. R.G. Barry Corp., 127 N.C. App. 529, 491 S.E.2d 678 (1997), cert. denied, 347 N.C. 671, 500 S.E.2d 86 (1998).

A change in condition can consist of either a change in the claimant's physical condition that impacts his earning capacity, a change in the claimant's earning capacity even though claimant's physical condition remains unchanged, or a change in the degree of disability even though claimant's physical condition remains unchanged. Blair v. American Television & Communications Corp., 124 N.C. App. 420, 477 S.E.2d 190 (1996).

No "Change of Condition" Requirement for Claims for Medical Expenses. — The complete absence of an express or implied reference in G.S. 97-25 to any "change of condition" requirement, in addition to that statute's clear language permitting the Industrial Commission to review medical treatment an employee is receiving and order further treatment at any time if an employee requests such a review, indicated that the legislature did not intend for an injured employee to make any showing of a change in condition before his employer would be required to pay for further medical services or treatment needed as a result of his compensable injury. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

It was not the intent of the legislature to require an injured employee to make any showing of a change in condition before his employer would be required to pay further medical services or treatment needed as a result of his compensable injury. Poe v. Raleigh/Durham Airport Auth., 121 N.C. App. 117, 464 S.E.2d 689 (1995).

Compensation Does Not Include Medical Expenses. — Because "compensation" does not include the payment of medical expenses, this provision does not affect the Commission's grant or denial of an employee's request for payments of those expenses. The Commission's authority for requiring an employer to pay the medical expenses of an injured employee is established by the terms of G.S. 97-25. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

"Change of condition" refers to a substantial change, after a final award of compensation, of the injured employee's physical capacity to earn and, in some cases, of his earnings. Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969); Gaddy v. Kern, 32 N.C. App. 671, 233 S.E.2d 609 (1977); Edwards v. Smith & Sons, 49 N.C. App. 191, 270 S.E.2d 569 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 228 (1981); Haponski v. Constructor's Inc., 87 N.C. App. 95, 360 S.E.2d 109 (1987).

Workers' compensation claimant failed to prove that the claimant had suffered a change in condition under G.S. 97-47, as the claimant's physician stated that any incapacity for work the claimant had was of the same kind and character as the claimant had at the time of the original hearing; a continued incapacity of the same kind and character and for the same injury was not a change of condition. Ward v. Floors Perfect, — N.C. App. —, 645 S.E.2d 109, 2007 N.C. App. LEXIS 1179 (2007).

A change of condition means an actual change and not a mere change of opinion with respect to a preexisting condition. West v. J.P. Stevens Co., 12 N.C. App. 456, 183 S.E.2d 876 (1971); Gaddy v. Kern, 32 N.C. App. 671, 233 S.E.2d 609 (1977); Edwards v. Smith & Sons, 49 N.C. App. 191, 270 S.E.2d 569 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 228 (1981).

Change in Physical Capacity to Earn Wages Alone. — Where plaintiff was unable to find another job, due to his severe physical restrictions, coupled with his vocational and educational limits, because the record was rife with testimony that plaintiff suffered a compensable work-related injury which caused damage to the lumbar region of plaintiff's back, and Industrial Commission was able to determine that subsequent accident caused a "temporary flare-up" of plaintiff's pre-existing injury, it followed that plaintiff's change in wage earning capacity must have been a result of that same pre-existing injury; the Commission's findings and conclusions to the contrary were unsupported by the evidence and were therefore reversed. Poe v. Raleigh/Durham Airport Auth., 121 N.C. App. 117, 464 S.E.2d 689 (1995).

Change of condition refers to conditions different from those existent when the award was made, and a continued incapacity of the same kind and character and for the same injury is not a change of condition; the change must be actual, and not a mere change of opinion with respect to the pre-existing condition. Haponski v. Constructor's Inc., 87 N.C. App. 95, 360 S.E.2d 109 (1987).

In determining if a change of condition has occurred, entitling an employee to additional compensation under this section, the primary factor is a change in condition affecting the employee's physical capacity to earn wages. Lucas v. Bunn Mfg. Co., 90 N.C. App. 401, 368 S.E.2d 386 (1988).

Change of Physician's Opinion. — A mere change of doctor's opinion with respect to claimant's preexisting condition does not constitute a change of condition required by this section. Shuler v. Talon Div. of Textron, 30 N.C. App. 570, 227 S.E.2d 627 (1976), overruled on other grounds, Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

Physician's change of opinion with respect to the degree of permanent partial disability is not evidence of a change in condition within the meaning of this section if it is based solely on his reconsidering the contents of the patient's medical record as of the date of his first opinion. If, however, the physician examines his patient subsequent to the date of his first opinion and in the interim the patient's physical condition has deteriorated, then a change of opinion with respect to the degree of permanent partial disability is evidence of a change in condition for purposes of this section. McLean v. Roadway Express, Inc., 307 N.C. 99, 296 S.E.2d 456 (1982).

Change of condition not shown where the only evidence that plaintiff presented to show a change of condition was the change of one doctor's opinion. Allen v. Roberts Elec. Contractors, 143 N.C. App. 55, 546 S.E.2d 133, 2001 N.C. App. LEXIS 216 (2001).

Difference of Opinion. — Plaintiff did not experience a change of condition where one physician gave him a 15% disability rating, which he accepted, and a second physician gave him a 30% disability rating, where the second physician commented that the discrepancy was a difference of opinion. Crump v. Independence Nissan, 112 N.C. App. 587, 436 S.E.2d 589 (1993).

Proof Not Limited to Testimony of Original Physician. — Applicant need not limit proof of a change in condition to the testimony of a physician who had examined the plaintiff before and after the change in condition; such physician may be unavailable for testifying during a later hearing for greater benefits, and furthermore, the Commission, not the testifying physician, makes the crucial comparison of conditions. Styron v. Duke Univ. Hosp., 96 N.C. App. 356, 385 S.E.2d 519 (1989).

New Findings on Additional Evidence. — Under this section, the Commission is not bound by prior orders when considering an alleged change of condition; rather, the Commission may make new findings based on the additional evidence presented. Grantham v. R.G. Barry Corp., 127 N.C. App. 529, 491 S.E.2d 678 (1997), cert. denied, 347 N.C. 671, 500 S.E.2d 86 (1998).

A change in the degree of permanent disability is a change in condition. West v. J.P. Stevens Co., 12 N.C. App. 456, 183 S.E.2d 876 (1971); McLean v. Roadway Express, Inc., 307 N.C. 99, 296 S.E.2d 456 (1982).

Change from Partial to Total Disability. — When the Commission finds on one occasion that a person is permanently partially disabled and on a later occasion finds, based on additional evidence, that the person is totally disabled, this supports a finding of a change in condition. Harmon v. Public Serv. of N.C., Inc., 81 N.C. App. 482, 344 S.E.2d 285, cert. denied, 318 N.C. 415, 349 S.E.2d 595 (1986).

Changes of condition occurring during the healing period and prior to the time of maximum recovery and the permanent disability, if any, found to exist at the end of the period of healing are not changes of condition within the meaning of this section. Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960).

Change of Condition Attributed to Preexisting Condition. — Where a North Carolina Industrial Commission finding that plaintiff's worsening lumbar spine condition was directly related to his original back condition and not caused by a work related accident was supported by competent evidence, the Commission did not err in denying plaintiff's claim for additional compensation and medical treatment. Pittman v. Thomas & Howard, 122 N.C. App. 124, 468 S.E.2d 283 (1996).

The claimant failed to prove a change in condition, where the medical evidence supported the Industrial Commission's finding that her tightened Achilles tendon was caused by the progressive nature of her pre-existing cerebral palsy, rather than an aggravation of a work-related injury. Bailey v. Sears Roebuck & Co., 131 N.C. App. 649, 508 S.E.2d 831 (1998).

Increase in Earning Power as Change of Condition. — Claimant had been awarded compensation for general partial disability and thereafter had obtained a job paying practically as much as he made at the time of the accident. It was held that the claimant had undergone a change of condition, as the basis of disability under the act is loss of earning power. Smith v. Swift & Co., 212 N.C. 608, 194 S.E. 106 (1937).

Awareness of Continuing Medical Attention Not Inconsistent with Change of Condition. — A claim for permanent partial disability may involve a "change in condition" within the purview of this section, notwithstanding the fact that the Industrial Commission and the defendants were aware, at the time when the closing receipt was signed, that plaintiff was still undergoing treatment for his injury, because none of the parties realized that plaintiff's injury might result in permanent disability. Mere awareness of continuing medical attention is not inconsistent with the eventual prospect of complete recovery. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179

S.E.2d 130, rev'd on other grounds, 279 N.C. 132, 181 S.E.2d 588 (1971).

Where the harmful consequences of an injury are initially unknown when the amount of compensation to be paid is determined by agreement, but subsequently develops, the amount of compensation to which the employee is entitled can be redetermined within the statutory period for reopening. This is a "change in condition" as the term is used in this section. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971); Hand ex rel. Hand v. Fieldcrest Mills, Inc., 85 N.C. App. 372, 355 S.E.2d 141, cert. denied, 320 N.C. 792, 361 S.E.2d 76 (1987).

Inability to Work Not a Change of Condition Where Claimant Has Same Disability. — Where plaintiff had been receiving compensation for over 275 weeks for permanent partial disability and then offered, as a basis for claiming total disability, proof that he had not been able to do any work, it was held that there had been no change of condition, since the claimant had the same disability he had at the time of his first rating. Murray v. Nebel Knitting Co., 214 N.C. 437, 199 S.E. 609 (1938).

Depression Caused by Compensated Injury. — Where the claimant's doctor testified that the claimant's depression was caused by his compensated injury three years earlier and that this depression adversely affected his capacity to work, the claimant established a significant change of condition under this section, and she was entitled to compensation for total incapacity under G.S. 97-29. Haponski v. Constructor's Inc., 87 N.C. App. 95, 360 S.E.2d 109 (1987).

Evidence Insufficient to Show Depression Caused a Change in Circumstances. — While two doctors testified that plaintiff was depressed because of his injury, there was no evidence that this depression prevented plaintiff from working, which is essential in order to show a change of condition under this section. Jones v. Candler Mobile Village, 118 N.C. App. 719, 457 S.E.2d 315 (1995).

As to serious bodily disfigurement, see Tucker v. Lowdermilk, 233 N.C. 185, 63 S.E.2d 109 (1951).

Burden of Proof. — The burden is on the party seeking the modification to prove the existence of the new condition and that it is causally related to the injury that is the basis of the award the party seeks to modify. Blair v. American Television & Communications Corp., 124 N.C. App. 420, 477 S.E.2d 190 (1996).

The burden is on the party seeking the modification to prove the existence of the new condition and that it is causally related to the injury that is the basis of the award the party seeks to modify; an employee satisfies this burden by producing medical evidence showing he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment. Grantham v. R.G. Barry Corp., 127 N.C. App. 529, 491 S.E.2d 678 (1997), cert. denied, 347 N.C. 671, 500 S.E.2d 86 (1998).

Decision Reversed Where There Was No Notice to Employer. — North Carolina Industrial Commission's decision that a workers' compensation claimant had sustained a change in condition was reversed as an employer did not have notice that the Commission would address a change in condition or the claimant's inability to comply with a mandated work schedule as the Commission had concluded that evidence that the claimant's condition had worsened was not relevant. Branch v. Carolina Shoe Co., 172 N.C. App. 511, 616 S.E.2d 378, 2005 N.C. App. LEXIS 1802 (2005).

Heart Attacks. — Where claimant's condition changed from temporary total disability following a heart attack to total and permanent disability following a third heart attack, this was a change in condition within the meaning of this section. Weaver v. Swedish Imports Maintenance, Inc., 319 N.C. 243, 354 S.E.2d 477 (1987).

Spread of Blood Poisoning. — After payments for a time under an approved agreement, claimant applied on January 6, 1936, for compensation payable in a lump sum. This was granted, and paid on February 24, 1936. On January 5, 1937, he applied for a reopening of the case on the ground that blood poisoning had spread and created a change of condition and that he was then suffering from Buerger's disease due to the injury. The hearing commissioner's finding that there had been a change of condition and that the application was in time was affirmed. Knight v. Ford Body Co., 214 N.C. 7, 197 S.E. 563 (1938).

Formation of Scar Tissue Not Change in Condition. — Where plaintiff's condition remained essentially unchanged since his award, and the intensifying of plaintiff's physical problems was due to the scar tissue that infiltrated the area where the operation had been done, plaintiff's continued incapacity was therefore of the same kind and character as his incapacity at the time of the award, and was not a change of condition within the meaning of this section. Sawyer v. Ferebee & Son, 78 N.C. App. 212, 336 S.E.2d 643 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

Question of Fact and Question of Law. — Whether there has been a change of condition is a question of fact; whether the facts found amount to a change of condition is a question of law. West v. J.P. Stevens Co., 12 N.C. App. 456, 183 S.E.2d 876 (1971).

Conclusive Effect of Commissioner's Finding as to Change of Condition. — Where there is ample evidence to support a finding of a change in claimant's condition as contemplated by this section, and evidence which would support a contrary finding, the finding of the Industrial Commission from the conflicting evidence is conclusive. Knight v. Ford Body Co., 214 N.C. 7, 197 S.E. 563 (1938).

By this section the Industrial Commission is given authority to review an award and to increase the compensation theretofore awarded when there has been a change of condition of the claimant, and when the evidence supports a finding of change of claimant's condition, the finding of the Commission is conclusive. Baldwin v. Amazon Cotton Mills, 253 N.C. 740, 117 S.E.2d 718 (1961).

Where the Commission finds a fact in one hearing and evidence in a subsequent hearing shows that such finding was not correct, this will support a finding of a different fact which supports a finding of a change in condition. Hubbard v. Burlington Indus., 76 N.C. App. 313, 332 S.E.2d 746 (1985).

Physician who did not examine plaintiff from December 1980 until September 1981, the date of the original award, would be unable to testify as to plaintiff's amount of disability at the time of the award, and thus his testimony would be incompetent as to whether plaintiff had suffered a change of condition since that time. Sawyer v. Ferebee & Son, 78 N.C. App. 212, 336 S.E.2d 643 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

Commission's Finding Review able. — Whether the facts as found by the Commission amount to a change of condition pursuant to this section is a question of law and thus properly reviewable by the Supreme Court. Weaver v. Swedish Imports Maintenance, Inc., 319 N.C. 243, 354 S.E.2d 477 (1987).

Award Subject to Modification If Substantial Change Occurs. — Though an earlier agreement approved by the Industrial Commission became in effect a final award, since it determined the extent of plaintiff's permanent disability and left no other issue for determination, the award was nevertheless subject to modification if a substantial change of condition had occurred. Lucas v. Bunn Mfg. Co., 90 N.C. App. 401, 368 S.E.2d 386 (1988).

An injured employee's disability rating need not change in order for the court to conclude that she has suffered a substantial change of condition under this section where the evidence indicated that her physical condition changed so as to impact her wage-earning capacity and several doctors testified that her condition had substantially worsened. Young v. Hickory Bus. Furn., 137 N.C. App. 51, 527 S.E.2d 344, 2000 N.C. App. LEXIS 263 (2000).

Effect of Pain Suffered by Person Shown to be Substantial Change in Condition. — While the physical and symptomatic changes that employee suffered — increases in the intensity and frequency of pain and muscle spasms and a decrease in the movement of the back muscles — may not appear to be great when considered by themselves and measured in the abstract, their effect upon the plaintiff was very profound, because they changed her from a person capable of working and earning wages five days a week to one incapable of working at all or earning anything, and thus commission's finding that employee had undergone a substantial change in condition would be affirmed. Lucas v. Bunn Mfg. Co., 90 N.C. App. 401, 368 S.E.2d 386 (1988).

Modification of Award Upheld. — Plaintiff, who received temporary total disability benefits under G.S. 97-29 for a compensable heart attack in April, 1979, was properly awarded permanent partial disability under G.S. 97-30 on his application under this section for modification of the prior award following three additional heart attacks, where the Commission found that he had been permanently and totally disabled since June, 1981, partially as a result of his compensable heart attack in 1979. Weaver v. Swedish Imports Maintenance, Inc., 80 N.C. App. 432, 343 S.E.2d 205 (1986), modified, 319 N.C. 243, 354 S.E.2d 477 (1987).

Where evidence before Industrial Commission showed that the continuous pain stemming from plaintiff's injury eventually rendered her totally incapable of earning any wages, this evidence was sufficient to justify the commission's finding and conclusion that a substantial change in plaintiff's back condition had occurred since the initial award. East v. Baby Diaper Servs., Inc., 119 N.C. App. 147, 457 S.E.2d 737 (1995).

Evidence Held Sufficient. — Plaintiff met her burden of establishing a causal connection between the fibromyalgia and her compensable injury in terms of "reasonable medical probability." Young v. Hickory Bus. Furn., 137 N.C. App. 51, 527 S.E.2d 344, 2000 N.C. App. LEXIS 263 (2000).

Assertion of injured employee who had previously received an award of benefits and medical expenses that she was wholly incapable of employment was not sufficient evidence to meet her burden of showing a substantial change in condition at her rehearing because her opinion was contrary to the unanimous and unchanged medical evidence that she was capable of performing light duty work, and because her testimony about her physical restrictions was virtually identical to that of the prior hearing at which she had been awarded benefits and medical expenses. Shingleton v. Kobacker Group, 148 N.C. App. 667, 559 S.E.2d 277, 2002 N.C. App. LEXIS 52 (2002).

Record supported Industrial Commission's decision that the employee's current unemployment was not related to prior compensable injury where employee had returned to employment without restrictions after his injury and, subsequently, certified that he was able to work. Pomeroy v. Tanner Masonry, 151 N.C. App. 171, 565 S.E.2d 209, 2002 N.C. App. LEXIS 709 (2002).

Employer Precluded from Showing Change in Condition. — Where evidence of a change of condition, specifically, a substantial change in physical capacity to earn wages, occurring after a final award of compensation, predated the decision of the full Industrial Commission, the employee was precluded from introducing it at a subsequent hearing under G.S. 97-47. Hunt v. N.C. State Univ., 159 N.C. App. 111, 582 S.E.2d 380, 2003 N.C. App. LEXIS 1425 (2003).

Where the North Carolina Industrial Commission invalidated a Form 26 agreement because no medical documentation was submitted, it was not obliged under G.S. 97-91 to determine whether the claimant had undergone a G.S. 97-47 change of condition. Clawson v. Phil Cline Trucking, Inc., 168 N.C. App. 108, 606 S.E.2d 715, 2005 N.C. App. LEXIS 152 (2005).

III. TIME LIMITATIONS.

This section is a statute of limitations which requires an employee to apply for additional compensation on the grounds of a change in condition within two years of the date on which the last compensation was paid. Apple v. Guilford County, 321 N.C. 98, 361 S.E.2d 588 (1987).

This section merely fixes a date after which the claim is barred. Ammons v. Z.A. Sneeden's Sons, 257 N.C. 785, 127 S.E.2d 575 (1962).

The time limitation is not jurisdictional; this section merely provides a plea in bar which may be asserted by the employer. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130, rev'd on other grounds, 279 N.C. 132, 181 S.E.2d 588 (1971).

The two year limitation of this section is not jurisdictional; it merely provides a defense which the employer may assert. Pennington v. Flame Refractories, Inc., 53 N.C. App. 584, 281 S.E.2d 463 (1981); Cook v. Southern Bonded, Inc., 82 N.C. App. 277, 346 S.E.2d 168 (1986), cert. denied, Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

Time limit in this section has been construed to be a statute of limitations and not a condition precedent to jurisdiction. Weston v. Sears Roebuck & Co., 65 N.C. App. 309, 309 S.E.2d 273 (1983), cert. denied, 311 N.C. 407, 319 S.E.2d 281 (1984).

But Is a Technical Legal Defense. — The lapse of time, when properly pleaded, is a technical legal defense. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

The two-year time limitation in this section is a statute of limitations, a technical legal defense which may be asserted by the employer. Hand ex rel. Hand v. Fieldcrest Mills, Inc., 85 N.C. App. 372, 355 S.E.2d 141, cert. denied, 320 N.C. 792, 361 S.E.2d 76 (1987).

Which Is Waived If Not Pleaded. — Under general principles of civil procedure, the statute of limitations is a technical defense, and must be timely pleaded or it is deemed waived. There is no reason why this same rule should not apply to cases arising under this section. Gragg v. W.M. Harris & Son, 54 N.C. App. 607, 284 S.E.2d 183 (1981).

The time limitation in this section is a nonjurisdictional limit and a technical, legal defense. Sound public policy and the fair, effective disposition of contested workers' compensation claims require that if the time limitation of this section is to be available as a defense to claims based upon a change of condition, such defense must be asserted prior to hearing on the merits; if not so asserted, it must be deemed to have been waived. Gragg v. W.M. Harris & Son, 54 N.C. App. 607, 284 S.E.2d 183 (1981).

When Time for Filing Claim for Change of Condition Begins to Run. — For purposes of this section, the statutory one-year period for filing a claim for a change of condition begins at the time final payment is accepted, not when I.C. Form 28B is filed. Nonetheless, the Commission must be given the opportunity to determine whether a payment labeled "final" is or should be, in fact, the final payment. After this determination is made, the Commission accepts and approves a copy of Form 28B. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1 (1986), aff'd in part, rev'd in part, 319 N.C. 167, 353 S.E.2d 392 (1987).

Plaintiff employee's claim for additional compensation filed with the Commission on April 3, 1996, was untimely because the limitations period began to run when plaintiff received her last payment of compensation in early March, 1994, regardless of whether she received a copy of Form 28B. Hunter v. Perquimans County Bd. of Educ., 139 N.C. App. 352, 533 S.E.2d 562, 2000 N.C. App. LEXIS 902 (2000), cert. denied, 352 N.C. 674, 545 S.E.2d 424 (2000).

Estoppel to Rely on Delay. — Delay for more than one year (now two years) may be asserted as a plea in bar, but the party interposing and relying on it may be estopped to assert it by inequitable conduct. Ammons v. Z.A. Sneeden's Sons, 257 N.C. 785, 127 S.E.2d 575 (1962); Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985).

Equity will deny the right to assert the defense of lapse of time when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

When the request for a review of an award for changed conditions was not made until more than 12 months (now two years) after delivery and acceptance of a check in final payment, review of the award was barred, but the employer and his insurance carrier, by their conduct, might have been estopped to plead the lapse of time. Willis v. J.M. Davis Indus., Inc., 280 N.C. 709, 186 S.E.2d 913 (1972).

Tolling of the statute may result from the honest but entirely erroneous expression of opinion as to some significant legal fact. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Case Still Pending Under § 97-25. — Where employee's refusal to cooperate with employer's physician resulted in litigation, the plaintiff's claim for further compensation, filed 2 years after her last compensation check, was not time-barred because her claim was not a change-of-condition case under this section, but a case still pending under G.S. 97-25, and defendants' filing of a Form 28B had no effect on employee's right to further compensation. Scurlock v. Durham County Gen. Hosp., 136 N.C. App. 144, 523 S.E.2d 439, 1999 N.C. App. LEXIS 1299 (1999).

Purpose of the two year limitation is to protect the employer against claims too old to be successfully investigated and defended. Pennington v. Flame Refractories, Inc., 53 N.C. App. 584, 281 S.E.2d 463 (1981).

Running of Time Limitation. — The limitation of this section begins to run when the employee is notified and the last payment of compensation pursuant to an agreement is made, and after one year (now two years) forecloses plaintiff's claim if there was a "change in condition" as contemplated by this section, and if defendants are not estopped to invoke the limitation. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130, rev'd on other grounds, 279 N.C. 132, 181 S.E.2d 588 (1971).

If the previous award directed the payment of both compensation and medical expense, then the injured employee would have one year (now two years) from the last payment of compensation pursuant to the award in which to file a claim for further compensation upon an alleged change of condition. If the award directed the payment of medical bills only, then the injured employee would have one year from the date on which the last payment for medical treatment was made in which to file a claim for further compensation upon an alleged change of condition. Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953). See also, Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948).

When Time Limitation Begins to Run. — Under this section, the time limitation commences to run from the date on which employee received the last payment of compensation, not from the date on which he received a Form 28B. Cook v. Southern Bonded, Inc., 82 N.C. App. 277, 346 S.E.2d 168 (1986), cert. denied, 318 N.C. 692, 351 S.E.2d 741 (1987).

The time limitation of this section does not commence to run upon the dismissal of an appeal. Cook v. Southern Bonded, Inc., 82 N.C. App. 277, 346 S.E.2d 168 (1986), cert. denied, 318 N.C. 692, 351 S.E.2d 741 (1987).

Two-year time limit of this section begins to run upon receipt and acceptance of the last compensation check, not when the injury constituting a change of condition is first diagnosed. Hand ex rel. Hand v. Fieldcrest Mills, Inc., 85 N.C. App. 372, 355 S.E.2d 141, cert. denied, 320 N.C. 792, 361 S.E.2d 76 (1987).

Form 60 Payments Were not Final Payments Causing Statute of Limitations to Begin. — Employee's claim for additional indemnity compensation was not time barred under G.S. 97-47, as the Form 60 payments did not resolve the extent of the employee's permanent disability and thus, at most, were an interlocutory award resolving the issue of compensability, but not the nature and extent of any disability. Perez v. Am. Airlines/AMR Corp., 174 N.C. App. 128, 620 S.E.2d 288, 2005 N.C. App. LEXIS 2304 (2005).

The exception clause added at the end of this section by the 1947 amendment has no relation to the filing of original claims for compensation or the time within which such claims are to be filed. It relates exclusively to the time within which an employee may file a petition for a review of an award theretofore made, and the time limit within which the review may be had is tolled by the payment of medical bills, if at all, only when such payments are made under the mandate of an award duly entered by the Commission. Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953).

Effect of Plaintiff's Signature on Closing Receipt. — The limitation would have begun to run when notice of the last payment of compensation under an agreement was given plaintiff, with or without plaintiff's signature on a closing receipt. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130, rev'd on other grounds, 279 N.C. 132, 181 S.E.2d 588 (1971).

The execution, filing and forwarding to plaintiff of I.C. Form 28B, which by its terms gave notice to plaintiff that his case was closed and that he had one year (now two years) in which to notify the Commission, in writing, that he claimed further benefits, in fact closed plaintiff's case and terminated his claim for injuries arising out of his accident. Plaintiff's signature was not a necessary element for the proper execution of the form. Chisholm v. Diamond Condominium Constr. Co., 83 N.C. App. 14, 348 S.E.2d 596 (1986), cert. denied, 319 N.C. 103, 353 S.E.2d 106 (1987).

Date of Last Payment. — The last payment of compensation within the meaning of this section is the date the last check was delivered to and accepted by the employee, and not the date the check was paid by the drawee bank. Paris v. Carolina Bldrs. Corp., 244 N.C. 35, 92 S.E.2d 405 (1956); Baldwin v. Amazon Cotton Mills, 253 N.C. 740, 117 S.E.2d 718 (1961).

An employee cannot be allowed 12 months (now two years) in which to request a review from the last date on which the compensation would have been due had he not elected to accept payment of the award in a lump sum. Paris v. Carolina Bldrs. Corp., 244 N.C. 35, 92 S.E.2d 405 (1956).

The last payment of compensation within the meaning of this section is the date the last check was delivered to and accepted by the employee. Cook v. Southern Bonded, Inc., 82 N.C. App. 277, 346 S.E.2d 168 (1986), cert. denied, 318 N.C. 692, 351 S.E.2d 741 (1987).

Notice Must Be Given to Employee and to Commission. — The law requires only that the injured employee be given notice of the time limitation, and that the Industrial Commission be given notice that the final payment of compensation has been made. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130, rev'd on other grounds, 279 N.C. 132, 181 S.E.2d 588 (1971).

Failure to Furnish Form 28B Estops Employer from Pleading Lapse of Time. — Under the Commission's Rule XI(5), an employer must execute Form 28B and furnish a copy to a claimant with his last compensation check. A failure to furnish a copy will estop the employer from pleading the lapse of time in bar of a claim asserted for additional compensation on the grounds of a change in condition. Sides v. G.B. Weaver & Sons Elec. Co., 12 N.C. App. 312, 183 S.E.2d 308 (1971).

But Furnishing Copy Late Does Not Estop Employer from Asserting Limitation. — Failure of the employer or the insurance carrier to furnish a copy of Industrial Commission Form 28B to an employee with his last compensation payment as required by former Industrial Commission Rule XI(5) did not estop them from asserting the time limitation of this section as a defense to employee's claim for additional compensation for change of condition; consequently, employee's claim filed more than one year (now two years) after receipt of his last compensation payment was barred notwithstanding it was filed within a year of his receipt of Form 28B from the carrier. Willis v. J.M. Davis Indus., Inc., 280 N.C. 709, 186 S.E.2d 913 (1972).

To allow an employee's claim for additional compensation for the reason that such claim was made within 12 months (now two years) from the time he was furnished a copy of Form 28B would be contrary to the express provisions of this section. Willis v. J.M. Davis Indus., Inc., 280 N.C. 709, 186 S.E.2d 913 (1972).

As Limitation Does Not Run from Receipt of Form. — The time limitation within which an employer can claim additional compensation commences to run from the date on which he receives the last payment of compensation and not from the time he receives Form 28B. Willis v. J.M. Davis Indus., Inc., 280 N.C. 709, 186 S.E.2d 913 (1972).

The statement, "If the carrier failed to comply with the rule by giving employee notice of the limited time within which he could claim additional compensation, it failed to put the statute of limitations in operation," found in White v. Shoup Boat Corp., 261 N.C. 495, 135 S.E.2d 216 (1964), is an inaccurate expression of the law and is disapproved. Willis v. J.M. Davis Indus., Inc., 280 N.C. 709, 186 S.E.2d 913 (1972).

The importance of Form 28B with respect to starting the running of the statutory period under this section is that this form serves as explicit notice to a claimant that if further benefits are claimed the Commission must be notified in writing within one year (now two years) from the date of receipt of claimant's last compensation check. Sides v. G.B. Weaver & Sons Elec. Co., 12 N.C. App. 312, 183 S.E.2d 308 (1971).

Timely Notice to Employer of Recurrence of Disability. — Where plaintiff contended that she notified defendant of a recurrence of disability within a year (now two years) after receipt of the last payment of compensation, but she filed no claim with the Commission until after a year (now two years) had elapsed, her rights were barred. Lee v. Rose's 5-10-25¢ Stores, 205 N.C. 310, 171 S.E. 87 (1933).

Letter Held Timely. — Letter based on change in condition, mailed to the Industrial Commission, held timely. Pennington v. Flame Refractories, Inc., 53 N.C. App. 584, 281 S.E.2d 463 (1981).

Additional Notice of Accident as Sufficient Notice of Claim to Further Benefits. — Plaintiff's act of filing an additional notice of accident, I.C. Form 18, claiming that he was still experiencing impairments in his lower back and right leg as a result of his accident, while not specifically alleging any change in condition or any permanent injuries, was sufficient to give the Commission the requisite written notice of plaintiff's claim to further benefits. Chisholm v. Diamond Condominium Constr. Co., 83 N.C. App. 14, 348 S.E.2d 596 (1986), cert. denied, 319 N.C. 103, 353 S.E.2d 106 (1987).

A Form 18 received prior to final payment would be taken as mere completion of the paper work required of the employee in connection with the filing of the initial claim and would not be adequate to signal a further claim based on change of condition. In order to achieve this purpose, a Form 18 filed prior to receipt of final payment would have to contain an express request for review based upon change of condition. Apple v. Guilford County, 321 N.C. 98, 361 S.E.2d 588 (1987).

Filing a Form 18 after receipt of final payment may satisfy the requirements of this section because receipt of a Form 18 by the employer and the carrier after they have made what they deem to be final payment may serve to notify them that the employee wishes to reopen the case. Apple v. Guilford County, 321 N.C. 98, 361 S.E.2d 588 (1987).

Employer and insurance carrier are entitled to treat final payment under a Form 21 agreement as closing the proceeding, absent timely notice that an employee seeks further compensation due to change of condition. Apple v. Guilford County, 321 N.C. 98, 361 S.E.2d 588 (1987).

As to limitation as to minor employees, see Lineberry v. Town of Mebane, 219 N.C. 257, 13 S.E.2d 429 (1941).

Form 28B Held Without Effect on Previously Filed Application for Review. — While an Industrial Commission Form 28B ("Report of Compensation of Disability"), when sent together with the employee's last compensation payment, ordinarily closes the employee's case, it has no effect on an application for review which has previously been filed with the Commission. Apple v. Guilford County, 84 N.C. App. 679, 353 S.E.2d 641, rev'd on other grounds, 321 N.C. 98, 361 S.E.2d 588 (1987).

Time Period of Change Required. — Where the Industrial Commission found that plaintiff was unable to work for a period of time, yet there was no finding as to the time period during which plaintiff experienced this change a remand was needed since the commission's findings were not sufficient to determine the rights of the parties. Dinkins v. Federal Paper Bd. Co., 120 N.C. App. 192, 461 S.E.2d 909 (1995).

§ 97-47.1. Payment without prejudice; limitations period.

When the employer has paid compensation without prejudice but timely contested liability as provided in G.S. 97-18(d), the right, if any, to further indemnity compensation and medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation, whichever last occurs, unless the employee files with the Commission a claim for further compensation prior to the expiration of this period. (1993 (Reg. Sess., 1994), c. 679, s. 3.5.)

Editor's Note. — Subsection (d) of G.S. 97-18, referred to above, was redesignated as subsection (f).

§ 97-48. Receipts relieving employer; payment to minors; when payment of claims to dependents subsequent in right discharges employer.

(a) Whenever payment of compensation is made to a widow or widower for her or his use, or for her or his use and the use of the child or children, the written receipt thereof of such widow or widower shall acquit the employer: Provided, however, that in order to protect the interests of minors or incompetents the Industrial Commission may at its discretion change the terms of any award with respect to whom compensation for the benefit of such minors or incompetents shall be paid.

(b) Whenever payment is made to any person 18 years of age or over, the written receipt of such person shall acquit the employer.

(c) Payment of death benefits by an employer in good faith to a dependent subsequent in right to another or other dependents shall protect and discharge the employer, unless and until such dependent or dependents prior in right shall have given notice of his or their claims. In case the employer is in doubt as to the respective rights of rival claimants, he may apply to the Industrial Commission to decide between them.

(d) A minor employee under the age of 18 years may sign agreements and receipts for payments of compensation for temporary total disability, and such agreements and receipts executed by such minor shall acquit the employer. Where the injury results in a permanent disability and the sum to be paid does not exceed five hundred dollars ($500.00) the minor employee may execute agreements and sign receipts and such agreements and receipts shall acquit the employer; provided, that when deemed necessary the Commission may require the signature of a parent or person standing in place of a parent. (1929, c. 120, s. 47; 1931, c. 274, s. 7; 1945, c. 766.)

CASE NOTES

Payment in Good Faith Discharges Employer. — Payment of award of compensation to employee's mother was in good faith and discharged the employer, where investigation by employer's carrier prior to hearing revealed that employee's mother and brother were next of kin, and mother and brother testified to the same effect at the hearing, and the Commission judicially determined that mother was entitled to all benefits, notwithstanding the fact that thereafter it was discovered that deceased left surviving a wife in another county. Green v. Briley, 242 N.C. 196, 87 S.E.2d 213 (1955).

Appointment of Person to Receive Minor's Death Benefits. — A clerk of Superior Court may not appoint a "general guardian" for a minor if a natural guardian, such as a biological mother, exists; however, a clerk of Superior Court may appoint some other person to receive death benefits on behalf of minor. Valles de Portillo v. D.H. Griffin Wrecking Co., 134 N.C. App. 714, 518 S.E.2d 555, 1999 N.C. App. LEXIS 904 (1999), cert. denied, 351 N.C. 186, 541 S.E.2d 727 (1999).

Cited in Lineberry v. Town of Mebane, 219 N.C. 257, 13 S.E.2d 429 (1941); Hill v. Cahoon, 252 N.C. 295, 113 S.E.2d 569 (1960); Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960); Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

§ 97-49. Benefits of mentally incompetent or minor employees under 18 may be paid to a trustee, etc.

If an injured employee is mentally incompetent or is under 18 years of age at the time when any right or privilege accrues to him under this Article, his guardian, trustee or committee may in his behalf claim and exercise such right or privilege. (1929, c. 120, s. 48.)

CASE NOTES

Declaration of Common-Law Rule. — This section is a mere declaration of the common-law rule. Lineberry v. Town of Mebane, 219 N.C. 257, 13 S.E.2d 429 (1941).

§ 97-50. Limitation as against minors or mentally incompetent.

No limitation of time provided in this Article for the giving of notice or making claim under this Article shall run against any person who is mentally incompetent, or a minor dependent, as long as he has no guardian, trustee, or committee. (1929, c. 120, s. 49.)

CASE NOTES

Application of Section. — This section is applicable only to the mentally incompetent and the minor dependent. Lineberry v. Town of Mebane, 219 N.C. 257, 13 S.E.2d 429 (1941).

Minor Not Barred by Failure to Give Notice of Claim. — A minor dependent under 18 years of age and who is without guardian, trustee or committee, is not barred during such disability by failure to give notice of claim for compensation as required by G.S. 97-22 et seq. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

Evidence Supported Commission's Finding of Competency. — Where there was evidence which would support a finding that plaintiff was incompetent during the relevant period, but there was also evidence which supported the commission's finding of fact that plaintiff was not incompetent, including evidence that plaintiff performed her job, which required physical and mental dexterity, in a satisfactory manner, understood her pay scale and contested the amount when she thought it was too low, the commission's finding was conclusive. Hand ex rel. Hand v. Fieldcrest Mills, Inc., 85 N.C. App. 372, 355 S.E.2d 141, cert. denied, 320 N.C. 792, 361 S.E.2d 76 (1987).

Applied in Wray v. Carolina Cotton & Woolen Mills Co., 205 N.C. 782, 172 S.E. 487 (1934).

Cited in Lineberry v. Town of Mebane, 218 N.C. 737, 12 S.E.2d 252 (1940); Fox v. Health Force, Inc., 143 N.C. App. 501, 547 S.E.2d 83, 2001 N.C. App. LEXIS 298 (2001).

§ 97-51. Joint employment; liabilities.

Whenever an employee, for whose injury or death compensation is payable under this Article, shall at the time of the injury be in joint service of two or more employers subject to this Article, such employers shall contribute to the payment of such compensation in proportion to their wages liability to such employee; provided, however, that nothing in this section shall prevent any reasonable arrangement between such employers for a different distribution as between themselves of the ultimate burden of compensation. (1929, c. 120, s. 50.)

CASE NOTES

Test for Determining if Lent Employee Entered Employment Relationship with Special Employer. — Because of the statutory requirement that the employment be under an "appointment or contract of hire," the first question which must be answered in determining whether a lent employee has entered into an employment relationship with a special employer for Workers' Compensation Act purposes is: Did he make a contract of hire with the special employer? If this question cannot be answered "yes," the investigation is closed, and this must necessarily be so, since the employee loses certain rights along with those he gains when he strikes up a new employment relation. Collins v. James Paul Edwards, Inc., 21 N.C. App. 455, 204 S.E.2d 873, cert. denied, 285 N.C. 589, 206 S.E.2d 862 (1974).

Lent employee must consent to new relationship. Collins v. James Paul Edwards, Inc., 21 N.C. App. 455, 204 S.E.2d 873, cert. denied, 285 N.C. 589, 206 S.E.2d 862 (1974).

Consent may be implied from the lent employee's acceptance of the special employer's control and direction. But what seems on the surface to be such acceptance may actually be only a continued obedience of the general employer's commands. Collins v. James Paul Edwards, Inc., 21 N.C. App. 455, 204 S.E.2d 873, cert. denied, 285 N.C. 589, 206 S.E.2d 862 (1974).

Basis for Consent Requirement in Lent Employee Cases. — The necessity for the lent employee's consent to a new employment relation stems from the statutory requirement of "contract of hire." Collins v. James Paul Edwards, Inc., 21 N.C. App. 455, 204 S.E.2d 873, cert. denied, 285 N.C. 589, 206 S.E.2d 862 (1974).

The only presumption in lent employee cases is the continuance of the general employment, which is taken for granted as the beginning point of any lent employee problem. Collins v. James Paul Edwards, Inc., 21 N.C. App. 455, 204 S.E.2d 873, cert. denied, 285 N.C. 589, 206 S.E.2d 862 (1974).

To overcome this presumption, it is not unreasonable to insist upon a clear demonstration that a new temporary employer has been substituted for the old, which demonstration should include a showing that a contract was made between the special employer and the employee, proof that the work being done was essentially that of the special employer, and proof that the special employer assumed the right to control the details of the work; failing this, the general employer should remain liable. Collins v. James Paul Edwards, Inc., 21 N.C. App. 455, 204 S.E.2d 873, cert. denied, 285 N.C. 589, 206 S.E.2d 862 (1974).

Conflict of Interest Is Between Two Employers. — What gives the lent employee cases their special character is the fact that they begin, not with an unknown relation, but with an existing employment relation. The conflict of interest becomes one not between employer and employee (who is assured of recovering from someone) but between two employers and their insurance carriers. Collins v. James Paul Edwards, Inc., 21 N.C. App. 455, 204 S.E.2d 873, cert. denied, 285 N.C. 589, 206 S.E.2d 862 (1974).

Employment Held Not Joint. — Deceased was employed as teacher and coach by the defendant school district. The State Board of Equalization paid part of his salary as teacher, while the school district paid the remainder of his salary both for teaching and for coaching. Deceased was killed while in performance of his duties as coach. It was held that deceased was an employee of the defendant school district but not of the State Board of Equalization since that body had no voice in his election or power over his actions. Perdue v. State Bd. of Equalization, 205 N.C. 730, 172 S.E. 396 (1934).

Contract Between Owner and Lessee of Truck Not Binding on Employee-Driver. — Deceased employee was a truck driver for X, who leased the truck to other haulers. While hauling goods for a lessee of the truck, and under his full control, deceased met his death. The lease contract between X and his lessee provided that X should carry compensation insurance upon the truck driver. It was held that this contract could not be binding upon the employee-driver, as he was not a party to it. Recovery of compensation was allowed against lessee for the death of the employee. The court left open the question of liability of X to the lessee. Roth v. McCord, 232 N.C. 678, 62 S.E.2d 64 (1950).

Cited in Goodson v. P.H. Glatfelter Co., 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

§ 97-52. Occupational disease made compensable; "accident" defined.

Disablement or death of an employee resulting from an occupational disease described in G.S. 97-53 shall be treated as the happening of an injury by accident within the meaning of the North Carolina Workers' Compensation Act and the procedure and practice and compensation and other benefits provided by said act shall apply in all such cases except as hereinafter otherwise provided. The word "accident," as used in the Workers' Compensation Act, shall not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of such employment, over extended periods of time, whether such events may or may not be attributable to fault of the employer and disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this Article: Provided, however, no compensation shall be payable for asbestosis and/or silicosis as hereinafter defined if the employee, at the time of entering into the employment of the employer by whom compensation would otherwise be payable, falsely represented himself in writing as not having previously been disabled or laid off because of asbestosis or silicosis. (1935, c. 123; 1979, c. 714, s. 2.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For comment on injury by accident in workers' compensation, see 59 N.C.L. Rev. 175 (1980).

For note on occupational disease under workers' compensation statute, see 16 Wake Forest L. Rev. 288 (1980).

For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

For discussion of occupational disease compensation in light of Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 370 (1983), see 62 N.C.L. Rev. 573 (1984).

For note discussing proof of causation requirement in occupational disease cases, in light of Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983), see 7 Campbell L. Rev. 99 (1984).

For note, "Caulder v. Waverly Mills: Expanding the Definition of an Occupational Disease Under the Last Injurious Exposure Rule," see 64 N.C.L. Rev. 1566 (1986).

For comment, "A Proposal to Reform the North Carolina Workers' Compensation Act to Address Mental-Mental Claims," see 32 Wake Forest L. Rev. 193 (1997).

For comment on the reality of work-related stress, see 20 Campbell L. Rev. 321 (1998).

CASE NOTES

Editor's Note. — *For additional cases regarding compensability of occupational disease, see the case notes under G.S. 97-53.*

Purpose of this Section and § 97-53. — Any scheme or plan for the payment of compensation to disabled employees should include those diseases or abnormal conditions of human beings the causative origin of which is occupational in nature. To meet this need the legislature adopted this section and G.S. 97-53. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

The purpose of this section and G.S. 97-53 was to compensate employees for occupational disease as defined in the Act. Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

The purpose of this section is to enable a worker to recover for disability caused by occupational disease under G.S. 97-29. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Exclusivity of Rights and Remedies. — The rights and remedies of an employee under the Workers' Compensation Act exclude all other rights and remedies, and an employee bound by the act may not maintain an action at common law against the employer and his foreman to recover for injuries caused by an occupational disease not enumerated in this section and G.S. 97-53, even though the disease is the result of negligence. Murphy v. American Enka Corp., 213 N.C. 218, 195 S.E. 536 (1938).

Common-Law Action Where Employer Has Rejected Act. — If an employee contracts an occupational disease while working for an employer who has rejected the act, recovery may be had in an action at common law upon a showing of negligence. Bame v. Palmer Stone Works, 232 N.C. 267, 59 S.E.2d 812 (1950).

Injury by Accident and Occupational Disease Distinguished. — An injury by accident, as that term is ordinarily understood, is distinguished from an occupational disease in that the former rises from a definite event, the time and place of which can be fixed, while the latter develops gradually over a long period of time. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

When a deputy commissioner stated, after a hearing, that she would treat the claimant's claim as one for an occupational disease, the employer's due process rights were not violated because an injury resulting from an occupational disease was to be treated as the happening of an injury by accident and the claimant was not required to make an election between a theory based on injury by accident or injury by occupational disease. Handy v. PPG Indus., 154 N.C. App. 311, 571 S.E.2d 853, 2002 N.C. App. LEXIS 1442 (2002).

Injury by Accident to Nurse Due to Understaffed Hospital. — North Carolina Industrial Commission's findings of fact, which were supported by competent evidence from the testimony of the injured nurse and another nurse, supported its conclusion of law that the injured nurse sustained an injury by accident arising out of and in the course of her employment at a hospital; the nurse testified that she hurt her left arm while repositioning a patient by herself at the hospital because the hospital was understaffed, and the nurse had to stand closer to the patient and to the bed and exert more force because she performed the act by herself. Legette v. Scotland Mem'l Hosp., — N.C. App. —, 640 S.E.2d 744, 2007 N.C. App. LEXIS 361 (2007).

Limitation on meaning of "accident," etc. simply prevents claims for maladies that are neither occupational in nature nor arise from an event definite in time and place. Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

An accident must result from an event, and multiple events, or stressors, occurring over a period of time, allegedly resulting in an acute cardiac incident, do not constitute an "accident;" consequently, attorney senior partner could not recover workers's compensation. Lovekin v. Lovekin & Ingle, 140 N.C. App. 244, 535 S.E.2d 610, 2000 N.C. App. LEXIS 1108 (2000).

Words "disablement or death" in this section merely describe a condition that must occur before recovery may be had under G.S. 97-29. They do not predicate recovery under G.S. 97-31 upon disability. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Disability Defined. — Disability is defined as incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; this definition applies to occupational diseases. Hilliard v. Apex Cabinet Co., 54 N.C. App. 173, 282 S.E.2d 828 (1981), rev'd on other grounds, 305 N.C. 593, 290 S.E.2d 682 (1982).

This Chapter does not guarantee that benefits will be paid whenever an employee is injured or suffers from an occupational disease; it is not designed to be health or accident insurance. Hilliard v. Apex Cabinet Co., 54 N.C. App. 173, 282 S.E.2d 828 (1981), rev'd on other grounds, 305 N.C. 593, 290 S.E.2d 682 (1982).

When Injury From Occupational Disease Is Compensable. — The current version of subdivision (13) of G.S. 97-53 applies to all claims for disablement in which the disability occurs after the effective date of the subdivision as amended, i.e., July 1, 1971, since under this section injury resulting from occupational disease is compensable only when it leads to disablement, and until that time the employee has no cause of action and the employer has no liability. Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979).

Benefits are paid only when, due to occupational disease or injury, employee is incapable of earning the same wages he earned at the time of contracting the disease or receiving the injury, at his same job or any other employment. Hilliard v. Apex Cabinet Co., 54 N.C. App. 173, 282 S.E.2d 828 (1981), rev'd on other grounds, 305 N.C. 593, 290 S.E.2d 682 (1982).

Disease Must Be Incident to or Result of Employment. — An award for an occupational disease cannot be sanctioned unless it be shown that the disease was incident to or the result of the particular employment in which the worker was engaged. Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E.2d 22 (1951).

If a disease is not a natural result of a particular employment, but is produced by some extrinsic or independent agency, it is in no real sense an occupational disease, and ordinarily may not be imputed to the occupation or employment. Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E.2d 22 (1951).

Disability resulting from a disease is compensable when the disease is aggravated or accelerated by causes and conditions characteristic of and peculiar to claimant's employment. Robinson v. J.P. Stevens & Co., 57 N.C. App. 619, 292 S.E.2d 144 (1982).

Based on state supreme court precedent, an employee's claim for worker's compensation benefits due to an occupational disease was properly denied because while he was more likely at an increased risk of developing an aggravation of his arthritic condition as a parking lot attendant, he failed to show that his employment placed him at a greater risk for contracting the condition. Thomas v. McLaurin Parking Co., — N.C. App. —, 640 S.E.2d 779, 2007 N.C. App. LEXIS 249 (2007).

If a disease is not disabling apart from aggravation by occupational conditions, the employer must compensate the employee for the entire resulting disability. Robinson v. J.P. Stevens & Co., 57 N.C. App. 619, 292 S.E.2d 144 (1982).

Other Gradually Developing Conditions Not Compensable. — This section precludes claims for conditions that develop gradually but do not fall into the category of occupational disease. Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Showing That Activity Did Not Previously Cause Pain Insufficient. — It is insufficient as a matter of law to show only that in the past a regular activity caused no pain and that the same activity now causes pain; there must be a specific fortuitous event, rather than a gradual build-up of pain, in order to show injury by accident. Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Employees who suffer due to personal sensitivities are not entitled to workers' compensation benefits, absent a finding that the disability is due to an occupational disease. Hilliard v. Apex Cabinet Co., 54 N.C. App. 173, 282 S.E.2d 828 (1981), rev'd on other grounds, 305 N.C. 593, 290 S.E.2d 682 (1982).

Employee's suicide caused by occupational disease is compensable under the Workers' Compensation Act. This is so because this section makes it clear that the death of an employee resulting from an occupational disease shall be treated as the happening of an injury by accident. Harvey v. Raleigh Police Dep't, 85 N.C. App. 540, 355 S.E.2d 147, cert. denied, 320 N.C. 631, 360 S.E.2d 86 (1987).

Only Diseases Mentioned in § 97-53 Are Compensable. — Disablement or death resulting from any "series of events" in employment shall be treated as the happening of an injury by accident compensable under the act when and only when such series of events culminates in one of the occupational diseases mentioned in G.S. 97-53. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951). But see now subdivision (13) of § 97-53.

Disease Resulting from Accident. — This section, providing that only the occupational diseases specified in this Article shall be compensable, relates only to occupational diseases, which are those resulting from long and continued exposure to risks and conditions inherent and usual in the nature of the employment, and does not preclude compensation for a disease not inherent in or incident to the nature of the employment when it results from an accident arising out of and in the course of the employment. MacRae v. Unemployment Comp. Comm'n, 217 N.C. 769, 9 S.E.2d 595 (1940). See also, Blassingame v. Southern Asbestos Co., 217 N.C. 223, 7 S.E.2d 478 (1940).

Claimant Must Prove Causation. — A claimant's right to compensation for an occupational disease under G.S. 97-53(13) and this section depends upon proper proof of causation, and the burden of proving each and every element of compensability is upon the plaintiff. Moore v. J.P. Stevens & Co., 47 N.C. App. 744, 269 S.E.2d 159, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980).

Claimant must show that diminution in earning capacity is due to occupational disease or injury; it is not enough merely to show a diminution in wages earned subsequent to the affliction or injury. Hilliard v. Apex Cabinet Co., 54 N.C. App. 173, 282 S.E.2d 828 (1981), rev'd on other grounds, 305 N.C. 593, 290 S.E.2d 682 (1982).

Disability Need Not Be Shown to Recover Under § 97-31. — The obvious intent of the Legislature in enacting this section was to permit and not restrict recovery for occupational diseases. This section, therefore, does not require that disability be shown as a condition to recovery under the schedule for occupational disease in G.S. 97-31. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Section 97-38 contemplates only one accident leading to death when it states "the accident." Death benefits accrue only if death occurs within the maximum statutorily set time after "the accident." It would defy legislative intent to hold that subsequent changes in disability status arising from the same occupational disease created new "accidents," thereby renewing the time limit for claiming benefits under G.S. 97-38. Joyner v. J.P. Stevens & Co., 71 N.C. App. 625, 322 S.E.2d 636 (1984).

Date of "Accident" in Occupational Disease Cases. — Where employee died 15 months after he became totally disabled by serum hepatitis, the claim of deceased employee's dependents for death benefits was not barred by G.S. 97-38 providing compensation if death results from an accident within two years or, while total disability continues, within six years after the accident, since the date of the "accident" in cases involving occupational disease is treated as the date on which disablement occurs and not as the date on which employee contracted the disease. Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

The date when plaintiff became disabled due to byssinosis is deemed to be the date upon which she sustained an injury by accident. Taylor v. J.P. Stevens & Co., 300 N.C. 94, 265 S.E.2d 144 (1980).

Date on Which Disease "Originates" Is Irrelevant. — As it is the event of disability which triggers entitlement to compensation and not the date of the last injurious exposure, the date on which a plaintiff's occupational disease "originated" has no relevance to his claim. Taylor v. Cone Mills Corp., 56 N.C. App. 291, 289 S.E.2d 60, rev'd on other grounds, 306 N.C. 314, 293 S.E.2d 189 (1982).

Industrial Commission did not err in concluding that plaintiff had not contracted an occupational disease while employed in defendant's textile mill, where the evidence tended to show that plaintiff suffered from chronic bronchitis and had evidence of mild obstructive lung disease, aggravated by exposure to cotton dust, but such infirmities would not interfere with any work except the most strenuous kind, so that plaintiff therefore did not suffer any disablement which would entitle him to compensation. Mills v. J.P. Stevens & Co., 53 N.C. App. 341, 280 S.E.2d 802, cert. denied, 304 N.C. 196, 285 S.E.2d 100 (1981).

Degenerative disc condition which is not shown to be "characteristic of and peculiar to" plaintiff's employment is not an occupational disease, and there can be no compensation without a connection between the disease and the employment. Griffitts v. Thomasville Furn. Co., 65 N.C. App. 369, 309 S.E.2d 277 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 884 (1984).

Chronic Obstructive Pulmonary Disease. — An employee who suffers from chronic obstructive pulmonary disease is entitled to findings of fact and conclusions of law that said disease is an occupational disease pursuant to G.S. 97-53(13) if it is shown by competent evidence that occupational exposure to a hazard known to cause the disease, such as cotton dust, significantly contributed to the causation or development of the disease. Swink v. Cone Mills, Inc., 65 N.C. App. 397, 309 S.E.2d 271 (1983).

Byssinosis is an occupational disease under G.S. 97-53(13) and is compensable under this section. Donnell v. Cone Mills Corp., 60 N.C. App. 338, 299 S.E.2d 436, cert. denied, 308 N.C. 190, 302 S.E.2d 243 (1983).

Byssinosis, as a component of chronic obstructive pulmonary disease, is a compensable occupational disease. Peoples v. Cone Mills Corp., 69 N.C. App. 263, 317 S.E.2d 120, modified on other grounds, 316 N.C. 426, 342 S.E.2d 798 (1986).

Special Provisions Relating to Asbestosis and Silicosis. — When the special provisions of the occupational disease amendment relating to asbestosis and silicosis were read in their entirety, it was apparent that they were designed to effect these objects: (1) to prevent the employment of unaffected persons peculiarly susceptible to asbestosis or silicosis in industries with dust hazards; (2) to secure compensation to those workers affected with asbestosis or silicosis, whose principal need is compensation; and (3) to provide compulsory changes of occupations for those workers affected by asbestosis or silicosis, whose primary need is removal to employments without dust hazards. Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948).

The clear intent of G.S. 97-61.6 to provide compensation for death occurring within 350 weeks from the date of last exposure to silicosis if the employee was at the time of death receiving compensation for disablement due to silicosis, even though the death does not result from silicosis, must be given effect notwithstanding subdivisions (6) and (10) of G.S. 97-2 and this section, since the specific provisions relating to silicosis, which were enacted because of the peculiar course of the disease, must be construed as an exception to the general tenor of the Workers' Compensation Act to provide compensation for death only if it results from an accident arising out of and in the course of the employment. Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

Remand for Findings as to Capacity for Other Employment. — Where the Commission found that plaintiff had chronic obstructive pulmonary disease caused in part by her exposure to respirable cotton dust during her employment, but that her impairment was not sufficient to render plaintiff incapable of performing types of employment which did not require very strenuous activity or exposure to cotton dust, but the Commission's findings did not address evidence that due to plaintiff's education, age and experience she was probably not capable of earning wages in any employment which did not require substantial physical exertion, the case would be remanded for appropriate findings and conclusions of plaintiff's capacity to earn wages in employment for which she might be qualified. Webb v. Pauline Knitting Indus., 78 N.C. App. 184, 336 S.E.2d 645 (1985).

Effect of Retirement. — Because disability measures an employee's present ability to earn wages, and is unrelated to a decision to withdraw from the labor force by retirement, the Commission may not deny disability benefits because the claimant retired, where there is evidence of diminished earning capacity caused by an occupational disease. Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986).

Report Under § 97-92(a). — Section 97-92(a) requires an employer to report any injury by accident if it keeps the employee from work for more than one day. Presumably this would include notice of an occupational disease which is considered an injury by accident. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

A claimant's post-injury earning capacity is the determinative factor in assessing disability. Tyndall v. Walter Kidde Co., 102 N.C. App. 726, 403 S.E.2d 548, cert. denied, 329 N.C. 505, 407 S.E.2d 553 (1991).

Burden on Claimant to Prove Unsuitability Due to Peculiar Characteristics. — The burden of proof rests upon the claimant to prove the existence of his disability and its extent, and relevant to these issues is evidence that the claimant may be unsuited for particular employment due to characteristics peculiar to him. Tyndall v. Walter Kidde Co., 102 N.C. App. 726, 403 S.E.2d 548, cert. denied, 329 N.C. 505, 407 S.E.2d 553 (1991).

Applied in Willingham v. Bryan Rock & Sand Co., 240 N.C. 281, 82 S.E.2d 68 (1954); Clark v. Burlington Indus., 49 N.C. App. 269, 271 S.E.2d 101 (1980); Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981); Harrell v. Harriet & Henderson Yarns, 56 N.C. App. 697, 289 S.E.2d 846 (1982); Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985); Hatcher v. Daniel Int'l Corp., 153 N.C. App. 776, 571 S.E.2d 20, 2002 N.C. App. LEXIS 1261 (2002).

Cited in Edwards v. Piedmont Pub. Co., 227 N.C. 184, 41 S.E.2d 592 (1947); Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950); Midkiff v. North Carolina Granite Corp., 235 N.C. 149, 69 S.E.2d 166 (1952); Hensley v. Farmers Fed'n Coop., 246 N.C. 274, 98 S.E.2d 289 (1957); Wood v. J.P. Stevens & Co., 36 N.C. App. 456, 245 S.E.2d 82 (1978); Sebastian v. Mona Watkins Hair Styling, 40 N.C. App. 30, 251 S.E.2d 872 (1979); Taylor v. J.P. Stevens & Co., 300 N.C. 94, 265 S.E.2d 144 (1980); Morrison v. Burlington Indus., 47 N.C. App. 50, 266 S.E.2d 741 (1980); Hundley v. Fieldcrest Mills, 58 N.C. App. 184, 292 S.E.2d 766 (1982); West v. Bladenboro Cotton Mills, Inc., 62 N.C. App. 267, 302 S.E.2d 645 (1983); Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983); Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986); McAllister v. Cone Mills Corp., 88 N.C. App. 577, 364 S.E.2d 186 (1988); Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

§ 97-53. (See editor's note on condition precedent) Occupational diseases enumerated; when due to exposure to chemicals.

The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this Article:

(1) Anthrax.
(2) Arsenic poisoning.
(3) Brass poisoning.
(4) Zinc poisoning.
(5) Manganese poisoning.
(6) Lead poisoning. Provided the employee shall have been exposed to the hazard of lead poisoning for at least 30 days in the preceding 12 months' period; and, provided further, only the employer in whose employment such employee was last injuriously exposed shall be liable.
(7) Mercury poisoning.
(8) Phosphorus poisoning.

(9) Poisoning by carbon bisulphide, menthanol, naphtha or volatile halogenated hydrocarbons.
(10) Chrome ulceration.
(11) Compressed-air illness.
(12) Poisoning by benzol, or by nitro and amido derivatives of benzol (dinitrolbenzol, anilin, and others).
(13) Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.
(14) Epitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye due to tar, pitch, bitumen, mineral oil, or paraffin, or any compound, product, or residue of any of these substances.
(15) Radium poisoning or disability or death due to radioactive properties of substances or to roentgen rays, X rays or exposure to any other source of radiation; provided, however, that the disease under this subdivision shall be deemed to have occurred on the date that disability or death shall occur by reason of such disease.
(16) Blisters due to use of tools or appliances in the employment.
(17) Bursitis due to intermittent pressure in the employment.
(18) Miner's nystagmus.
(19) Bone felon due to constant or intermittent pressure in employment.
(20) Synovitis, caused by trauma in employment.
(21) Tenosynovitis, caused by trauma in employment.
(22) Carbon monoxide poisoning.
(23) Poisoning by sulphuric, hydrochloric or hydrofluoric acid.
(24) Asbestosis.
(25) Silicosis.
(26) Psittacosis.
(27) Undulant fever.
(28) Loss of hearing caused by harmful noise in the employment. The following rules shall be applicable in determining eligibility for compensation and the period during which compensation shall be payable:
  a. The term "harmful noise" means sound in employment capable of producing occupational loss of hearing as hereinafter defined. Sound of an intensity of less than 90 decibels, A scale, shall be deemed incapable of producing occupational loss of hearing as defined in this section.
  b. "Occupational loss of hearing" shall mean a permanent sensorineural loss of hearing in both ears caused by prolonged exposure to harmful noise in employment. Except in instances of preexisting loss of hearing due to disease, trauma, or congenital deafness in one ear, no compensation shall be payable under this subdivision unless prolonged exposure to harmful noise in employment has caused loss of hearing in both ears as hereinafter provided.
  c. No compensation benefits shall be payable for temporary total or temporary partial disability under this subdivision and there shall be no award for tinnitus or a psychogenic hearing loss.
  d. An employer shall become liable for the entire occupational hearing loss to which his employment has contributed, but if previous deafness is established by a hearing test or other competent evidence, whether or not the employee was exposed to harmful noise within six months preceding such test, the employer shall

not be liable for previous loss so established, nor shall he be liable for any loss for which compensation has previously been paid or awarded and the employer shall be liable only for the difference between the percent of occupational hearing loss determined as of the date of disability as herein defined and the percentage of loss established by the preemployment and audiometric examination excluding, in any event, hearing losses arising from nonoccupational causes.

e. In the evaluation of occupational hearing loss, only the hearing levels at the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second shall be considered. Hearing losses for frequencies below 500 and above 3,000 cycles per second are not to be considered as constituting compensable hearing disability.

f. The employer liable for the compensation in this section shall be the employer in whose employment the employee was last exposed to harmful noise in North Carolina during a period of 90 working days or parts thereof, and an exposure during a period of less than 90 working days or parts thereof shall be held not to be an injurious exposure; provided, however, that in the event an insurance carrier has been on the risk for a period of time during which an employee has been injuriously exposed to harmful noise, and if after insurance carrier goes off the risk said employee has been further exposed to harmful noise, although not exposed for 90 working days or parts thereof so as to constitute an injurious exposure, such carrier shall, nevertheless, be liable.

g. The percentage of hearing loss shall be calculated as the average, in decibels, of the thresholds of hearing for the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second. Pure tone air conduction audiometric instruments, properly calibrated according to accepted national standards such as American Standards Association, Inc., (ASA), International Standards Organization (ISO), or American National Standards Institute, Inc., (ANSI), shall be used for measuring hearing loss. If more than one audiogram is taken, the audiogram having the lowest threshold will be used to calculate occupational hearing loss. If the losses of hearing average 15 decibels (26 db if ANSI or ISO) or less in the four frequencies, such losses of hearing shall not constitute any compensable hearing disability. If the losses of hearing average 82 decibels (93 db if ANSI or ISO) or more in the four frequencies, then the same shall constitute and be total or one hundred percent (100%) compensable hearing loss. In measuring hearing impairment, the lowest measured losses in each of the four frequencies shall be added together and divided by four to determine the average decibel loss. For each decibel of loss exceeding 15 decibels (26 db if ANSI or ISO) an allowance of one and one-half percent (1½%) shall be made up to the maximum of one hundred percent (100%) which is reached at 82 decibels (93 db if ANSI or ISO). In determining the binaural percentage of loss, the percentage of impairment in the better ear shall be multiplied by five. The resulting figure shall be added to the percentage of impairment in the poorer ear, and the sum of the two divided by six. The final percentage shall represent the binaural hearing impairment.

h. There shall be payable for total occupational loss of hearing in both ears 150 weeks of compensation, and for partial occupational loss of hearing in both ears such proportion of these periods of payment as such partial loss bears to total loss.

i. No claim for compensation for occupational hearing loss shall be filed until after six months have elapsed since exposure to harmful noise with the last employer. The last day of such exposure shall be the date of disability. The regular use of employer-provided protective devices capable of preventing loss of hearing from the particular harmful noise where the employee works shall constitute removal from exposure to such particular harmful noise.

j. No consideration shall be given to the question of whether or not the ability of an employee to understand speech is improved by the use of a hearing aid. The North Carolina Industrial Commission may order the employer to provide the employee with an original hearing aid if it will materially improve the employee's ability to hear.

k. No compensation benefits shall be payable for the loss of hearing caused by harmful noise after October 1, 1971, if employee fails to regularly utilize employer-provided protection device or devices, capable of preventing loss of hearing from the particular harmful noise where the employee works.

(29) **(See editor's note on condition precedent)** Infection with smallpox, infection with vaccinia, or any adverse medical reaction when the infection or adverse reaction is due to the employee receiving in employment vaccination against smallpox incident to the Administration of Smallpox Countermeasures by Health Professionals, section 304 of the Homeland Security Act, Pub. L. No. 107-296 (Nov. 25, 2002) (to be codified at 42 U.S.C. § 233(p)), or when the infection or adverse medical reaction is due to the employee being exposed to another employee vaccinated as described in this subdivision.

Occupational diseases caused by chemicals shall be deemed to be due to exposure of an employee to the chemicals herein mentioned only when as a part of the employment such employee is exposed to such chemicals in such form and quantity, and used with such frequency as to cause the occupational disease mentioned in connection with such chemicals. (1935, c. 123; 1949, c. 1078; 1953, c. 1112; 1955, c. 1026, s. 10; 1957, c. 1396, s. 6; 1963, c. 553, s. 1; c. 965; 1971, c. 547, s. 1; c. 1108, s. 1; 1973, c. 760, ss. 1, 2; 1975, c. 718, s. 4; 1987, c. 729, ss. 11, 12; 1991, c. 703, s. 10; 2003-169, s. 2.)

Condition Precedent to Recovery Under this Act. — Session Laws 2003-169, s. 7, provides: "In the event that federal regulatory or statutory provisions providing compensation and benefits to persons for infection with smallpox, infection with vaccinia, or any adverse medical reaction incident to the Administration of Smallpox Countermeasures by Health Professionals, section 304 of the Homeland Security Act, Pub. L. No. 107-296 (Nov. 25, 2002) (to be codified at 42 U.S.C. § 233(p)) are adopted, a condition precedent to recovery under this act shall be that the person claiming compensation and benefits under this act shall first seek compensation and benefits under the federal provisions, with those provisions constituting primary coverage and the person then being entitled to compensation and benefits under this act not exceeding a total recovery under the federal provisions and this act equal to the amount available under the applicable provisions of this act."

Editor's Note. — Session Laws 2003-169, s. 8, is a severability clause.

Session Laws 2003-169, s. 9, provides that the amendment to this section by s. 2 of the act is effective June 12, 2003, and applicable to claims arising from infection or adverse medical reactions related to smallpox vaccinations incident to the Administration of Smallpox Countermeasures by Health Professionals, section 304 of the Homeland Security Act, Pub. L. No. 107-296 (Nov. 25, 2002)(to be codified at 42 U.S.C. § 233(p)) whether the infection or adverse medical reactions occurred before, on, or after June 12, 2003.

Legal Periodicals. — For brief comment on the 1949 amendment, see 27 N.C.L. Rev. 495 (1949).

For comment discussing workers' compensation and infectious disease in the context of Booker v. Duke Medical Center, 32 N.C. App. 185, 231 S.E.2d 187 (1977), see 9 N.C. Cent. L.J. 124 (1977).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note on occupational disease under workers' compensation statute, see 16 Wake Forest L. Rev. 288 (1980).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1032 (1981).

For comment on Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981), see 4 Campbell L. Rev. 107 (1981).

For note on Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981), see 18 Wake Forest L. Rev. 801 (1982).

For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

For comment discussing dual causation of occupational disease in light of Rutledge v. Tultex Corp., 308 N.C. 85, 301 S.E.2d 359 (1983), see 19 Wake Forest L. Rev. 1137 (1983).

For discussion of occupational disease compensation in light of Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 370 (1983), see 62 N.C.L. Rev. 573 (1984).

For note discussing proof of causation requirement in occupational disease cases, in light of Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983), see 7 Campbell L. Rev. 99 (1984).

For note, "Caulder v. Waverly Mills: Expanding the Definition of an Occupational Disease Under the Last Injurious Exposure Rule," see 64 N.C.L. Rev. 1566 (1986).

For comment, "A Proposal to Reform the North Carolina Workers' Compensation Act to Address Mental-Mental Claims," see 32 Wake Forest L. Rev. 193 (1997).

For comment on the reality of work-related stress, see 20 Campbell L. Rev. 321 (1998).

CASE NOTES

I. In General.
II. Subdivision (13).
III. Particular Diseases.
IV. Hearing Loss.

I. IN GENERAL.

Editor's Note. — *For additional cases regarding compensability of occupational disease, see the case notes under G.S. 97-52.*

1949 Amendment Held Unconstitutional. — Former subdivision (26), which was added to this section by Session Laws 1949, c. 1078, and which purported to make certain forms of heart disease compensable occupational diseases when suffered by firemen, was unconstitutional, since it sought to confer upon firemen a special privilege not accorded to other municipal employees, nor to employees in private industry, and created for firemen substantial financial benefits, to be paid from the public treasury under the guise of workers' compensation benefits, without establishing an occupational disease as the usual incident or result of the particular employment. Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E.2d 22 (1951), commented on in 30 N.C.L. Rev. 98 (1951). See also Davis v. City of Winston-Salem, 234 N.C. 95, 66 S.E.2d 28 (1951).

Legislative Intent. — The clear intent of the General Assembly in enacting the current version of this section was to bring North Carolina in line with the vast majority of states by providing comprehensive coverage for occupational diseases. Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

The purpose of G.S. 97-52 and this section was to compensate employees for occupational disease as defined in the Act. Bowles v. CTS of Asheville, Inc., 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Technical Words to Be Accorded Their Technical Connotations. — In designating those diseases and conditions which are to be deemed occupational in origin and compensable under the act, the legislature, for the most part, used technical terms. Anthrax, bursitis, asbestosis, silicosis, nystagmus, synovitis, tenosynovitis are technical words. In construing the act, the court must accord them their technical connotations. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

Common-Law Actions Excluded as to Certain Occupational Diseases. — In dealing with certain unscheduled occupational diseases, the Supreme Court has held common-law actions to be excluded by the act; but in these cases the condition admittedly and allegedly arose out of the employment. Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943).

But Employee May Bring Common-Law Action Against Employer Who Has Rejected Act. — Where silicosis is contracted by an employee whose employer has rejected the act, the employee may recover in an action at common law upon a showing of negligence, but the doctrine of res ipsa loquitur is not applicable. Bame v. Palmer Stone Works, 232 N.C. 267, 59 S.E.2d 812 (1950).

Effect of Last Sentence. — The last sentence of this section is intended to limit compensable diseases to those that are actually caused by on-the-job exposure to hazardous substances, rather than to limit the number of diseases that are compensable. McAllister v. Cone Mills Corp., 88 N.C. App. 577, 364 S.E.2d 186 (1988).

"Occupational Disease" Defined. — The legislature, in listing those diseases which are to be deemed occupational in character, was fully aware of the meaning of the term "occupational disease." Indeed, it in effect defined the term in G.S. 97-52 as a diseased condition caused by a series of events, of a similar or like nature, occurring regularly or at frequent intervals over an extended period of time, in employment. The term has likewise been defined as a diseased condition arising gradually from the character of the employee's work. These are the accepted definitions of the term. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

A disease, contracted in the usual and ordinary course of events, which from the common experience of humanity is known to be incidental to a particular employment, is an occupational disease. Morrow v. Memorial Mission Hosp., 21 N.C. App. 299, 204 S.E.2d 543 (1974).

An "occupational disease" suffered by a servant or an employee, if it means anything as distinguished from a disease caused or superinduced by an actionable wrong or injury, is neither more nor less than a disease which is the usual incident or result of the particular employment in which the worker is engaged, as distinguished from one which is caused or brought about by the employer's failure in his duty to furnish him a safe place to work. Morrow v. Memorial Mission Hosp., 21 N.C. App. 299, 204 S.E.2d 543 (1974).

There was no evidence that the employee's nervous breakdown was (1) characteristic of and peculiar to the employee's employment; (2) not an ordinary disease to which the public was exposed; or (3) that there was a causal connection between the disease and the employee's employment; thus, the industrial commission properly denied the employee's workers' compensation claim. Pitillo v. N.C. Dep't of Envtl. Health & Natural Res., 151 N.C. App. 641, 566 S.E.2d 807, 2002 N.C. App. LEXIS 882 (2002).

When Illness Is Compensable. — An illness is compensable under this section, whether mentioned specifically in the statute or falling within the general definition in subdivision (13) of this section, only if it also comes within well understood definitions of the term "occupational diseases." Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

Only those occupational diseases specifically designated are compensable under the act. Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950), decided prior to the first 1971 amendment which rewrote subdivision (13).

Only those diseases and conditions enumerated in this section are occupational diseases within the meaning of the act. McAllister v. Cone Mills Corp., 88 N.C. App. 577, 364 S.E.2d 186 (1988).

Unless Due to Specified Causes and Conditions. — The clear language of this section provides that for any disease other than those specifically named to be deemed an "occupational disease," it must be proven to be due to causes and conditions as specified in the section. Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981).

Or Aggravated or Accelerated by Conditions Peculiar to Employment. — Disability resulting from a disease is compensable when the disease is aggravated or accelerated by causes and conditions characteristic of and peculiar to claimant's employment. Robinson v. J.P. Stevens & Co., 57 N.C. App. 619, 292 S.E.2d 144 (1982).

If a disease is not disabling apart from aggravation by occupational conditions, the employer must compensate the employee for the entire resulting disability. Robinson v. J.P. Stevens & Co., 57 N.C. App. 619, 292 S.E.2d 144 (1982).

Disability caused by, or death resulting from, a disease is compensable only when the disease is an occupational disease, or is aggravated or accelerated by causes and conditions characteristic of and peculiar to the claimant's employment. Goodman v. Cone Mills Corp., 75 N.C. App. 493, 331 S.E.2d 261 (1985).

Circumstances Showing Connection Between Disease and Occupation. — In the case of occupational diseases, proof of a causal connection between the disease and the employee's occupation must of necessity be based on circumstantial evidence. Among the circumstances which may be considered are the following: (1) The extent of exposure to the disease or disease-causing agents during employment; (2) the extent of exposure outside employment; and (3) absence of the disease prior to the work-related exposure, as shown by the employee's medical history. Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979); Hansel v. Sherman Textiles, 49 N.C. App. 1, 270 S.E.2d 585 (1980), rev'd on other grounds, 304 N.C. 44, 283 S.E.2d 101 (1981).

Qualifying Disease Is Compensable Even if It Is Also an "Injury by Accident". — If an employee contracts an infectious disease as a result of his employment and it falls within either the schedule of diseases set out in the statute or the general definition of "occupational disease" in subdivision (13), it should be treated as a compensable event regardless of the fact that it might also qualify as an "injury by accident" under G.S. 97-2(6). Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

Denial of compensation may be predicated upon failure of claimant to prove any element of compensability under this section. Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981).

Expert Testimony. — Conflicting expert testimony on the question of whether the deceased employee died as a result of an occupational disease, caused by exposure to benzol poisoning, arising out of and in the course of his employment, was sufficient to sustain the Commission's award of compensation to the employee's dependent. Tindall v. American Furn. Co., 216 N.C. 306, 4 S.E.2d 894 (1939).

While the construction of a statute is ultimately a question of law for the courts, expert opinion testimony as to the meaning of technical terms used in a statute is clearly competent. Expert testimony may be received as an aid to proper interpretation if the statute or rule uses technical terms which are not generally understood or is ambiguous or indefinite. Taylor v. Cone Mills Corp., 306 N.C. 314, 293 S.E.2d 189 (1982).

Duty of Commission. — In determining whether a given illness falls within a definition set out in this section, it is the duty of the Commission to consider all of the competent evidence, make definitive findings, draw its conclusions of law from these findings, and enter the appropriate award. Harrell v. J.P. Stevens & Co., 45 N.C. App. 197, 262 S.E.2d 830, cert. denied, 300 N.C. 196, 269 S.E.2d 623 (1980).

Appellate Review Limited. — Review of Industrial Commission decisions is limited to a determination of whether there was competent evidence before the Commission to support its findings and whether such findings support its legal conclusions; the Court of Appeals cannot substitute its judgment for that of the Commission. Findings of fact, when supported by competent evidence, are conclusive on appeal. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Evaluation of Evidence. — In making its findings, the Commission's function is to weigh and evaluate the entire evidence and determine as best it can where the truth lies. Harrell v. J.P. Stevens & Co., 45 N.C. App. 197, 262 S.E.2d 830, cert. denied, 300 N.C. 196, 269 S.E.2d 623 (1980).

Proof of Inability to Earn. — Plaintiffs may prove they were incapable after injury of earning the same wages they had earned before injury in any other employment in one of four ways: (1) the production of medical evidence that they are physically or mentally, as consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that they are capable of some work, but have, after a reasonable effort been unsuccessful in their effort to obtain employment; (3) the production of evidence that they are capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, or lack of education, to seek other employment; or (4) the production of evidence that they have obtained other employment at a wage less than that earned prior to the injury. Grantham v. R.G. Barry Corp., 115 N.C. App. 293, 444 S.E.2d 659 (1994).

Award for Total Disability Not Authorized Where 40 to 50 Percent Not Occupational in Origin. — The Industrial Commission does not have authority to award compensation for total disability when 40 to 50 percent of claimant's disablement is not occupational in origin and was not aggravated or accelerated by any occupational disease. Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981).

Award for Partial Disability Upheld. — Where evidence supported the Industrial Commission's conclusion that claimant was totally disabled and that 55 percent of her disability was due to an occupational disease and 45 percent of her disability was due to other physical infirmities, it was not error for the Commission to award claimant compensation for a 55 percent partial disability rather than for total disability. Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981).

Finding of Total Disability Proper. — Evidence that plaintiff, age 58, had a fifth grade education and had no training to do any work other than textile work; that prior to his employment in textile mills, plaintiff had no lung disease or breathing difficulties; that during his employment he developed respiratory problems; that plaintiff was diagnosed as having byssinosis; and that he was 50 percent to 70 percent disabled and was totally disabled to perform his former textile employment was evidence supporting the Commission's findings and conclusion that plaintiff was totally disabled due to an occupational disease. Anderson v. A.M. Smyre Mfg. Co., 54 N.C. App. 337, 283 S.E.2d 433 (1981).

Applied in Clark v. Burlington Indus., 49 N.C. App. 269, 271 S.E.2d 101 (1980); May v. Shuford Mills, Inc., 64 N.C. App. 276, 307 S.E.2d 372 (1983); Caulder v. Waverly Mills, 67 N.C. App. 739, 314 S.E.2d 4 (1984); Foster v. Carolina Marble & Tile Co., 132 N.C. App. 505, 513 S.E.2d 75, 1999 N.C. App. LEXIS 202 (1999), cert. denied, 350 N.C. 830, 537 S.E.2d 822 (1999).

Cited in Johnson v. Erwin Cotton Mills Co., 232 N.C. 321, 59 S.E.2d 828 (1950); Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951); Morrison v. Burlington Indus., 47 N.C. App. 50, 266 S.E.2d 741 (1980); Goodman v. Linn-Corriher Corp., 53 N.C. App. 612, 281 S.E.2d 458 (1981); Taylor v. J.P. Stevens & Co., 57 N.C. App. 643, 292 S.E.2d 277 (1982); Hundley v. Fieldcrest Mills, 58 N.C. App. 184, 292 S.E.2d 766 (1982); West v. Bladenboro Cotton Mills, Inc., 62 N.C. App. 267, 302 S.E.2d 645 (1983); Taylor v. J.P. Stevens & Co., 307 N.C. 392, 298 S.E.2d 681 (1983); Adkins v. Fieldcrest Mills, Inc., 71 N.C. App. 621, 322

S.E.2d 642 (1984); Long v. North Carolina Finishing Co., 82 N.C. App. 568, 346 S.E.2d 669 (1986); Joyner v. Rocky Mount Mills, 85 N.C. App. 606, 355 S.E.2d 161 (1987); Gregory v. Sadie Cotton Mills, Inc., 90 N.C. App. 433, 368 S.E.2d 650 (1988); Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991); Walters v. Algernon Blair, 120 N.C. App. 398, 462 S.E.2d 232 (1995), aff'd per curiam, 344 N.C. 628, 476 S.E.2d 105 (1996), cert. denied, 520 U.S. 1196, 117 S. Ct. 1551, 137 L. Ed. 2d 700 (1997); Baker v. City of Sanford, 120 N.C. App. 783, 463 S.E.2d 559 (1995); Jordan v. Central Piedmont Community College, 124 N.C. App. 112, 476 S.E.2d 410 (1996); Grantham v. R.G. Barry Corp., 127 N.C. App. 529, 491 S.E.2d 678 (1997), cert. denied, 347 N.C. 671, 500 S.E.2d 86 (1998); Oliver v. Lane Co., 143 N.C. App. 167, 544 S.E.2d 606, 2001 N.C. App. LEXIS 220 (2001); Robbins v. Wake County Bd. of Educ., 151 N.C. App. 518, 566 S.E.2d 139, 2002 N.C. App. LEXIS 762 (2002); Payne v. Charlotte Heating & Air Conditioning, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005); Ward v. Floors Perfect, — N.C. App. —, 645 S.E.2d 109, 2007 N.C. App. LEXIS 1179 (2007).

II. SUBDIVISION (13).

The 1963 amendment of subdivision (13) of this section to include infections or inflammations of "any other internal or external organ or organs of the body" applied only to cases in which the last exposure in an occupation subject to the hazards of such disease occurred on or after July 1, 1963. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

The 1971 amendment to subdivision (13) of this section broadened its coverage to include a wider range of conditions susceptible to interpretation of being occupational diseases within the meaning of the act. Carawan v. Carolina Tel. & Tel. Co., 79 N.C. App. 703, 340 S.E.2d 506 (1986).

When Disease Is Compensable Under Subdivision (13). — A disease is compensable under subdivision (13) of this section where neither the chemical causing the disease nor the disease itself is mentioned in the statute. McAllister v. Cone Mills Corp., 88 N.C. App. 577, 364 S.E.2d 186 (1988).

The 1971 amendment of subdivision (13) of this section to its present form, which defines occupational disease, applies to all cases originating on and after July 1, 1971. Unlike the 1963 amendment, it was not limited to cases in which the "last exposure" to disease occurred after its effective date, but to cases "originating" after such date. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

The current (1971) version of subdivision (13) of this section applies to all claims for disablement in which the disability occurs after the statute's effective date, July 1, 1971. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Time of Disablement. — Given plaintiff's allegation that she was disabled after the effective date of the present version of subdivision (13), it was incumbent upon the Commission to determine when plaintiff became disabled before it decided which law applied to her claim. Where the Commission heard no evidence on this point and made no factual determination as to the date of disablement, the case would be remanded for a determination of that issue. Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979).

Time of disablement for the purpose of deciding which version of the Workers' Compensation Act to apply runs from the date the claimant was incapable of working due to a later diagnosed occupational disease. Taylor v. J.P. Stevens & Co., 300 N.C. 94, 265 S.E.2d 144 (1980).

Subdivision (13) Intended to Define "Occupational Disease". — Except for those diseases specifically named in the statute, the legislature intended the present version of subdivision (13) to define the term "occupational disease." To the extent that this statute conflicts with prior judicial definitions of the term "occupational disease," the older definitions must give way. Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

What Constitutes Occupational Disease. — Under subdivision (13) of this section, any disease is an occupational disease if it is due to causes and conditions peculiarly characteristic of the worker's particular trade, occupation or employment, and if the disease is not one that the general public, outside of the particular employment, stands an equal risk of contracting. The statute contains no other conditions and excludes no particular diseases, including the ordinary diseases of life. Thomason v. Fiber Indus., 78 N.C. App. 159, 336 S.E.2d 632 (1985), cert. denied, 316 N.C. 202, 341 S.E.2d 573 (1986).

A disease is an occupational disease compensable under this section if claimant's employment exposed him to a greater risk of contracting this disease than members of the public generally and such exposure significantly contributed to, or was a significant causal factor in, the disease's development. Perry v. Burlington Indus., Inc., 80 N.C. App. 650, 343 S.E.2d 215 (1986).

Competent evidence supported the Industrial Commission's conclusion that a workers' compensation claimant did not prove he developed an occupational disease due to conditions characteristic of his employment because his hyperactive airways disease was caused by his personal, unusual sensitivity to small amounts of certain chemicals. Nix v. Collins & Aikman, Co., 151 N.C. App. 438, 566 S.E.2d 176, 2002 N.C. App. LEXIS 751 (2002).

Employee who was exposed to toxic chemicals in the course of his employment spray-painting automobiles showed his exposure to workplace chemicals caused or significantly contributed to his lung disease, as he showed: (1) the disease was characteristic of persons engaged in his occupation; (2) the disease was not an ordinary disease of life to which the general public was equally exposed with those engaged in his occupation, as his employment exposed him to the chemicals to a greater extent than the exposure experienced by the general public and the agent to which he had a greater exposure was the cause of his disease; and (3) there was a causal connection between the disease and his employment. Matthews v. City of Raleigh, 160 N.C. App. 597, 586 S.E.2d 829, 2003 N.C. App. LEXIS 1928 (2003).

For an occupational disease to be compensable under subdivision (13) of this section, two conditions must be met: (1) It must be due to causes and conditions characteristic and peculiar to the employment; and (2) the particular employment conditions must place the worker at greater risk than the general public of contracting the disease. Fann v. Burlington Indus., 59 N.C. App. 512, 296 S.E.2d 819 (1982).

To prove the existence of a compensable "occupational disease" under this section: (1) the disease must be characteristic of a trade or occupation; (2) the disease must not be an ordinary disease of life to which the public is equally exposed outside of the employment; and (3) there must be proof of causation, i.e., proof of a causal connection between the disease and the employment. Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981); Perry v. Burlington Indus., Inc., 80 N.C. App. 650, 343 S.E.2d 215 (1986).

What Plaintiff Must Show Under Subdivision (13). — Plaintiff must show, in order to be entitled to compensation for disablement resulting from an occupational disease covered by subdivision (13) of this section: (1) that her disablement results from an occupational disease encompassed by this section, i.e., an occupational disease due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, as distinguished from an ordinary disease of life to which the general public is equally exposed outside of the employment; and (2) the extent of the disablement resulting from said occupational disease, i.e., whether she is totally or partially disabled as a result of the disease. Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981).

The Supreme Court has rejected the requirement that an employee quantify the degree of exposure to the harmful agent during his employment. Any evaluation of the workplace for the agent in question after claimant's departure would not quantify claimant's exposure, but would merely "guessimate" it. Since the degree of exposure does not need to be measured during claimant's employment, it should not need to be quantified in findings of fact, either. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Three elements are necessary to show the existence of a compensable occupational disease under this section: (1) the disease must be characteristic of persons engaged in a particular trade or occupation in which the plaintiff is engaged; (2) the disease must not be an ordinary disease of life to which the public is equally exposed; and (3) there must be a causal connection between the disease and the plaintiff's employment. Jarvis v. Food Lion, Inc., 134 N.C. App. 363, 517 S.E.2d 388 (1999).

Competent evidence supported the industrial commission's finding that (1) while the nature of the claimant's work as a secretary and graphic artist did not place her at greater risk for contracting mesothelioma, the requirement that she work in a building with higher-than-normal asbestos levels did; (2) mesothelioma was not an ordinary disease of life to which the public was exposed equally as the claimant; (3) there was a causal connection between mesothelioma and the claimant's employment; and (4) the claimant sustained a compensable occupational disease as a result of her employment, pursuant to G.S. 97-53(13). Robbins v. Wake County Bd. of Educ., 151 N.C. App. 518, 566 S.E.2d 139, 2002 N.C. App. LEXIS 762 (2002).

While an employee's toxic encephalopathy was not listed as an occupational disease in G.S. 97-53, he sufficiently showed, under G.S. 97-53(13) that: (1) the disease was characteristic of persons engaged in his occupation of spray-painting automobiles; (2) the disease was not an ordinary disease of life to which the general public was equally exposed with those engaged in his occupation; and (3) there was a causal connection between the disease and his employment. Matthews v. City of Raleigh, 160 N.C. App. 597, 586 S.E.2d 829, 2003 N.C. App. LEXIS 1928 (2003).

Industrial Commission's conclusion that the worker had not satisfied her burden of showing that her job exposed her to an increased risk of developing fibromyalgia was well supported where there was insufficient evidence to prove the worker's job placed her at an increased risk of developing the occupational disease and the job did not cause her condition. James v. Perdue Farms, Inc., 160 N.C. App. 560, 586 S.E.2d 557, 2003 N.C. App. LEXIS 1831 (2003), cert. denied, 358 N.C. 234, 594 S.E.2d 191 (2004).

The substance to which plaintiff was

last injuriously exposed need not be in a substance known to cause the disease. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

When Disease Is "Characteristic" of Profession. — To be compensable under subdivision (13) of this section, a disease must, inter alia, be "characteristic of and peculiar to a particular trade, occupation or employment." A disease is "characteristic" of a profession when there is a recognizable link between the nature of the job and an increased risk of contracting the disease in question. Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979); Humphries v. Cone Mills Corp., 52 N.C. App. 612, 279 S.E.2d 56, cert. denied, 304 N.C. 390, 285 S.E.2d 832 (1981); Anderson v. A.M. Smyre Mfg. Co., 54 N.C. App. 337, 283 S.E.2d 433 (1981).

Under subdivision (13), a disease is "characteristic" of a profession when there is a recognizable link between the nature of the job and an increased risk of contracting the disease in question. Keller v. City of Wilmington Police Dep't, 65 N.C. App. 675, 309 S.E.2d 543 (1983).

Where the injured party's expert and the employer's expert disagreed as to whether the injured party had carpal tunnel syndrome and whether it was caused by the work performed by the injured party for the employer as was required under G.S. 97-53(13), the testimony of the injured party's expert was entitled to greater weight than the testimony of the employer's expert; the injured party's expert was the injured party's treating physician, while the employer's expert was retained by the employer and did not treat the injured party. Currence v. Sarah Lee Intimates/Bali, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2090 (May 21, 2002).

"Peculiar to the occupation," as used in subdivision (13) of this section, means that the conditions of the employment must result in a hazard which distinguishes it in character from the general run of occupations and is in excess of that attending employment in general. Keller v. City of Wilmington Police Dep't, 65 N.C. App. 675, 309 S.E.2d 543 (1983).

"Employment" Refers to Particular Job. — When considering whether a claimant suffers from an occupational disease, the term "employment" must be interpreted as referring to the claimant's particular job, rather than to the type of job. Woody v. Thomasville Upholstery Inc., 146 N.C. App. 187, 552 S.E.2d 202, 2001 N.C. App. LEXIS 857 (2001), cert. denied, 354 N.C. 371, 557 S.E.2d 538 (2001).

Proof of Causation Is Essential. — In order for an occupational disease which develops over a long period of time to be compensable under subdivision (13) of this section, it must be proved that it was caused by the plaintiff's employment. Brown v. J.P. Stevens & Co., 49 N.C. App. 118, 270 S.E.2d 602 (1980), cert. denied, 304 N.C. 192, 285 S.E.2d 96 (1981).

Proof of a causal connection between the disease and the employee's occupation is an essential element in proving the existence of a compensable occupational disease within the meaning of this section. Hansel v. Sherman Textiles, 49 N.C. App. 1, 270 S.E.2d 585 (1980), rev'd on other grounds, 304 N.C. 44, 283 S.E.2d 101 (1981).

There must be a proof of causation between the injury and the employment. Keller v. City of Wilmington Police Dep't, 65 N.C. App. 675, 309 S.E.2d 543 (1983).

Plaintiff did not meet the burden of showing a causal connection between her back injury and her employment with defendant. Thompson v. Tyson Foods, Inc., 119 N.C. App. 411, 458 S.E.2d 746 (1995).

Workers' compensation claimant did not meet her burden of proving that her job demonstrating household cleaning products placed her at a greater risk than the general public of developing carpal tunnel syndrome, in spite of a medical opinion that it did, because that opinion was based on her description of what the job entailed, and the opinion changed when based on a different description supported by evidence before the Commission; thus the Commission's conclusion that the job did not place her at greater risk was supported by competent evidence and was binding on the reviewing court. Hobbs v. Clean Control Corp., 154 N.C. App. 433, 571 S.E.2d 860, 2002 N.C. App. LEXIS 1441 (2002).

Causation Not Proven. — Workers' compensation claimant did not establish causation under G.S. 97-53(13) where her doctor testified that her condition could have come from her employment, but that he did not know, because the claimant failed to provide him with sufficient information as to her job duties. Faison v. Allen Canning Co., 163 N.C. App. 755, 594 S.E.2d 446, 2004 N.C. App. LEXIS 573 (2004).

Employee was denied temporary total disability benefits for her alleged occupational disease, chemical sensitivity, under G.S. 91-53(13), where the experts opined that the employee had a heightened peculiar sensitivity to chemicals and that her personal sensitivity predated any exposure she alleged caused condition, and any expert opinion supporting the employee's position was based on mere speculation or possibility. Hayes v. Tractor Supply Co., 170 N.C. App. 405, 612 S.E.2d 399, 2005 N.C. App. LEXIS 1003 (2005).

If a disease is produced by some extrinsic or independent agency, it may not be imputed to the occupation or the employment. Moore v. J.P. Stevens & Co., 47 N.C. App. 744, 269 S.E.2d 159, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980).

But Employment Need Not Be Exclusive

Cause of Disease. — Subdivision (13) in no way requires that the conditions of employment be the exclusive cause of the disease in order to be compensable. Humphries v. Cone Mills Corp., 52 N.C. App. 612, 279 S.E.2d 56, cert. denied, 304 N.C. 390, 285 S.E.2d 832 (1981).

The disease need not be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather, employment must result in a hazard which distinguishes it in character from the general run of occupations. Humphries v. Cone Mills Corp., 52 N.C. App. 612, 279 S.E.2d 56, cert. denied, 304 N.C. 390, 285 S.E.2d 832 (1981).

The hazards of employment do not have to be the sole cause of a worker's injury in order for the worker to receive compensation for the full extent of his incapacity for work caused by the injury. Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983).

Where the accident and resultant injury arise out of both the idiopathic condition of the worker and the hazards incident to the employment, the employer is liable. But not so where the idiopathic condition is the sole cause of the injury. Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983).

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983) expressly replaced the former standard of actual causation with a liberalized standard of causation, whereby exposure to cotton dust need only be a significant causative or contributing factor in the disease's development. Calloway v. Mills, 78 N.C. App. 702, 338 S.E.2d 548 (1986).

Fact that on cross-examination physician testified that plaintiff's cigarette smoking was probably a more significant contributing factor than his occupation did not compel the conclusion that plaintiff did not have a compensable occupational disease. So long as the employment significantly contributed to, or was a significant causal factor in, the disease's development, an occupational disease is compensable under this section. Perry v. Burlington Indus., Inc., 80 N.C. App. 650, 343 S.E.2d 215 (1986).

The claimant's rotator cuff injury was compensable, even if her second job aggravated the injury, where the shoulder pains began two years before she began cleaning houses in addition to her regular job as a reclaim operator, and this subsection does not require that the conditions of employment be the exclusive cause of the occupational disease. Garren v. P.H. Glatfelter Co., 131 N.C. App. 93, 504 S.E.2d 810 (1998).

Disease Need Not Be Unique to the Particular Occupation. — To satisfy the first and second elements of subdivision (13) of this section, it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question. All ordinary diseases of life are not excluded from the statute's coverage. Only those ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded. Thus, the first two elements are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally. Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983).

Factual inquiry should be whether occupational exposure was such significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work. Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983); Collins v. Mills, 85 N.C. App. 243, 354 S.E.2d 245 (1987).

Causal Connection May Be Established by Circumstantial Evidence. — In occupational disease cases, the causal connection between the disease and the employee's occupation must of necessity be based upon circumstantial evidence. Lumley v. Dancy Constr. Co., 79 N.C. App. 114, 339 S.E.2d 9 (1986).

Circumstantial evidence of the causal connection between the occupation and the disease is sufficient. Medical opinions given may be based either on personal knowledge or observation or on information supplied him by others, including the patient. Absolute medical certainty is not required. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

The right to compensation for a disease caused in part by occupational factors and in part by nonoccupational factors depends on proving: (1) that the occupation in question exposed the worker to a greater risk of contracting the disease than members of the public generally, and (2) that the worker's exposure significantly contributed to or was a significant causal factor in the disease's development. Mills v. Mills, 68 N.C. App. 151, 314 S.E.2d 833 (1984); Gay v. J.P. Stevens & Co., 79 N.C. App. 324, 339 S.E.2d 490 (1986).

Ordinary Disease of Life. — If the medical evidence tends to show that plaintiff suffers from an ordinary disease of life to which the general public is equally exposed, which is not proven to be due to causes and conditions which are characteristic of and peculiar to any particular trade, occupation or employment and which is not aggravated or accelerated by an occupational disease, the claim is not compensable. Thompson v. Burlington Indus., 59 N.C. App. 539, 297 S.E.2d 122 (1982), cert. denied, 307 N.C. 582, 299 S.E.2d 650 (1983).

Exposure to Environmental Irritants. — Where an employee is exposed in his workplace to environmental irritants which in fact hasten the onset of a disabling condition which did not previously exist, such aggravation is tantamount to causation for purposes of subdivision (13) of this section, and the resulting disability is an occupational disease thereunder. Walston v. Burlington Indus., 49 N.C. App. 301, 271 S.E.2d 516 (1980), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982).

Commission Was Not Required to Make Two Separate Findings Regarding Aggravation of Disease. — The terms "significantly contributing to" and "aggravated," regarding exposure to a substance and its effect on a claimant's health, are interchangeable. Therefore, where the Industrial Commission had determined that plaintiff's exposure to cotton dust did not significantly contribute to his disease, it was tantamount to a finding that his disease was not aggravated by his exposure to cotton dust. It was not necessary for the Commission to make two separate findings. Wilkins v. J.P. Stevens & Co., 100 N.C. App. 742, 398 S.E.2d 66 (1990), aff'd, 333 N.C. 449, 426 S.E.2d 675 (1993).

Commission Must Determine Significance of Exposure. — Ultimately, the Commission must determine whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work. Gay v. J.P. Stevens & Co., 79 N.C. App. 324, 339 S.E.2d 490 (1986); Perry v. Burlington Indus., Inc., 80 N.C. App. 650, 343 S.E.2d 215 (1986).

Factors in Determining Significance of Exposure. — In determining the role occupational exposure played in development of disease, the Commission may consider, in addition to expert medical testimony, factual circumstances which bear on the question of causation. Thus, the Commission may consider (1) the nature and extent of claimant's occupational exposure, (2) the presence or absence of other nonwork-related exposures and components which contributed to the disease's development, and (3) correlations between claimant's work history and the development of the disease. Gay v. J.P. Stevens & Co., 79 N.C. App. 324, 339 S.E.2d 490 (1986); Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Award Where Occupational and Nonoccupational Disease Cannot Be Apportioned. — Where medical evidence would not permit any reasonable apportionment of claimant's disability between occupational and nonoccupational disease, claimant would be entitled to an award for her entire disability if her occupational disease was a substantial and material factor in bringing about that disability. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985), remanding to the Commission for a determination of the issue.

Mixed Question of Law and Fact. — Whether a given illness falls within the general definition set out in subdivision (13) presents a mixed question of fact and law. The Commission must determine first the nature of the disease from which the plaintiff is suffering, that is, its characteristics, symptoms and manifestations. Ordinarily, such findings will be based on expert medical testimony. Having made appropriate findings of fact, the next question the Commission must answer is whether or not the illness which plaintiff has contracted falls within the definition set out in the statute. This latter judgment requires a conclusion of law. Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979); Harrell v. J.P. Stevens & Co., 45 N.C. App. 197, 262 S.E.2d 830, cert. denied, 300 N.C. 196, 269 S.E.2d 623 (1980).

Whether a given illness falls within the general definitions set out in subdivision (13) of this section presents a mixed question of fact and law. Taylor v. J.P. Stevens & Co., 300 N.C. 94, 265 S.E.2d 144 (1980); Taylor v. Cone Mills Corp., 306 N.C. 314, 293 S.E.2d 189 (1982).

Explicit Findings Required. — Where the Commission awards compensation for disablement due to an occupational disease encompassed by subdivision (13), the opinion an award must contain explicit findings as to the characteristics, symptoms and manifestations of the disease from which the plaintiff suffers, as well as a conclusion of law as to whether the disease falls within the statutory provision. Moore v. J.P. Stevens & Co., 47 N.C. App. 744, 269 S.E.2d 159, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980); Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981); Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Occupational Disease Found. — Competent evidence supported the finding that a textile mill employee's work environment significantly contributed to the development of her asthma to the extent that it disabled her, where a medical expert testified that exposure "more likely than not" contributed to the worsening of her asthma, and another doctor testified that the employee's asthma was severe enough to prevent her from working. Locklear v. Stedman Corporation/Sara Lee Knit Prods., 131 N.C. App. 389, 508 S.E.2d 795 (1998).

A claimant's fibromyalgia, which was contributed to by severe depression caused by a supervisor's demeaning treatment, and the employer's failure to remedy the problem, was a compensable occupational disease. Woody v. Thomasville Upholstery Inc., 146 N.C. App. 187, 552 S.E.2d 202, 2001 N.C. App. LEXIS 857

(2001), cert. denied, 354 N.C. 371, 557 S.E.2d 538 (2001).

Occupational Disease Not Found. — Evidence was insufficient to support a finding that plaintiff had a compensable occupational disease, where none of plaintiff's co-workers testified that they had consulted a physician and had been diagnosed with fibromyalgia, although they testified that they experienced similar symptoms as plaintiff, and none of the medical witnesses expressed an opinion as to whether plaintiff's employment or occupation subjected her to a greater risk of contracting the disease. Norris v. Drexel Heritage Furnishings, Inc., 139 N.C. App. 620, 534 S.E.2d 259, 2000 N.C. App. LEXIS 994 (2000).

Industrial commission properly denied a nurse's claim for compensation for an alleged occupational disease pursuant to G.S. 97-53(13); the nurse's constant exposure to the death of patients was not a significant factor in the development of the nurse's depression, and thus presented insufficient evidence to demonstrate that the workplace stressors contributing to the development of her depression were causes and conditions characteristic of and peculiar to her position as a registered nurse. Lewis v. Duke Univ., 163 N.C. App. 408, 594 S.E.2d 100, 2004 N.C. App. LEXIS 412 (2004).

North Carolina Industrial Commission did not err in concluding that an employee failed to show that he was suffering from an occupational disease because the employee presented no evidence, and the Commission made no findings to support a conclusion, that the employee's depression was due to causes and conditions characteristic of and peculiar to his employment in the aircraft section of his employer. Bursell v. N.C. Indus. Comm'n I.C. No. 177846, 172 N.C. App. 73, 616 S.E.2d 342, 2005 N.C. App. LEXIS 1427 (2005).

North Carolina Industrial Commission properly denied an employee's application for workers' compensation benefits because the employee failed to meet her burden of showing that her employment as a sixth-grade teacher placed her at an increased risk of developing anxiety disorder; thus, the employee failed to establish that her condition was an occupational disease pursuant to G.S. 97-53(13), as the employee's position did not expose her to unusual and stressful conditions, and her employer did not require her to perform any extraordinary tasks. Hassell v. Onslow County Bd. of Educ., — N.C. App. —, 641 S.E.2d 324, 2007 N.C. App. LEXIS 487 (2007).

Unless there is a proper finding that plaintiff suffers from an occupational disease, the analysis required by Morrison v. Burlinton Indus., 304 N.C. 1, 282 S.E.2d 458 (1981) and Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981) is inappropriate. Lumpkins v. Mills, 56 N.C. App. 653, 289 S.E.2d 848 (1982).

Claimant Has Burden of Proof. — A claimant's right to compensation for an occupational disease under subdivision (13) of this section and G.S. 97-52 depends upon proper proof of causation, and the burden of proving each and every element of compensability is upon the plaintiff. Moore v. J.P. Stevens & Co., 47 N.C. App. 744, 269 S.E.2d 159, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980).

The claimant carries the burden of proving the existence of a compensable claim. Gay v. J.P. Stevens & Co., 79 N.C. App. 324, 339 S.E.2d 490 (1986).

Claimant has the burden of proof, but if the occupational exposure in question is such that it augments the disease process to any degree, however slight, the employer is liable. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Respiratory surfaces of the lungs are "external contact surfaces" of the body as contemplated by subdivision (13) of this section as it existed prior to the 1971 amendment. Taylor v. Cone Mills Corp., 306 N.C. 314, 293 S.E.2d 189 (1982).

Evidence offered was sufficient to support the Industrial Commission's findings that a spontaneous tear of the rotator cuff was an occupational disease within the meaning of subsection (13) of this section. Gibbs v. Leggett & Platt, Inc., 112 N.C. App. 103, 434 S.E.2d 653 (1993).

Causal Relationship Between Disease and Inability to Work. — Evidence that a claimant's environmental restriction (caused by an occupational disease) significantly limits the scope of potential employment in his or her usual vocation, when combined with other factors such as a lack of training in any other vocation, is competent to establish a causal nexus between the occupational disease and the partial or total inability to earn wages in the same or any other employment. Preslar v. Cannon Mills Co., 80 N.C. App. 610, 343 S.E.2d 209 (1986).

Individual who retired from job in which he had 47 years of experience at age 70, and subsequently attempted to return to work but could not obtain comparable employment, was entitled to partial disability compensation based on the difference between his present and former wages, in view of environmental restriction, caused by his occupational disease (COPD), which combined with other factors to limit the scope of his potential employment. Preslar v. Cannon Mills Co., 80 N.C. App. 610, 343 S.E.2d 209 (1986).

Wrongful Death Claim Barred. — Wrongful death complaint alleging that defendant, decedent's employer, negligently required decedent to perform tasks which exposed decedent to known carcinogens, thereby causing decedent's cancer of the bladder and resulting death, came within the language of subdivision (13) of this section and was barred by the Workers' Compensation Act. McAllister v. Cone Mills Corp., 88 N.C. App. 577, 364 S.E.2d 186 (1988).

Evidence Sufficient. — The employee met her burden in showing that her employment caused or was a significant contributing factor to her rotator cuff tear, where she showed that her work as a reclaim operator required her to perform the repetitive activities involving her shoulders of removing, replacing, and stacking bobbins, and her medical witness testified that the work could have been a significant factor in causing the injury. Garren v. P.H. Glatfelter Co., 131 N.C. App. 93, 504 S.E.2d 810 (1998).

III. PARTICULAR DISEASES.

Degenerative disc condition which is not shown to be "characteristic of and peculiar to" plaintiff's employment is not an occupational disease, and there can be no compensation without a connection between the disease and the employment. Griffitts v. Thomasville Furn. Co., 65 N.C. App. 369, 309 S.E.2d 277 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 884 (1984).

Evidence Insufficient. — Court agreed with Industrial Commission that plaintiff failed to demonstrate that her carpal tunnel syndrome was an occupational disease "which was characteristic of and peculiar to her employment" within the meaning of this section. Jarvis v. Food Lion, Inc., 134 N.C. App. 363, 517 S.E.2d 388 (1999).

Finding that employee's ulnar neuropathy and cervical spine condition were compensable occupational diseases was reversed because the employee failed to establish that employment as a bus driver placed the employee at a greater risk of contracted either condition than the general public; statements by the employee's doctor were insufficient to establish the necessary causal relationship for the employee's conditions to be compensable as occupational diseases. Chambers v. Transit Mgmt., 360 N.C. 609, 636 S.E.2d 553, 2006 N.C. LEXIS 1195 (2006).

Heart Disease. — Heart disease is not an occupational disease. West v. North Carolina Dep't of Conservation & Dev., 229 N.C. 232, 49 S.E.2d 398 (1948); Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E.2d 22 (1951).

Infectious hepatitis is not listed in this section. Smith v. Memorial Mission Hosp., 21 N.C. App. 380, 204 S.E.2d 546 (1974).

Evidence presented was insufficient to show that infectious hepatitis was a disease which was characteristic of and peculiar to the occupation of a master mechanic acting, sometimes as a plumber, in the course of his employment for a hospital. Morrow v. Memorial Mission Hosp., 21 N.C. App. 299, 204 S.E.2d 543 (1974); Smith v. Memorial Mission Hosp., 21 N.C. App. 380, 204 S.E.2d 546 (1974).

Serum Hepatitis. — Because serum hepatitis is not expressly mentioned in the schedule of diseases contained in this section, it is a compensable injury only if it falls within the general definition set out in subdivision (13). Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

Hepatitis C Virus. — Habilitation aide presented no evidence that she was exposed to the hepatitis C virus at work as the aide relied on alleged blood-to-blood exposure with residents at the facility as sufficient proof of causation; however, exposure to blood, standing alone, was not sufficient evidence of exposure to the hepatitis C virus as proof of exposure to the disease or disease-causing agents during employment was required and uninfected blood could not be characterized as a disease-causing agent. Poole v. Center, 151 N.C. App. 668, 566 S.E.2d 839, 2002 N.C. App. LEXIS 902 (2002).

Industrial commission properly denied a claim for workers' compensation benefits pursuant to G.S. 97-53(13); testimony by an expert on infectious diseases was sufficient to support the finding that a worker's hepatitis C was not caused by work-related contact with sewage. Carroll v. Town of Ayden, 160 N.C. App. 637, 586 S.E.2d 822, 2003 N.C. App. LEXIS 1927 (2003), aff'd, 359 N.C. 66, 602 S.E.2d 674 (2004).

Dermatitis resulting from contact with gloves made of commercial rubber held not an occupational disease compensable under the act. Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950).

Skin Condition Caused by Sensitivity to Chemicals Used in Work. — A hair stylist was not entitled to disability compensation payments where her skin condition, caused by her sensitivity to chemicals used in her work, had completely cleared up within one month of her terminating employment. While it might be true that her skin disease could recur if she returned to her previous job, there was no evidence of any continuing disability as a result of a disease contracted in the course of employment. She was not entitled to compensation for her susceptibility to the skin disease. Sebastian v. Mona Watkins Hair Styling, 40 N.C. App. 30, 251 S.E.2d 872, cert. denied, 297 N.C. 301, 254 S.E.2d 921 (1979).

Calcification of Tendons and Ligaments. — Where, in a hearing before the Industrial Commission, the critical issue raised by the evidence was whether the calcification of tendons and ligaments in plaintiff's shoulders, resulting in a 10 percent permanent partial disability to both arms, was an occupational disease within the meaning of subdivision (13), this issue engendered two distinct findings of fact which had to be made: (1) an explicit description of plaintiff's duties in performing her occupation, and (2) a determination of whether such duties caused the calcification and resulting disability to either or both of plaintiff's arms. Cannady v. Gold Kist, 43 N.C. App. 482, 259 S.E.2d 342 (1979).

Tenosynovitis Caused by Trauma in Employment. — Synovitis is the inflammation of a synovial membrane and tenosynovitis or tendosynovitis is the inflammation of a synovial membrane which forms the protective sheath that encloses the tendon. It is sometimes used to denote the inflammation of both the sheath and the tendon. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

The causative origin of tenosynovitis is either infection or trauma. The clause "caused by trauma in employment" was used by the legislature to modify the word "tenosynovitis" so as to include the occupational and exclude the infectious type, i.e., to include the traumatic and exclude the idiopathic. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

In using the modifying phrase, "caused by trauma in employment," the legislature necessarily meant a series of events in employment occurring regularly, or at frequent intervals, over an extended period of time, and culminating in the condition technically known as tenosynovitis. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

A single blow on the arm might bruise the extensor tendons to such an extent as to cause temporary tenosynovitis. The resulting condition would be properly termed an injury by accident caused by trauma. But it would not constitute an occupational disease, for an occupational disease is a diseased or morbid condition which develops gradually, and is produced by a series of events in employment occurring over a period of time. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

Tenosynovitis attributable to repeated strain or stress on the extensor tendons of claimant's arms incident to the performance of the duties of his employment is "caused by trauma in employment" and is an occupational disease compensable under the provisions of this section, since "trauma" in its technical sense is not limited to injuries resulting from external force or violence. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

Torn Rotator Cuff. — Industrial Commission properly determined that a worker suffered a compensable occupations disease as defined by G.S. 97-53; the evidence indicated that the worker's employment as a cameraman predisposed him to a greater risk for rotator cuff and shoulder problems than the general public, as his work involved much overhead lifting and body contortion in order to get proper camera angles. Flynn v. EPSG Mgmt. Servs., 171 N.C. App. 353, 614 S.E.2d 460, 2005 N.C. App. LEXIS 1208 (2005).

Asbestosis. — North Carolina Industrial Commission did not err in denying benefits for asbestosis and lung cancer where there was competent evidence in the record to support the Commission's findings regarding the employee's last injurious exposure to asbestos, and where the Commission applied the correct legal standard in evaluating both claims; the evidence supported a reasonable inference that the employee was exposed to asbestos for at least 30 days or parts thereof within seven consecutive months while working for a different employer, and the employee's last injurious exposure to the hazards of asbestosis occurred with the different employer. Hatcher v. Daniel Int'l Corp., 153 N.C. App. 776, 571 S.E.2d 20, 2002 N.C. App. LEXIS 1261 (2002).

Silicosis is an inflammatory disease of the lungs due to the inhalation of particles of silicon dioxide. It is incurable and is one of the most disabling occupational diseases because it makes the lungs susceptible to other infection, particularly tuberculosis. According to the textbook writers, it has been definitely determined that the removal of a man who has silicosis from silica exposure, does not stop the progress of the disease at once, but that fibrotic changes continue to develop for another one or two years. Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952).

Byssinosis. — The Commission erred in assuming that byssinosis is an irritation of the pulmonary air passages without hearing evidence and making findings of fact as to the nature of claimant's illness, which is required of the Commission in determining whether a given illness falls within the general definition set out in subdivision (13). The causes and development of byssinosis, and the structural and functional changes produced by the diseases, are still the subject of scientific debate, and the Supreme Court has never before considered a case involving byssinosis. Under these circumstances, judicial notice as to the essential characteristics of the disease is inappropriate. Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979).

Despite evidence that plaintiff had smoked three-fourths of a pack of cigarettes daily for 30 years, the medical evidence and plaintiff's own testimony was sufficient to find him permanently disabled under this section from byssinosis caused by the conditions of his employment in the weave room of a textile plant. Humphries v. Cone Mills Corp., 52 N.C. App. 612, 279 S.E.2d 56, cert. denied, 304 N.C. 390, 285 S.E.2d 832 (1981).

Byssinosis, as a component of chronic obstructive pulmonary disease, is a compensable occupational disease. Peoples v. Cone Mills Corp., 69 N.C. App. 263, 317 S.E.2d 120, modified on other grounds, 316 N.C. 426, 342 S.E.2d 798 (1986).

Apportionment between causal factors is no longer the standard for disability compensation in cases involving exposure to cotton dust. Gibson v. Little Cotton Mfg. Co., 73 N.C. App. 143, 325 S.E.2d 698 (1985).

Evidence held sufficient to support the finding that plaintiff was partially incapable of engaging in gainful employment by byssinosis and chronic obstructive lung disease as a result of 29 years of smoking and exposure to cotton dust, and that his occupational disease, combined with his age, limited education and work experience, limited his ability to earn wages. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Chronic Obstructive Pulmonary Disease. — To hold that the inhalation of cotton dust must be the sole cause of chronic obstructive lung disease before this disease can be considered occupational establishes too harsh a principle from the standpoint of the worker and the purposes and policies of the Workers' Compensation Act. This act should be liberally construed so that the benefits under the act will not be denied by narrow, technical or strict interpretation. Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983).

Chronic obstructive lung disease may be an occupational disease provided the occupation in question exposed the worker to a greater risk of contracting this disease than members of the public generally, and provided the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other non-work related factors also made significant contributions or were significant causal factors. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, 311 S.E.2d 590 (N.C. 1984); McHargue v. Burlington Indus., 78 N.C. App. 324, 337 S.E.2d 584 (1985); 302 N.C. 183, 273 S.E.2d 705 (1981).

An employee who suffers from chronic obstructive pulmonary disease is entitled to findings of fact and conclusions of law that said disease in an occupational disease pursuant to subdivision (13) of this section, if it is shown by competent evidence that occupational exposure to a hazard known to cause the disease, such as cotton dust, significantly contributed to the causation or development of the disease. Swink v. Cone Mills, Inc., 65 N.C. App. 397, 309 S.E.2d 271 (1983).

A claimant is not required to establish work-related byssinosis as a causal element of his or her chronic obstructive pulmonary disease in order to prove the existence of an occupational disease within the meaning of subdivision (13) of this section. Rather, he or she needs only to establish the existence of chronic obstructive pulmonary disease and to establish that exposure to cotton dust in the work environment significantly contributed to or was a significant causal factor in the development of the disease. Clark v. American & Efird Mills, 66 N.C. App. 624, 311 S.E.2d 624, cert. denied, 311 N.C. 399, 319 S.E.2d 268 (1984), aff'd, 312 N.C. 616, 323 S.E.2d 920 (1985).

Where plaintiff established the existence of chronic obstructive pulmonary disease with chronic bronchitis as the only element thereof, in order to conclude that plaintiff did not have an occupational disease within the meaning of subdivision (13) of this section the Commission would have to make findings, supported by competent record evidence, that plaintiff's exposure to cotton dust was neither a significant contribution to nor a significant causal factor in the development of her disease. Clark v. American & Efird Mills, 66 N.C. App. 624, 311 S.E.2d 624, cert. denied, 311 N.C. 399, 319 S.E.2d 268 (1984), aff'd, 312 N.C. 616, 323 S.E.2d 920 (1985).

Although the Industrial Commission made no findings regarding the significance of plaintiff's exposure to cotton dust in relation to the development of his lung disease, an award of workers' compensation would nevertheless be proper if the evidence supported a conclusion that occupational exposure was a significant contributing or causal factor in the development of plaintiff's lung disease. Mills v. Mills, 68 N.C. App. 151, 314 S.E.2d 833 (1984).

The following legal standard determines whether a claimant suffering from chronic obstructive lung disease has a compensable occupational disease under subdivision (13): The occupation in question must have exposed the worker to a greater risk of contracting this disease than members of the public generally, and provided the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other non-work related factors also make significant contributions, or were significant causal factors. Gibson v. Little Cotton Mfg. Co., 73 N.C. App. 143, 325 S.E.2d 698 (1985).

Chronic obstructive lung disease may be an occupational disease provided that the worker's exposure to substances peculiar to the occupation in question significantly contributed to, or was a significant causal factor in, the development of the disease. Goodman v. Cone Mills Corp., 75 N.C. App. 493, 331 S.E.2d 261 (1985).

In determining whether exposure to an occupational substance significantly contributed to, or was a significant causal factor in, chronic obstructive lung disease, the Commission may consider medical testimony as well as other factual circumstances in the case, including the extent of the worker's exposure to the substance, the extent of non-occupational but contributing factors, and the manner of development of the disease as it relates to the claimant's work history. Goodman v. Cone Mills Corp., 75 N.C. App. 493, 331 S.E.2d 261 (1985).

Where a medical doctor, a specialist in pulmonary medicine, testified, and the Commission found, that the claimant's chronic obstructive lung disease was not caused, in whole or in part, by exposure to an occupational substance (i.e., cotton dust), but was due instead, to cigarette smoking, upon such a finding, the Commission was required to conclude that the claimant's disease was not an occupational disease. Goodman v. Cone Mills Corp., 75 N.C. App. 493, 331 S.E.2d 261 (1985).

Doctor's testimony that the sulfuric acid fumes inhaled by plaintiff in his employment as a "battery buster" were a respiratory irritant, along with testimony that plaintiff often inhaled those fumes, was sufficient to establish a causal relationship with plaintiff's obstructive lung disease. Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501, aff'd, 318 N.C. 410, 348 S.E.2d 595 (1986).

Employee in his late fifties whose formal education ended after the first grade, and who could not read, write or sign his name; did not know his date of birth; had a long history of cigarette smoking; worked on and off in the textile industry until March, 1981; and had chronic obstructive pulmonary disease, was not entitled to benefits, as he failed to prove extent of exposure to cotton dust and causation. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Chronic obstructive pulmonary disease may be an occupational disease if (i) the occupation in question exposed the worker to a greater risk of contracting the disease than that faced by members of the public generally and (ii) the worker's exposure to cotton dust significantly contributed to or was a significant causal factor in the disease's development, even if other non-work-related factors also make significant contributions, or were significant causal factors. Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983); Collins v. Mills, 85 N.C. App. 243, 354 S.E.2d 245 (1987).

Testimony of physician that considering plaintiff's history of cigarette smoking, his ability to perform work today would be the same had plaintiff worked on a farm rather than in the textile industry, supported the commission's conclusion that plaintiff's exposure to cotton dust was not a significant factor in the cause of plaintiff's chronic obstructive lung disease. Collins v. Mills, 85 N.C. App. 243, 354 S.E.2d 245 (1987).

When Byssinosis and Chronic Obstructive Pulmonary Disease Are "Occupational" Under Subdivision (13). — Byssinosis and chronic obstructive pulmonary disease are not among the prima facie occupational diseases listed in this section. Therefore, to be "occupational" under the catch-all provision of subdivision (13), the plaintiff's disease must be characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged, and not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation, and there must be a causal connection between the disease and the claimant's employment. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Evidence held sufficient to support the finding that plaintiff was partially incapable of engaging in gainful employment by byssinosis and chronic obstructive lung disease as a result of 29 years of smoking and exposure to cotton dust, and that his occupational disease, combined with his age, limited education and work experience, limited his ability to earn wages. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Obstruction caused by chronic obstructive lung disease need not be apportioned between occupational and nonoccupational causes; a claimant may recover the entire disability resulting from such obstruction, so long as the occupation-related cause was a significant causal factor in the disease's development. Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985).

Progression of chronic obstructive lung disease is not the test of compensability; rather, the test is whether the occupational exposure significantly contributed to the disabling disease's development. Neal v. Leslie Fay, Inc., 78 N.C. App. 117, 336 S.E.2d 628 (1985).

Lung Disease Partially Caused by Occupational Exposure. — In determining chronic obstructive lung disabilities which are caused in part by occupational exposure to cotton dust and in part by some other cause or causes unrelated to the employment, the following rule applies: When exposure to cotton dust is an insignificant causal factor in, or does not significantly contribute to, the development of the disabling lung disease, it is not an occupational disease within the purview of subdivision (13) of this section and no compensation is due therefor; but when the exposure to cotton dust significantly contributes to, or is a significant causal factor in, the development of a disabling lung disease it is an occupational disease and compensation for the full extent of the disability is due. Neal v. Leslie Fay, Inc., 78 N.C. App. 117, 336 S.E.2d 628 (1985).

Findings as to Cause of Lung Disease. — It was not enough for the Commission to say that claimant's lung disease was "not caused by" exposure to cotton dust in her employment, where the Commission did not, however, make any findings on the issue of "significant contribution." McHargue v. Burlington Indus., 78 N.C. App. 324, 337 S.E.2d 584 (1985).

Tuberculosis. — Plaintiff failed to show correlation between his work as a janitor and the development of tuberculosis, with the exception of his exposure to a coemployee with the disease, or that the nature of a janitorial job increased a person's risk of developing tuberculosis, for tuberculosis to be found to be an occupational disease under subdivision (13). Higgs v. Southeastern Cleaning Serv., 122 N.C. App. 456, 470 S.E.2d 337 (1996).

Chronic Bronchitis Caused by Pneumonia. — Finding of the Commission that employee who worked in the cotton textile industry had chronic bronchitis caused by nonwork-related pneumonia would be upheld. Clark v. American & Efird Mills, 82 N.C. App. 192, 346 S.E.2d 155, cert. denied, 318 N.C. 413, 349 S.E.2d 591 (1986).

Costochondritis. — Evidence tending to show that the disabling inflammation of the cartilaginous tissues between plaintiff's sternum and ribs was caused by her constant lifting of 50 pound cakes of yarn, as her employment required; that the causes and conditions of her inflammation were peculiarly characteristic of her employment; and that her work placed her at a greater risk of contracting the inflammatory disease process than the public at large, few of whom regularly and repeatedly lift anything weighing 50 pounds, was support enough for the Commission's conclusion that plaintiff's disabling costochondritis was an occupational disease under subdivision (13). Thomason v. Fiber Indus., 78 N.C. App. 159, 336 S.E.2d 632 (1985), cert. denied, 316 N.C. 202, 341 S.E.2d 573 (1986).

Pesticide Allergy. — Although chlorpyrifos (Dursban), to which plaintiff was allergic, is not listed in this section, the evidence permitted the Commission to find and conclude that the form and quantity of her exposure to chlorpyrifos, due to repeated treatment of the workplace by the employer, caused her to contract a compensable occupational disease. Carawan v. Carolina Tel. & Tel. Co., 79 N.C. App. 703, 340 S.E.2d 506 (1986).

Scarring of Ulnar Arteries. — Evidence held to support the Commission's finding that adventitial scarring of the ulnar arteries was peculiar to the occupation of carpenter's helper, which trade involves repetitive trauma to the palm area of the hand. Lumley v. Dancy Constr. Co., 79 N.C. App. 114, 339 S.E.2d 9 (1986).

Insect Sting. — Where plaintiff failed to show that he was at an increased risk of being stung than a member of the general public, the sting was not an accident or an injury arising out of the employment. Minter v. Osborne Co., 127 N.C. App. 134, 487 S.E.2d 835 (1997), cert. denied, 347 N.C. 401, 494 S.E.2d 415 (1997).

Suicide. — Commission's finding that police officer's death by suicide was not due to a compensable disease within the meaning of subdivision (13) was not supported by findings of fact where the commission failed to determine whether he had a dysthymic disorder (depression) as testified to by expert, and made no findings adequate to support a conclusion that if he had a dysthymic disorder, it was not an occupational disease. Harvey v. Raleigh Police Dep't, 85 N.C. App. 540, 355 S.E.2d 147, cert. denied, 320 N.C. 631, 360 S.E.2d 86 (1987).

Stress. — There was sufficient evidence to support the findings of the full commission that plaintiff suffered occupational stress as a result of her employment as a police officer and was entitled to workers' compensation benefits. Pulley v. City of Durham, 121 N.C. App. 688, 468 S.E.2d 506 (1996).

Non-Hodgkin's Lymphoma. — The Industrial Commission's finding that a deceased firefighter's non-Hodgkin's lymphoma was a compensable occupational disease was not supported by competent evidence, where it was not shown that the disease was characteristic of persons engaged in firefighting, or that it was not an ordinary disease of life to which the public generally is equally exposed, or that there was a causal connection between the disease and firefighting. Beaver v. City of Salisbury, 130 N.C. App. 417, 502 S.E.2d 885 (1998), review dismissed, 350 N.C. 376, 514 S.E.2d 89 (1999).

Carpal Tunnel Syndrome. — Where plaintiff's doctors failed to testify that her employment as a typist was a significant contributing factor to the development of her carpal tunnel syndrome, the Industrial Commission correctly found that plaintiff was not entitled to benefits. Hardin v. Motor Panels, Inc., 136 N.C. App. 351, 524 S.E.2d 368, 2000 N.C. App. LEXIS 5 (2000), cert. denied, 351 N.C. 473, 543 S.E.2d 488 (2000).

Employee did not prove the presence of a compensable occupational disease under G.S. 97-53(13), as the employee's job was high impact/low repetition which could not cause carpal tunnel syndrome, and did not place the employee at a greater risk for developing carpal tunnel syndrome than the general public. Futrell v. Resinall Corp., 151 N.C. App. 456, 566 S.E.2d 181, 2002 N.C. App. LEXIS 779 (2002), aff'd, 357 N.C. 158, 579 S.E.2d 269 (2003).

Industrial commission properly awarded workers' compensation disability and medical benefits for bilateral carpal tunnel syndrome pursuant to G.S. 97-57, as testimony by treating physicians showed that the work placed the worker at increased risk for the injury, and thus the carpal tunnel syndrome qualified as an occupational disease pursuant to G.S. 97-53(13). Jarrett v. McCreary Modern, Inc., 167 N.C. App. 234, 605 S.E.2d 197, 2004 N.C. App. LEXIS 2175 (2004).

Coccidioidomycosis. — Although coccidioidomycosis is not one of the occupational diseases listed in G.S. 97-53, truck driver was entitled to worker's compensation benefits because the disease was one that the general public was not at risk of exposure to since it was limited to a specific geographic region, and the truck driver would not have contracted the disease but for the driver's work, which required the driver to drive through an area of the southwest infested by dust-borne mold or fungus. Pressley v. Southwestern Freight Lines, 144 N.C. App. 342, 551 S.E.2d 118, 2001 N.C. App. LEXIS 438 (2001).

Post-Traumatic Stress Disorder. — Record supported the North Carolina Industrial Commission's decision that a nurse who worked at a behavioral center suffered post-traumatic stress disorder due to job-related stress to which the general public was not exposed, and that she met the criteria for workers' compensation benefits. Smith-Price v. Charter Pines Behavioral Ctr., 160 N.C. App. 161, 584 S.E.2d 881, 2003 N.C. App. LEXIS 1737 (2003).

Firefighter's post-traumatic stress disorder, depression, and other psychological conditions did not develop and were not aggravated by causes and conditions characteristic of and peculiar to his employment as a firefighter. Failing an employment test and perceiving demotion were not uncommon circumstances in the workplace. Clark v. City of Asheville, 161 N.C. App. 717, 589 S.E.2d 384, 2003 N.C. App. LEXIS 2259 (2003).

IV. HEARING LOSS.

Compensability of Hearing Loss Existing Prior to October 1, 1971. — Nothing in Session Laws 1971, c. 1108, s. 3, which added subdivision (28) of this section, or in subdivision (28) itself, expressly mandates that hearing loss existing prior to October 1, 1971, is not compensable, as long as the last injurious exposure occurred after that date. Clark v. Burlington Indus., Inc., 78 N.C. App. 695, 338 S.E.2d 553, cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

If plaintiff, who suffered an occupational hearing loss while employed with defendant, could show any augmentation of his condition, however slight, proximately resulting from his employment with defendant and occurring after October 1, 1971, then defendant could properly and constitutionally be liable for the entire disability. Clark v. Burlington Indus., Inc., 78 N.C. App. 695, 338 S.E.2d 553, cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

Augmentation of Hearing Loss after October 1, 1971. — Defendant employer may be held liable for plaintiff's entire disability if plaintiff could show any augmentation of his occupational hearing loss, however slight, proximately resulting from his employment with defendant and occurring after October 1, 1971. Preslar v. Cannon Mills Co., 81 N.C. App. 276, 344 S.E.2d 141 (1986).

The Commission erred in awarding plaintiff compensation for the 10% difference between his hearing loss established in 1984 and his hearing loss established prior to October 1, 1971, the effective date of subdivision (28) of this section, rather than awarding him compensation for the entire occupational hearing loss of 48.5% to which his employment contributed. Preslar v. Cannon Mills Co., 81 N.C. App. 276, 344 S.E.2d 141 (1986).

A construction of subdivision (28) which defeats its purpose would be irrational and will not be adopted by the Supreme Court. McCuiston v. Addressograph-Multigraph Corp., 308 N.C. 665, 303 S.E.2d 795 (1983).

In order to obtain an award of workers' compensation for loss of hearing under subdivision (28), plaintiff must prove that he suffered a loss of hearing in both ears which was caused by harmful noise in his work environment. Price v. Broyhill Furn., 90 N.C. App. 224, 368 S.E.2d 1 (1988).

Plaintiff was entitled to compensation according to his wages at the time of last exposure, since plaintiff had met the burden of proof for that period of time; expert medical testimony clearly indicated that during this time, in which plaintiff was exposed to noise above 90 decibels in immediate proximity without the benefit of protective headgear, plaintiff's pattern and degree of hearing loss correlated to the kind of noise to which he was exposed. Sellers v. Lithium Corp., 94 N.C. App. 575, 380 S.E.2d 526 (1989), cert. denied, 325 N.C. 547, 385 S.E.2d 501 (1989).

The 90 decibel limit in this section is the ambient noise level. Clark v. Burlington Indus., Inc., 78 N.C. App. 695, 338 S.E.2d 553, cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

No presumption arises under subdivision (28) if the noise intensity level is 90 decibels or greater. Claimant must still prove a loss of hearing caused by harmful noise in the employment. McCuiston v. Addressograph-Multigraph Corp., 308 N.C. 665, 303 S.E.2d 795 (1983).

Burden of Proof. — To establish a prima facie case under subdivision (28) of this section, a plaintiff must prove: (1) loss of hearing in both ears which was (2) caused by harmful noise in his work environment. Upon so doing, the burden of proof shifts to the employer. If the employer then proves that the sound which caused plaintiff's hearing loss was of an intensity of less than 90 decibels, plaintiff cannot recover. McCuiston v. Addressograph-Multigraph Corp., 308 N.C. 665, 303 S.E.2d 795 (1983).

Burden to prove that noise level was under 90 decibels exists only when the defendant seeks to establish an affirmative defense under paragraph (28)a. Price v. Broyhill Furn., 90 N.C. App. 224, 368 S.E.2d 1 (1988).

Employee Need Not Measure Noise Level. — It is unreasonable to assume that the legislature intended an employee to bear the burden of making noise-level measurements during his employment in order to lay the groundwork for a workers' compensation claim. Such an interpretation of subdivision (28) would make it virtually impossible for an employee to successfully bring suit for compensation for a hearing loss, due to the difficulty he would encounter in attempting to make measurements of sound on his employer's premises. McCuiston v. Addressograph-Multigraph Corp., 308 N.C. 665, 303 S.E.2d 795 (1983).

Intensity Less Than 90 Decibels Is Affirmative Defense. — In seeking to recover workers' compensation for occupational loss of hearing, an employee does not have the burden of proving as part of his prima facie case that the workplace sound which caused his hearing loss was of intensity of 90 decibels, A scale, or more. Rather, proof that the sound causing plaintiff's injury was of intensity less than 90 decibels is an affirmative defense available to the employer. McCuiston v. Addressograph-Multigraph Corp., 308 N.C. 665, 303 S.E.2d 795 (1983).

Ninety decibels is generally considered a threshold of safe noise under federal and state occupational health and safety standards. Under such noise standards, many employers are required to maintain a continuing effective hearing conservation program for employees exposed to occupational noise level of 85 decibels or more. McCuiston v. Addressograph-Multigraph Corp., 308 N.C. 665, 303 S.E.2d 795 (1983).

Effect of Regular Use of Protective Devices. — The last sentence of subdivision (28)i of this section means that regular use of protective devices constitutes removal from exposure only for purposes of triggering the statutory six-month waiting period established by the first sentence of paragraph (28)i. Clark v. Burlington Indus., Inc., 78 N.C. App. 695, 338 S.E.2d 553, cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

The providing of protective devices does not establish any absolute bar to claims for hearing loss, and the Commission erred in so interpreting subdivision (28)i of this section. Clark v. Burlington Indus., Inc., 78 N.C. App. 695, 338 S.E.2d 553, cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

Noise to Be Measured in Workplace and Not Inside Protective Device. — North Carolina industrial noise monitoring requirements require noise to be measured in the workplace. Contentions that compliance with the 90 decibel standard should be measured inside the hearing protective device worn by the employee, rather than in the workplace itself, have been rejected. Clark v. Burlington Indus., Inc., 78 N.C. App. 695, 338 S.E.2d 553, cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

§ 97-54. "Disablement" defined.

The term "disablement" as used in this Article as applied to cases of asbestosis and silicosis means the event of becoming actually incapacitated because of asbestosis or silicosis to earn, in the same or any other employment, the wages which the employee was receiving at the time of his last injurious exposure to asbestosis or silicosis; but in all other cases of occupational disease "disablement" shall be equivalent to "disability" as defined in G.S. 97-2(9). (1935, c. 123; 1955, c. 525, s. 1.)

Legal Periodicals. — For discussion of occupational disease compensation in light of Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 370 (1983), see 62 N.C.L. Rev. 573 (1984).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under this section as it stood before the 1955 amendment.*

Section 97-61.5 was held in conflict with this section and former § 97-58(a), thereby establishing an exception. This exception made the diagnosis of asbestosis or silicosis the same as disablement. The disease must therefore have developed within two years of the last exposure. Roberts v. Southeastern Magnesia & Asbestos Co., 61 N.C. App. 706, 301 S.E.2d 742 (1983), decided prior to 1987 amendment to § 97-58, which repealed subsection (a).

"Any other employment" construed. — This section clearly states that disablement begins when a claimant is incapacitated because of asbestosis or silicosis from earning in the same or any other employment the wages he earned at the time of his last injurious exposure to silicosis or asbestosis. It simply does not require that "any other employment" be a "dusty" trade. Martin v. Petroleum Tank Serv., 65 N.C. App. 565, 309 S.E.2d 536 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 885 (1984).

In ascertaining the right to compensation in cases involving occupational diseases such as silicosis, the Industrial Commission must ordinarily determine (1) whether the plaintiff in fact has an occupational disease, (2) whether, and to what extent, the plaintiff is disabled within the meaning of this section, and (3) to what degree any such disability is caused by the occupational disease. Pitman v. Feldspar Corp., 87 N.C. App. 208, 360 S.E.2d 696 (1987), cert. denied, 321 N.C. 474, 364 S.E.2d 924 (1988).

Silicosis and Asbestosis Disablement as Inability to Work Near Dust. — Unlike disablement from other occupational diseases, disablement from silicosis and asbestosis is measured from the time a claimant can no longer work at dusty trades, not from the time he can no longer work at any job. Taylor v. J.P. Stevens & Co., 300 N.C. 94, 265 S.E.2d 144 (1980).

Two-prong test is used to determine when running of claim period is triggered: (1) the time at which employee is disabled within the meaning of this section by his inability to work, and (2) the time at which employee is informed of his disease by competent medical authority. Martin v. Petroleum Tank Serv., 65 N.C. App. 565, 309 S.E.2d 536 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 885 (1984).

Disability Refers to Diminished Capacity to Earn Money. — Under the act, disability refers not to physical infirmity but to a diminished capacity to earn money. Mabe v. North Carolina Granite Corp., 15 N.C. App. 253, 189 S.E.2d 804 (1972).

But Earning Capacity Must Be That of Particular Plaintiff. — With respect to disability, the question is what effect has the disease had upon the earning capacity of this particular plaintiff; not what effect a like physical impairment would have upon an employee of average age and intelligence. Mabe v. North Carolina Granite Corp., 15 N.C. App. 253, 189 S.E.2d 804 (1972).

Where the plaintiff is fully incapacitated because of silicosis to earn wages through work at hard labor, which is the only work he is qualified to do by reason of his age and education, the plaintiff is totally incapacitated because of silicosis to earn, in the same or any other employment, the wages he was earning at the time of his last injurious exposure. Mabe v. North Carolina Granite Corp., 15 N.C. App. 253, 189 S.E.2d 804 (1972).

When Disablement Deemed to Have Occurred. — The time when disablement is deemed to have occurred depends upon the factual situation under consideration. Fetner v. Rocky Mount Marble & Granite Works, 251 N.C. 296, 111 S.E.2d 324 (1959).

An employee does not contract or develop asbestosis or silicosis in a few weeks or months. These diseases develop as the result of exposure for many years to asbestos dust or dust of silica. Both diseases, according to the textbook writers, are incurable and usually result in total permanent disability. Therefore, it would seem that the victims of these incurable occupational diseases constitute a legitimate burden on the industries in which they were exposed to the hazards that produced their disablement. Such was the intent of the legislature. Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952).

When Plaintiff First Learned of Disease Irrelevant to When Disability Began. — Plaintiff did not become disabled within the meaning of the Workers' Compensation Act until June 3, 1982, when he was forced to stop work of any kind because of his occupational disease. Because plaintiff was able to earn the wages he had always received until that date, the arguments as to when plaintiff was first informed of the nature and work-related cause of his disease were irrelevant. Thus his claim, filed on February 2, 1983, was timely. Underwood v. Cone Mills Corp., 78 N.C. App. 155, 336 S.E.2d 634 (1985), cert. denied, 316 N.C. 202, 341 S.E.2d 583 (1986).

The fact that a worker performed his duties with regularity until the date he was dismissed because he was affected with silicosis does not require a finding that he was not disabled at that time as defined by this section. Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948).

Medical Testimony Necessary to Establish "Disablement". — Evidence tending to establish "disablement," as that term is used in the statute in reference to silicosis, must be supported by medical testimony, and the finding of the competent medical authority must be to the effect that disablement occurred within two years from the last exposure. Huskins v. United Feldspar Corp., 241 N.C. 128, 84 S.E.2d 645 (1954).

Disablement from Asbestosis or Silicosis. — Employee becoming disabled by asbestosis or silicosis within the terms of the specific definition embodied in G.S. 97-54, and who was no longer employed by the employer and had not been "removed" by the employer as required by G.S. 97-61.5(b), was entitled to be considered for ordinary compensation measured by the general provisions of the North Carolina Workmen's Compensation Act and not G.S. 97-61.5(b). Abernathy v. Sandoz Chemicals/Clariant Corp., 151 N.C. App. 252, 565 S.E.2d 218, 2002 N.C. App. LEXIS 724 (2002), cert. denied, 356 N.C. 432, 572 S.E.2d 421 (2002).

Disablement from asbestosis under G.S. 97-54 was defined as the event of becoming actually incapacitated because of asbestosis to earn, in the same or any other employment, the wages that the employee was receiving at the time of his last injurious exposure to asbestos. Abernathy v. Sandoz Chemicals/Clariant Corp., 151 N.C. App. 252, 565 S.E.2d 218, 2002 N.C. App. LEXIS 724 (2002), cert. denied, 356 N.C. 432, 572 S.E.2d 421 (2002).

Evidence of Disability from Silicosis. — Due to the nature of silicosis, it is essential to establish the presence of the disease by competent medical authority. But where it has been established that a person who has been exposed to free silica dust has developed silicosis to the extent that it may be disabling, testimony other than that of a medical expert may be admitted and considered in determining when such person actually became disabled or disabled to work. Certainly, a victim of silicosis is competent to testify to his lessened capacity to work, his shortness of breath, and the effect that physical exertion has upon him, all of which are normal symptoms of silicosis. Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952).

Evidence of Disability from Byssinosis and Chronic Obstructive Lung Disease. — Evidence held sufficient to support the finding that plaintiff was partially incapable of engaging in gainful employment by byssinosis and chronic obstructive lung disease as a result of 29 years of smoking and exposure to cotton dust, and that his occupational disease, combined with his age, limited education and work experience, limited his ability to earn wages. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 345 S.E.2d 374 (1986).

Finding that plaintiff has not been able to work since leaving his employment and that plaintiff is totally disabled, taken together with additional findings regarding plaintiff's age, limited education, work experience, worsened physical condition and inability to exert himself, support a conclusion that plaintiff is unable to earn wages at any job, and are minimally sufficient to support a conclusion of disability. Pitman v. Feldspar Corp., 87 N.C. App. 208, 360 S.E.2d 696 (1987), cert. denied, 321 N.C. 474, 364 S.E.2d 924 (1988).

Evidence that plaintiff could do "light work" if no silica dust were involved was insufficient to support a finding that he was not disabled from doing "ordinary work," since the two terms are not synonymous in the realm of manual labor. Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948).

Claimant Unable to Earn Wages in Any Job for Which Qualified Is Totally, Not Partially, Disabled. — The Commission erred as a matter of law by awarding claimant compensation for partial disability when it found as fact that plaintiff was incapable of earning wages in any employment for which plaintiff was qualified. Based on the Commission's findings, plaintiff was totally disabled within the meaning of G.S. 97-29. Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

Where a plaintiff, due to an occupational disease, is fully incapacitated to earn wages at employment which is the only work he is qualified to do by reason of such factors as age and education, he is totally incapacitated. Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986).

Evidence held sufficient to show claimant disabled. Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951); Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952). See also Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948).

Employee's estate was entitled to permanent and total disability benefits under G.S. 97-29 and G.S. 97-54 because: (1) testimony by a physician appointed by the industrial commission supported the commission's finding of fact that the employee suffered from asbestosis as a result of his employment with the employer as an asbestos tile installer; (2) the employee's medical course continued as the appointed physician had predicted that it would based on his diagnosis; and (3) the employee suffered from breathing problems as a result of asbestosis that severely impaired his daily activities and rendered him unable to perform gainful employment. Estate of Gainey v. S. Flooring & Acoustical Co., — N.C. App. —, 646 S.E.2d 604, 2007 N.C. App. LEXIS 1468 (2007).

Evidence Held Sufficient to Show that Injurious Exposure Occurred during Course of Employment. — Where the record disclosed that plaintiff did not continue earning wages after 1969, her unsuccessful attempts to work during the years 1969 to 1980, when considered in conjunction with the medical evidence, merely demonstrated her total incapacity to earn wages; thus the commission's determination that plaintiff's last injurious exposure to the hazards of her occupational disease occurred while she was employed in 1968, and its order that employer and its carrier in 1968 pay her an award under the provisions of G.S. 97-29 in effect on October 1, 1968, would be affirmed. Gregory v. Sadie Cotton Mills, Inc., 90 N.C.

App. 433, 368 S.E.2d 650, cert. denied, 322 N.C. 835, 371 S.E.2d 277 (1988).

Six Day Leave of Absence Incompensable. — Plaintiff's six day leave-of-absence was incompensable under the Act for disability compensation. Howard v. Square-D Co., 128 N.C. App. 303, 494 S.E.2d 606 (1998).

Evidence held insufficient to show disablement occurring within two years from last exposure. Huskins v. United Feldspar Corp., 241 N.C. 128, 84 S.E.2d 645 (1954).

As to criterion of disability in cases of asbestosis and silicosis prior to the 1955 amendment. Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948); Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952); Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952); Brinkley v. United Feldspar & Minerals Corp., 246 N.C. 17, 97 S.E.2d 419 (1957).

Applied in Willingham v. Bryan Rock & Sand Co., 240 N.C. 281, 82 S.E.2d 68 (1954); Dowdy v. Fieldcrest Mills, Inc., 59 N.C. App. 696, 298 S.E.2d 82 (1982); May v. Shuford Mills, Inc., 64 N.C. App. 276, 307 S.E.2d 372 (1983); Joyner v. J.P. Stevens & Co., 71 N.C. App. 625, 322 S.E.2d 636 (1984); Allen v. Standard Mineral Co., 71 N.C. App. 597, 322 S.E.2d 644 (1984).

Cited in Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951); Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957); Sebastian v. Mona Watkins Hair Styling, 40 N.C. App. 30, 251 S.E.2d 872 (1979); Taylor v. J.P. Stevens & Co., 300 N.C. 94, 265 S.E.2d 144 (1980); McKee v. Crescent Spinning Co., 54 N.C. App. 558, 284 S.E.2d 175 (1981); Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986); Gregory v. Sadie Cotton Mills, Inc., 90 N.C. App. 433, 368 S.E.2d 650 (1988); Tyndall v. Walter Kidde Co., 102 N.C. App. 726, 403 S.E.2d 548 (1991); Clark v. ITT Grinnell Indus. Piping, Inc., 141 N.C. App. 417, 539 S.E.2d 369, 2000 N.C. App. LEXIS 1416 (2000).

§ 97-55. "Disability" defined.

The term "disability" as used in this Article means the state of being incapacitated as the term is used in defining "disablement" in G.S. 97-54. (1935, c. 123.)

Legal Periodicals. — For discussion of occupational disease compensation in light of Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 370 (1983), see 62 N.C.L. Rev. 573 (1984).

CASE NOTES

Applied in Dowdy v. Fieldcrest Mills, Inc., 59 N.C. App. 696, 298 S.E.2d 82 (1982); May v. Shuford Mills, Inc., 64 N.C. App. 276, 307 S.E.2d 372 (1983).

Cited in Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952); Taylor v. J.P. Stevens & Co., 300 N.C. 94, 265 S.E.2d 144 (1980); McKee v. Crescent Spinning Co., 54 N.C. App. 558, 284 S.E.2d 175 (1981); Hyatt v. Waverly Mills, 56 N.C. App. 14, 286 S.E.2d 837 (1982).

§ 97-56. Limitation on compensable diseases.

The provisions of this Article shall apply only to cases of occupational disease in which the last exposure in an occupation subject to the hazards of such diseases occurred on or after March 26, 1935. (1935, c. 123.)

§ 97-57. Employer liable.

In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.

For the purpose of this section when an employee has been exposed to the hazards of asbestosis or silicosis for as much as 30 working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious;

provided, however, that in the event an insurance carrier has been on the risk for a period of time during which an employee has been injuriously exposed to the hazards of asbestosis or silicosis, and if after insurance carrier goes off the risk said employee is further exposed to the hazards of asbestosis or silicosis, although not so exposed for a period of 30 days or parts thereof so as to constitute a further injurious exposure, such carrier shall, nevertheless, be liable. (1935, c. 123; 1945, c. 762; 1957, c. 1396, s. 7.)

Legal Periodicals. — For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

For note, "Caulder v. Waverly Mills: Expanding the Definition of an Occupational Disease Under the Last Injurious Exposure Rule," see 64 N.C.L. Rev. 1566 (1986).

CASE NOTES

The purpose of this section is to determine whether there has been sufficient exposure to the hazards of asbestosis during a particular period of employment to hold the employer during that period liable. By contrast, the purpose of former G.S. 97-58(a) was to limit the time in which an employer was liable for a compensable exposure. Long v. North Carolina Finishing Co., 82 N.C. App. 568, 346 S.E.2d 669 (1986).

Function of Section. — The rule under this section, assigning liability to the employer where the employee was last injuriously exposed, serves to eliminate the need for complex and expensive litigation of the issue of relative contribution by each of several employments to a plaintiff's occupational disease. The possibility that some employers may bear a disproportionate share of the total liability for occupational disease is a problem for the legislature, not the courts, to consider. Frady v. Groves Thread/General Accident Ins. Co., 56 N.C. App. 61, 286 S.E.2d 844, aff'd, 312 N.C. 316, 321 S.E.2d 835 (1984).

This section does not provide for partnership in responsibility, and has nothing to say as to the length of the last employment or the degree of injury which the deleterious exposure must inflict to merit compensation. It takes the breakdown practically where it occurs — with the last injurious exposure. Haynes v. Feldspar Producing Co., 222 N.C. 163, 22 S.E.2d 275 (1942).

And Negates Comparative Responsibility of Successive Employers and Insurance Carriers. — Any suggestion of comparative responsibility as between successive employers and their respective carriers, or as between successive carriers for the same employer, is dispelled by the plain language of this section. The liability is upon the employer and carrier on the risk when the employee was "last injuriously exposed" to the hazards of silicosis, as that expression is here defined. Stewart v. Duncan, 239 N.C. 640, 80 S.E.2d 764 (1954).

Presumption Created by Section 97-57. — Section 97-57 creates an irrebuttable legal presumption that the last thirty days of work is the period of last injurious exposure. Thus, "an exposure which proximately augmented the disease to any extent, however slight" is deemed the last injurious exposure. Barber v. Babcock & Wilcox Constr. Co., 101 N.C. App. 564, 400 S.E.2d 735 (1991).

Plaintiff does not have to establish that the conditions of his employment with the defendant caused or significantly contributed to his disease. He need only show that: (1) he has an occupational disease and (2) he was "last injuriously exposed to the hazards of such disease" in the defendant's employment. Barber v. Babcock & Wilcox Constr. Co., 101 N.C. App. 564, 400 S.E.2d 735 (1991).

Plaintiff satisfied his burden of proof and was entitled to workers' compensation benefits where there was an irrebuttable legal presumption that the last thirty days of work subjecting the plaintiff to the hazards of asbestos is the period of last injurious exposure and the Industrial Commission held that plaintiff was exposed to the inhalation during the 48 days he worked for last employer, the defendant. Barber v. Babcock & Wilcox Constr. Co., 101 N.C. App. 564, 400 S.E.2d 735 (1991).

The Commission erred in requiring plaintiff to prove that her last employment was the cause of her occupational disease, as this section assesses liability to the employer in whose employment the employee was last injuriously exposed, however minimal the exposure, to the hazards of the occupational disease. Rutledge v. Tultex Corp./Kings Yarn, 56 N.C. App. 345, 289 S.E.2d 72, aff'd in part and rev'd in part on other grounds, 308 N.C. 85, 301 S.E.2d 359 (1983).

"Hazard". — The term "hazard" should be given its common and ordinary meaning, since there is nothing to indicate that the legislature intended it to have some other meaning and it has not acquired some technical meaning. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

By the phrase "hazards of the disease," as used in this section, the legislature intended to include more than substances which are capable in themselves of producing an occupational disease. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

In order for a substance to be a "hazard" of an occupational disease within the meaning of this section, it must be a substance peculiar to the workplace. By this it is meant that the substance is one to which the worker has a greater exposure on the job than does the public generally, either because of the nature of the substance itself or because the concentrations of the substance in the workplace are greater than concentrations to which the public generally is exposed. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

A condition peculiar to the workplace which accelerates the progress of an occupational disease to such an extent that the disease finally causes the worker's incapacity to work constitutes a source of danger and difficulty to that worker and increases the possibility of that worker's ultimate loss. It constitutes, therefore, a hazard of the disease as the term "hazard" is commonly used. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

Dust as Substance Peculiar to Workplace. — Dust arising from the processing of synthetic fibers in textile plants is a substance to which, because of its nature, workers in those plants have a greater exposure than does the public generally. It is, therefore, a substance peculiar to the workplace. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

Effect of Preexisting Condition. — An employer must take his employee as he finds him, and will be liable for the full extent of the employee's compensable injury even where a preexisting condition substantially contributes to the degree of the injury. Frady v. Groves Thread/General Accident Ins. Co., 56 N.C. App. 61, 286 S.E.2d 844, aff'd, 312 N.C. 316, 321 S.E.2d 835 (1984).

The statutory term "last injuriously exposed" means an exposure which proximately augmented the disease to any extent, however slight. Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983).

Liability of Employer in Whose Employment Employee Was Last Injuriously Exposed. — In compensable cases of occupational diseases, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease is liable. This section does not require an independent showing of a significant contribution to the occupational disease. Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501, aff'd, 318 N.C. 410, 348 S.E.2d 595 (1986); Anderson v. Gulistan Carpet, Inc., 144 N.C. App. 661, 550 S.E.2d 237, 2001 N.C. App. LEXIS 575 (2001).

Where plaintiff's doctor testified that she had negative Tinel's and Phalen's signs immediately after her resignation from her job but positive bilateral Tinel's and Phalen's signs 15 months after her resignation and after holding various other jobs, the Industrial Commission did not err in finding that she was last "injuriously exposed" to carpal tunnel syndrome while working with her subsequent employers. Hardin v. Motor Panels, Inc., 136 N.C. App. 351, 524 S.E.2d 368, 2000 N.C. App. LEXIS 5 (2000), cert. denied, 351 N.C. 473, 543 S.E.2d 488 (2000).

North Carolina Industrial Commission did not err in denying benefits for asbestosis and lung cancer where there was competent evidence in the record to support the Commission's findings regarding the employee's last injurious exposure to asbestos, and where the Commission applied the correct legal standard in evaluating both claims; the evidence supported a reasonable inference that the employee was exposed to asbestos for at least 30 days or parts thereof within seven consecutive months while working for a different employer, and the employee's last injurious exposure to the hazards of asbestosis occurred with the different employer. Hatcher v. Daniel Int'l Corp., 153 N.C. App. 776, 571 S.E.2d 20, 2002 N.C. App. LEXIS 1261 (2002).

There was some competent evidence to support the North Carolina Industrial Commission's award of total disability benefits and death benefits, pursuant to G.S. 97-39, to an estate administratrix on behalf of her deceased husband, who had been an employee of the employer for a period of time, where it was determined that the employer was the place where the employee had his last injurious exposure to asbestos, pursuant to G.S. 97-57, and further, that he in fact had "asbestosis," as that term was defined under G.S. 97-62; credibility determinations were within the province of the Commission, and not for the court to redetermine. Payne v. Charlotte Heating & Air Conditioning, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

Last Injurious Exposure Can Be Quantitatively Slight. — Exposure to a substance which can cause an occupational disease can be a last injurious exposure to the hazards of such disease under this section even if the exposure in question is so slight quantitatively that it could not in itself have produced the disease. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

If the occupational exposure in question is such that it augments the disease process to any degree, however slight, the employer is liable. Gay v. J.P. Stevens & Co., 79 N.C. App. 324, 339 S.E.2d 490 (1986).

"Last injuriously exposed" means an exposure which proximately augmented the disease to any extent, however slight. Cain v. Guyton, 79 N.C. App. 696, 340 S.E.2d 501, aff'd, 318 N.C. 410, 348 S.E.2d 595 (1986).

Substance Need Not Be Known to Cause Disease. — In addition, the substance to which plaintiff was last injuriously exposed need not be a substance known to cause the disease. Gay v. J.P. Stevens & Co., 79 N.C. App. 324, 339 S.E.2d 490 (1986).

Finding of Last Injurious Exposure Held Not Inconsistent with Other Findings. — Where an employee's exposure to dust at his last employer's plants, including the last plant at which he worked, contributed to his pulmonary symptoms and was harmful to him, and his last injurious exposure to the hazards of his lung disease occurred while he was employed by his last employer, the Commission's finding that dust from the synthetic fibers present at his last employer's plants was not known to cause chronic obstructive lung disease did not preclude a conclusion that exposure to it constituted a last injurious exposure to the hazards of the disease. Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).

In chronic obstructive lung disease cases, the last injurious exposure to "the hazards of such disease" is not necessarily limited to cotton dust; it can be to other conditions that enhance or augment the disease process and the worker's condition to any extent. Neal v. Leslie Fay, Inc., 78 N.C. App. 117, 336 S.E.2d 628 (1985).

It is not necessary that the last injurious exposure to the hazards of chronic obstructive lung disease either caused or significantly contributed to the occupational disease; it is enough if the exposure augmented the disease to any extent whatever. Neal v. Leslie Fay, Inc., 78 N.C. App. 117, 336 S.E.2d 628 (1985).

Most Recent Employer Found Liable for Pre-existing Condition. — A textile mill employee's second employer was liable for her asthma, where there was medical testimony that employee's exposure at the second employer's mill likely augmented her illness, however slight, such that employee was last injuriously exposed to the hazards of her disease at the second employer's mill. Locklear v. Stedman Corporation/Sara Lee Knit Prods., 131 N.C. App. 389, 508 S.E.2d 795 (1998).

It is not necessary that claimant show that the conditions of employment caused or significantly contributed to occupational disease. She need only show: (1) That she has a compensable occupational disease and (2) that she was "last injuriously exposed to the hazards of such disease" in defendant's employment. Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983).

Portion of Disability Due to Industrial Disease Not Chargeable to Age and Education. — Where an industrial disease renders an employee actually incapacitated to earn any wages, the employer may not ask that a portion of the disability be charged to employee's advanced age and poor learning on the ground that if it were not for these factors he might still retain some earning capacity. Anderson v. A.M. Smyre Mfg. Co., 54 N.C. App. 337, 283 S.E.2d 433 (1981).

Liability of Insurance Carrier. — The carrier of the insurance during the employee's last 30-day period of exposure to the hazards of an occupational disease is solely liable for compensation allowed for total disability from the occupational disease. This result is not affected by the fact that prior to the time such insurance company became the carrier, medical examinations had disclosed that the employee was suffering with the disease, or that the Industrial Commission had advised him as to the compensation and rehabilitation provisions of the act, but had, in the exercise of its discretion, failed to order him to quit the occupation pursuant to former G.S. 97-61. Bye v. Interstate Granite Co., 230 N.C. 334, 53 S.E.2d 274 (1949).

Where compensation insurer carried risk for employer from 1947 through Jan. 31, 1953, and employer did not carry insurance from Feb. 1, 1953 through Feb. 19, 1953, insurer was liable for at least a pro rata part of award based on finding that employee became disabled by silicosis on Feb. 19, 1953, the last date on which the employee was remuneratively employed by the employer. Mayberry v. Oakboro Granite & Marble Co., 243 N.C. 281, 90 S.E.2d 511 (1955), decided under this section as it stood before the 1957 amendment.

Before the 1957 amendment, which added the proviso to the second paragraph of this section, where an employee became disabled from asbestosis while working for a single employer, but different insurers were on the risk during the employee's last 30 days' exposure to the hazards of the disease, the carrier last on the risk, even though it was on the risk for only the last five days on which the employee worked, was solely liable for the award under a provision of the policy contracts that each policy should apply only to injury by disease of which the last day of the last exposure occurred during the policy period. Hartsell v. Thermoid Co., 249 N.C. 527, 107 S.E.2d 115 (1959).

Where there are two companies and, presumably, two insurance carriers, or one company and two insurance carriers, the carrier on the risk when the employee is last injuriously exposed is the liable party. Jones v. Beaunit Corp., 72 N.C. App. 351, 324 S.E.2d 624 (1985).

Insurance carrier bore the burden of proving that its lost insurance policy, which otherwise would have covered an employee under G.S. 97-57, excluded the employee's claim based on a last injurious exposure to asbestos in North Carolina; additionally, coverage was properly found to exist under the policy because the North Carolina Industrial Commission's determination that the insurance carrier was the carrier on the risk was supported by competent evidence. Vaughan v. Carolina Indus. Insulation, — N.C. App. —, 643 S.E.2d 613, 2007 N.C. App. LEXIS 842 (2007).

Application of definition of "injurious exposure" in the first clause of the second paragraph of this section to the hazards of asbestosis is limited, by the express language of the statute, to determining liability under this section. Long v. North Carolina Finishing Co., 82 N.C. App. 568, 346 S.E.2d 669 (1986).

Exposure Requirement of This Section Not Read into Former § 97-58(a). — Logically there was no reason to read the exposure requirements of this section into former G.S. 97-58(a), and the Court of Appeals would decline to do so. Long v. North Carolina Finishing Co., 82 N.C. App. 568, 346 S.E.2d 669 (1986).

A claimant need not provide scientific proof of his exposure to asbestos for purposes of this section; plaintiff presented substantial other evidence of his repeated exposure to asbestos during his employment with defendant-employer to justify his compensation. Austin v. Continental Gen. Tire, 141 N.C. App. 397, 540 S.E.2d 824, 2000 N.C. App. LEXIS 1415 (2000), rev'd on other grounds, 354 N.C. 344, 553 S.E. 2d 680 (2001).

A claimant need not introduce scientific evidence to prove his exposure to asbestos for the purposes of this section; testimony of plaintiff, two co-workers, a defense witness and three medical experts was, therefore, sufficient to support the Commission's finding that plaintiff was exposed to asbestos. Clark v. ITT Grinnell Indus. Piping, Inc., 141 N.C. App. 417, 539 S.E.2d 369, 2000 N.C. App. LEXIS 1416 (2000).

Findings Required to Support Award for Silicosis. — To support an award to one suffering from silicosis, the Industrial Commission must find, inter alia, that the employee had been exposed to the hazards of silicosis for the period provided by this section, and that the employee's work in the State must have exposed him to the inhalation of silica dust for the further period prescribed by G.S. 97-63. Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957); Woodell v. Starr Davis Co., 77 N.C. App. 352, 335 S.E.2d 48 (1985).

This section creates an irrebuttable presumption, of law. The last day of work was the date of disablement and the last 30 days of work was the period of last injurious exposure. The Commission could not arbitrarily select any 30 days of employment, other than the last 30 days, within the seven months' period for convenience or protection of any of the parties, even if there was some evidence which may be construed to support such selection. Fetner v. Rocky Mount Marble & Granite Works, 251 N.C. 296, 111 S.E.2d 324 (1959).

Where Employee Was Advised That He Had Silicosis before Expiration of 30-Day Period. — Where the evidence supported findings of the Industrial Commission that an employee suffering disability from silicosis was last injuriously exposed to the hazards of the disease for 30 working days within seven consecutive calendar months while in the employment of defendant, this section placed liability therefor upon such employer and his insurance carrier during that period, and the mere fact that the employee was advised that he had silicosis prior to the expiration of this 30-day period but continued for a short time to perform his same work was insufficient, standing alone, to sustain the insurance carrier's contention that his employment after the discovery of the disease was in bad faith so as to make the loss fall upon it. Stewart v. Duncan, 239 N.C. 640, 80 S.E.2d 764 (1954).

Where the evidence showed that decedent's last possible exposure occurred in February, 1975, he was required to meet the statutory time limitations between February 1965, and February 1975. Exposure which occurred prior to 1964 could not be used to calculate his level of exposure since it occurred over 10 years prior to the last exposure. Gosney v. Golden Belt Mfg., 89 N.C. App. 670, 366 S.E.2d 873, cert. denied, 322 N.C. 835, 371 S.E.2d 276 (1988), upholding Commission's finding that plaintiff failed to show the length of exposure to asbestos required by this section and § 97-63.

Carpal Tunnel Syndrome. — Industrial commission properly awarded workers' compensation disability and medical benefits for bilateral carpal tunnel syndrome pursuant to G.S. 97-57, as testimony by treating physicians showed that the work placed the worker at increased risk for the injury, and thus the carpal tunnel syndrome qualified as an occupational disease pursuant to G.S. 97-53(13). Jarrett v. McCreary Modern, Inc., 167 N.C. App. 234, 605 S.E.2d 197, 2004 N.C. App. LEXIS 2175 (2004).

Applied in Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952); Willingham v. Bryan Rock & Sand Co., 240 N.C. 281, 82 S.E.2d 68 (1954); Roberts v. Southeastern Magnesia & Asbestos Co., 61 N.C. App. 706, 301 S.E.2d 742 (1983); Shockley v. Cairn Studios Ltd., 149 N.C. App. 961, 563 S.E.2d 207, 2002 N.C. App. LEXIS 363 (2002), cert. dismissed, 356 N.C. 678, 577 S.E.2d 887 (2003), cert. denied, 356 N.C. 678, 577 S.E.2d 888 (2003).

Cited in Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951); Frady v. Groves Thread/General Accident Ins. Co., 312 N.C. 316, 321 S.E.2d 835 (1984); Abernathy v. Sandoz Chemicals/Clariant Corp., 151 N.C. App. 252, 565 S.E.2d 218, 2002 N.C. App.

LEXIS 724 (2002), cert. denied, 356 N.C. 432, 572 S.E.2d 421 (2002).

§ 97-58. Time limit for filing claims.

(a) Repealed by Session Laws 1987, c. 729, s. 13.

(b) The report and notice to the employer as required by G.S. 97-22 shall apply in all cases of occupational disease except in case of asbestosis, silicosis, or lead poisoning. The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.

(c) The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be. Provided, however, that the right to compensation for radiation injury, disability or death shall be barred unless a claim is filed within two years after the date upon which the employee first suffered incapacity from the exposure to radiation and either knew or in the exercise of reasonable diligence should have known that the occupational disease was caused by his present or prior employment. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 6; 1963, c. 553, s. 2; 1973, c. 1060, s. 3; 1981, c. 734, s. 1; 1987, c. 729, s. 13.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

For note, "Wilder v. Amatex Corp.: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases," see 64 N.C.L. Rev. 416 (1986).

For note, "Caulder v. Waverly Mills: Expanding the Definition of an Occupational Disease Under the Last Injurious Exposure Rule," see 64 N.C.L. Rev. 1566 (1986).

CASE NOTES

I. In General.
II. Asbestosis, Silicosis and Lead Poisoning.
III. Report and Notice.
IV. Filing of Claims.
V. Knowledge of Employee.

I. IN GENERAL.

Editor's Note. — *Most of the cases below were decided prior to the 1987 amendment repealing subsection (a), which had set certain restrictions on claims relating to asbestosis and lead poisoning.*

Former subsection (a) and subsections (b) and (c) were construed in pari materia and to ascertain the true legislative intent. Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951), overruled on other grounds, 300 N.C. 94, 265 S.E.2d 144 (1980).

Subsections (b) and (c) must be construed in pari materia. Underwood v. Cone Mills Corp., 78 N.C. App. 155, 336 S.E.2d 634 (1985), cert. denied, 316 N.C. 202, 341 S.E.2d 583 (1986).

When subsections (b) and (c) of this section are interpreted in pari materia, they require an employee who seeks to recover for disability resulting from an occupational disease to give notice or file a claim within two years of the time when he is first informed by competent medical authority of the nature and work-related cause of the disease. Lawson v. Cone Mills Corp., 68 N.C. App. 402, 315 S.E.2d 103 (1984).

As to the inapplicability of the last exposure rule to diseases other than silicosis and asbestosis, see Taylor v. J.P. Stevens & Co., 300 N.C. 94, 265 S.E.2d 144 (1980).

Failure to obtain approval for payments of medical expenses does not raise an estoppel claim. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

What Findings of Fact Are Conclusive on Review. — Except as to questions of jurisdiction, findings of fact by the Industrial Commission are conclusive on appeal when supported by competent evidence even though there is evidence to support contrary findings.

Findings of jurisdictional fact by the Industrial Commission, however, are not conclusive upon appeal, even though supported by evidence in the record. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, 311 S.E.2d 590 (N.C. 1984).

Review of Jurisdictional Findings. — Findings of the Industrial Commission that employee received notice from competent medical authority that she had an occupational disease on June 25, 1977 at an occupational respiratory problem screening clinic and that her claim, filed on July 11, 1980, was barred by the two-year statute of limitations in this section were jurisdictional findings of fact fully reviewable by the Court of Appeals. Dawkins v. Mills, 74 N.C. App. 712, 329 S.E.2d 688 (1985).

When a defendant employer challenges the jurisdiction of the Industrial Commission, any reviewing court, including the Supreme Court, has the duty to make its own independent findings of jurisdictional facts from its consideration of the entire record. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, 311 S.E.2d 590 (N.C. 1984).

For decision under former statute relating to notice of death from occupational disease, see Blassingame v. Southern Asbestos Co., 217 N.C. 223, 7 S.E.2d 478 (1940).

Applied in Willingham v. Bryan Rock & Sand Co., 240 N.C. 281, 82 S.E.2d 68 (1954); Taylor v. J.P. Stevens & Co., 43 N.C. App. 216, 258 S.E.2d 426 (1979); Eller v. Porter-Hayden Co., 48 N.C. App. 610, 269 S.E.2d 284 (1980); Perdue v. Daniel Int'l, Inc., 59 N.C. App. 517, 296 S.E.2d 845 (1982); May v. Shuford Mills, Inc., 64 N.C. App. 276, 307 S.E.2d 372 (1983); Joyner v. J.P. Stevens & Co., 71 N.C. App. 625, 322 S.E.2d 636 (1984); Jones v. Beaunit Corp., 72 N.C. App. 351, 324 S.E.2d 624 (1985); Wall v. Macfield/Unifi, 131 N.C. App. 863, 509 S.E.2d 798 (1998).

Cited in Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948); Williams v. Ornamental Stone Co., 232 N.C. 88, 59 S.E.2d 193 (1950); Fetner v. Rocky Mount Marble & Granite Works, 251 N.C. 296, 111 S.E.2d 324 (1959); Gragg v. W.M. Harris & Son, 54 N.C. App. 607, 284 S.E.2d 183 (1981); Payne v. Cone Mills Corp., 60 N.C. App. 692, 299 S.E.2d 847 (1983); Hogan v. Cone Mills Corp., 63 N.C. App. 439, 305 S.E.2d 213 (1983); Martin v. Petroleum Tank Serv., 65 N.C. App. 565, 309 S.E.2d 536 (1983); Peoples v. Cone Mills Corp., 69 N.C. App. 263, 317 S.E.2d 120 (1984); C.W. Matthews Contracting Co. v. State, 75 N.C. App. 317, 330 S.E.2d 630 (1985); Wilder v. Amatex Corp., 314 N.C. 550, 336 S.E.2d 66 (1985); Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985); Peace v. J.P. Stevens Co., 95 N.C. App. 129, 381 S.E.2d 798 (1989).

II. ASBESTOSIS, SILICOSIS AND LEAD POISONING.

Editor's Note. — *Most of the cases below were decided prior to the 1987 amendment deleting subsection (a), which had set certain restrictions on claims relating to asbestosis and lead poisoning.*

Applicability of 1981 Amendment to Former Subsection (a). — The Commission erred in failing to apply the provisions of former subsection (a) of this section, as amended effective July 1, 1981, where plaintiff's decedent died on December 11, 1981, and plaintiff's claim was filed on January 8, 1982. As the amended version of subsection (a) was in effect at the time plaintiff's right to compensation arose, viz., the time of decedent's death, the amended version could constitutionally apply to plaintiff's claim. Long v. North Carolina Finishing Co., 82 N.C. App. 568, 346 S.E.2d 669 (1986).

Purpose of § 97-57 and Former Subsection (a) of This Section Compared. — The purpose of G.S. 97-57 is to determine whether there has been sufficient exposure to the hazards of asbestosis during a particular period of employment to hold the employer during that period liable. By contrast, the purpose of former subsection (a) of this section was to limit the time in which an employer was liable for a compensable exposure. Long v. North Carolina Finishing Co., 82 N.C. App. 568, 346 S.E.2d 669 (1986).

Exposure Requirement of § 97-57 Not Read into Former Subsection (a) of This Section. — Logically there was no reason to read the exposure requirements of G.S. 97-57 into former subsection (a) of this section, and the Court of Appeals would decline to do so. Long v. North Carolina Finishing Co., 82 N.C. App. 568, 346 S.E.2d 669 (1986).

Section 97-61.5 is in conflict within § 97-54 and this section, thereby establishing an exception. This exception makes the diagnosis of asbestosis or silicosis the same as disablement. The disease must therefore have developed within two years of the last exposure. Roberts v. Southeastern Magnesia & Asbestos Co., 61 N.C. App. 706, 301 S.E.2d 742 (1983).

In this section the legislature recognized that silicosis is a progressive disease, and provided that an employer might be held liable for compensation for silicosis if disablement resulted at any time within two years after the last exposure to the disease. Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948).

Disablement Dates from Time Claimant Was Advised He Had Disease. — By enacting this section, the legislature intended to authorize the filing of a claim for asbestosis, silicosis or lead poisoning where disablement occurs within two years after the last exposure to such disease; and, although disablement may have existed from the time the employee quit work, such disablement, for the purpose of notice and claim for compensation, should date from the time the employee was notified by competent medical authority that he had such disease. Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951); Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951), overruled on other grounds, 300 N.C. 94, 265 S.E.2d 194 (1980).

Due to the peculiar nature of the disease, the slow process of its development, the similarity of its symptoms to those of other diseases which affect the lungs and for other reasons, a worker, whatever his actual physical condition may be, is not charged with notice that he has silicosis until and unless he is so advised by competent medical authority, and the time within which he must file his claim for compensation begins to run from the date he is so advised. Huskins v. United Feldspar Corp., 241 N.C. 128, 84 S.E.2d 645 (1954).

Advising an employee, who has been exposed to free silica dust, that his examination reveals "evidence of dust disease" is not sufficient to put him on notice that he has silicosis. Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952).

Where disablement from silicosis occurs, as defined in § 97-54, and notice of claim is filed in accord with the provisions contained in this section, the claimant need not be advised by competent medical authority that he has silicosis within two years from the date of his last exposure. Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952).

The reason for allowing two years from the date of the last exposure to silica dust in which to determine actual disability from silicosis is that silicosis is a progressive disease, and the lung changes continue to develop for one or two years after removal of the worker from the silica hazard. Brinkley v. United Feldspar & Minerals Corp., 246 N.C. 17, 97 S.E.2d 419 (1957).

Incapacity Not Resulting Within Two Years of Last Exposure. — Claimant was removed from the hazard of silica dust before becoming incapacitated within the meaning of G.S. 97-54. He was thereafter employed by the same employer for five years at the same wage at employment free from the hazard of silica dust. It was held that his retirement from such other occupation at the end of five years could not have been caused by incapacity from silicosis resulting within two years of the last exposure to silica dust, and compensation therefor could not be sustained. Brinkley v. United Feldspar & Minerals Corp., 246 N.C. 17, 97 S.E.2d 419 (1957).

Competency of Evidence Other Than Expert Medical Testimony. — While it is essential to establish the presence of silicosis or asbestosis by competent medical authority, evidence other than expert medical testimony is competent on the question of whether claimant is disabled and whether such disablement occurred within two years from date of last exposure. Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952).

III. REPORT AND NOTICE.

The purpose of the notice of injury requirement is two-fold. It allows the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury. Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

Report and Notice to Employer Under § 97-22. — The employee is not required to give any notice pursuant to the provisions of G.S. 97-22 to the employer in case of asbestosis, silicosis and lead poisoning. In all other cases of occupational disease, the time for giving the notice pursuant to G.S. 97-22 is extended to 30 days after the employee has been advised by competent medical authority that he is suffering from an occupational disease, and the one-year period (now two years) within which he may file his claim dates from receipt of such advice. Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951), overruled on other grounds, 300 N.C. 94, 265 S.E.2d 144 (1980).

Reading subsection (b) of this section in conjunction with G.S. 97-22, a claim for compensation under the act is barred if the employer is not notified within 30 days of the date on which the claimant is informed of the diagnosis, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby. Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

Waiver of Notice Issue Where Not Raised. — An employer who fails to raise the issue of notice at the hearing before the compensation board may not raise it on appeal. Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

Employer's failure to notify the Commission pursuant to subsection (a) of § 97-92 does not raise an estoppel claim. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

In an action brought by the dependents of an employee who died of hepatitis in order to recover death benefits, the employer waived its right to notice of the employee's disease where it failed to raise that issue at the hearing before the Industrial Commission; moreover, under the circumstances of the case it was unrealistic to assume that the employer did not immediately receive notice of the diagnosis of the employee's disease, where the employee continued to work in the same laboratory in which he contracted the disease, and where his duties were changed after he "suffered" the disease, so that he no longer handled blood. Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

IV. FILING OF CLAIMS.

The two-year time limit for filing claims under subsection (c) is a condition precedent with which claimants must comply in order to confer jurisdiction on the Industrial Commission to hear the claim. Poythress v. J.P. Stevens & Co., 54 N.C. App. 376, 283 S.E.2d 573 (1981), cert. denied, 305 N.C. 153, 289 S.E.2d 380 (1982); Clary v. A.M. Smyre Mfg. Co., 61 N.C. App. 254, 300 S.E.2d 704 (1983); Lawson v. Cone Mills Corp., 68 N.C. App. 402, 315 S.E.2d 103 (1984); Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, 311 S.E.2d 590 (N.C. 1984); Dawkins v. Mills, 74 N.C. App. 712, 329 S.E.2d 688 (1985).

Subsection (c) of this section does not establish a defense to a claim for workers' compensation, but is a condition precedent with which claimants must comply in order to confer jurisdiction on the Industrial Commission to hear the claim. Clary v. A.M. Smyre Mfg. Co., 61 N.C. App. 254, 300 S.E.2d 704 (1983).

Two year statute of limitation is a condition precedent with which a plaintiff must comply in order to confer jurisdiction on the Industrial Commission. Underwood v. Cone Mills Corp., 78 N.C. App. 155, 336 S.E.2d 634 (1985), cert. denied, 316 N.C. 202, 341 S.E.2d 583 (1986).

The burden is on plaintiff to establish that the claim was timely filed, and a failure to do so creates a jurisdictional bar to the claim. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, 311 S.E.2d 590 (N.C. 1984).

When Two-Year Limit Begins to Run. — Two factors trigger the onset of the two-year period in the case of an occupational disease. Time begins running when an employee has suffered: (1) injury from an occupational disease which (2) renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity by injury. Taylor v. J.P. Stevens & Co., 300 N.C. 94, 265 S.E.2d 144 (1980).

The two-year period within which claims for benefits for an occupational disease must be filed under subsection (c) of this section begins running when an employee has suffered injury from an occupational disease which renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity by such injury, and the employee is informed by competent medical authority of the nature and work-related cause of the disease. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, 311 S.E.2d 590 (N.C. 1984); Dawkins v. Mills, 74 N.C. App. 712, 329 S.E.2d 688 (1985).

The two year period within which claims for benefits for an occupational disease must be filed begins running when an employee has suffered injury from an occupational disease which renders the employee incapable of earning, at any job, the wages the employee was receiving at the time of the incapacity, and the employee is informed by competent medical authority of the nature and work-related cause of the disease. Underwood v. Cone Mills Corp., 78 N.C. App. 155, 336 S.E.2d 634 (1985), cert. denied, 316 N.C. 202, 341 S.E.2d 583 (1986).

Though the two-year time limit for timely filing is a jurisdictional requisite, without which the Commission may not consider a workers' compensation claim, the time does not begin to run against occupational disease claims until the employee is informed by competent medical authority of the nature and work-related cause of the disease. McCubbins v. Fieldcrest Mills, Inc., 79 N.C. App. 409, 339 S.E.2d 497, cert. denied, 316 N.C. 732, 345 S.E.2d 389 (1986).

Two conditions must be met in order to start the two-year statute of limitations running against a claimant: (1) The employee must have suffered an occupational disease which renders the employee incapable of earning, at any job, the wages the employee was receiving at the time of the incapacity, and (2) the employee has been informed by competent medical authority of the nature and work-related cause of the disease. Rutledge v. Stroh Cos., 105 N.C. App. 307, 412 S.E.2d 901 (1991), cert. denied, 331 N.C. 384, 417 S.E.2d 791 (1992).

The two-year period within which claims for occupational disease must be filed begins running when an employee suffers injury which renders the employee incapable of earning, at any job, the wages the employee was receiving at the time of the incapacity, and the employee is informed by medical authority of the nature and work-related cause of the disease. Howard v. Square-D Co., 128 N.C. App. 303, 494 S.E.2d 606 (1998).

The two-year time limitation for filing claims does not begin to run anew when employee's condition changes from permanent partial disability to permanent total disability. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, 311 S.E.2d 590 (N.C. 1984).

Had the legislature intended that only total permanent disability or disablement trigger the two-year limitation on claims or that a change in an employee's condition from permanent partial disability to permanent total disability would begin the two-year limitation period anew, the legislature would have said so in plain language. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, 311 S.E.2d 590 (N.C. 1984).

Two-Year Time Limitation Runs from Date When Employee Receives Clear Information That His Disease Is Work-Related. — The plaintiff, who was disabled as of September 20, 1992, but was not advised by a competent medical authority that his disease was a result of his occupation until April 1994, notified his employer of his occupational disease within the requisite two-year period when he filed his Form 18 claim on January 24, 1994; the doctors testified that they had shared suspicions with each other of a causal relationship between plaintiff's work and health, but no testimony was offered that any of those doctors informed the plaintiff that his job was causing his disease. Terrell v. Terminix Servs., 142 N.C. App. 305, 542 S.E.2d 332, 2001 N.C. App. LEXIS 91 (2001).

Employer's Reliance upon Subsection (c) Not Estopped by Omission Under § 97-92(a). — The prescribed penalty against an employer for the neglectful omission to report to the Industrial Commission an employee's absence under G.S. 97-92(a) is not the tolling of a "statute of limitation" or a bar, either through estoppel or waiver, to reliance upon subsection (c) of this section. Poythress v. J.P. Stevens & Co., 54 N.C. App. 376, 283 S.E.2d 573 (1981), cert. denied, 305 N.C. 153, 289 S.E.2d 380 (1982).

The dependents' claim for compensation would not be barred by the employee's failure to file within the statutory period where the dependents were not parties to the proceeding brought by the employee. Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979).

The employee is required to file but a single claim, and the amount of compensation payable is predicated on the extent of the disability resulting from the accident or occupational disease. Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 304 S.E.2d 215 (1983), rehearing denied, 311 S.E.2d 590 (N.C. 1984).

Hearing Loss Claim Filed Under This Section. — Where, although plaintiff's original awareness of hearing loss was precipitated by a single event, medical testimony indicated that the resulting disability was caused by repeated exposure to heightened levels of noise prior to 1974, the claim did not need to meet the requirements of G.S. 97-22 which is for injury by accident claims; plaintiff's claim was one for compensation for occupational disease and plaintiff had met the necessary filing requirements set forth in this section. Sellers v. Lithium Corp., 94 N.C. App. 575, 380 S.E.2d 526 (1989), cert. denied, 325 N.C. 547, 385 S.E.2d 501 (1989).

Carpal Tunnel Claim. — Plaintiffs claim was timely filed even though she was diagnosed with carpal tunnel syndrome and was unable to work for 6 days over two years before the claim was filed because she returned to work and continued to work for approximately 16 months more before she finally incurred a compensable period of disability. Howard v. Square-D Co., 128 N.C. App. 303, 494 S.E.2d 606 (1998).

V. KNOWLEDGE OF EMPLOYEE.

When Time Limitations Begin to Run. — With reference to occupational diseases, the time within which an employee must give notice or file claim begins to run when the employee is first informed by competent medical authority of the nature and work-related cause of the disease. Taylor v. J.P. Stevens & Co., 300 N.C. 94, 265 S.E.2d 144 (1980); McCall v. Cone Mills Corp., 61 N.C. App. 118, 300 S.E.2d 245, cert. denied, 308 N.C. 544, 304 S.E.2d 237 (1983); Clary v. A.M. Smyre Mfg. Co., 61 N.C. App. 254, 300 S.E.2d 704 (1983).

An employee must be informed clearly, simply and directly that he has an occupational disease and that the illness is work-related to trigger the running of the two-year period set forth in this section. Lawson v. Cone Mills Corp., 68 N.C. App. 402, 315 S.E.2d 103 (1984).

It is not enough that the worker be told a medical name for his disease, which may be meaningless to him, without a statement of its causal relationship to an extra-hazardous occupation. McKee v. Crescent Spinning Co., 54 N.C. App. 558, 284 S.E.2d 175 (1981), cert. denied, 305 N.C. 301, 291 S.E.2d 150 (1982).

Employee Is Not Required to Diagnose His Own Condition. — It was not the legislative intent to require an employee, in many instances, suffering from any one of these occupational diseases to make a correct medical diagnosis of his own condition or to file his notice and claim for compensation before he knew he had such disease, or run the risk of having his claim barred by the one-year (now two-year) statute. Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951), overruled on other grounds, 300 N.C. 94, 265 S.E.2d 144 (1980).

Nor to Inquire and Discover Relationship of Disease to Employment. — The legislature never intended that a claimant for workers' compensation benefits would have to make a correct medical diagnosis of his own condition prior to notification by other medical authority of his disease in order to timely make his claim; likewise, plaintiff cannot be expected to inquire further and discover the relationship of his condition to his employment. McKee v. Crescent Spinning Co., 54 N.C. App. 558, 284 S.E.2d 175 (1981), cert. denied, 305 N.C. 301, 291 S.E.2d 150 (1982).

When Plaintiff First Learned of Disease Irrelevant to When Disability Began. — Plaintiff did not become disabled within the meaning of the Workers' Compensation Act until June 3, 1982, when he was forced to stop work of any kind because of his occupational disease. Because plaintiff was able to earn the wages he had always received until that date, the arguments as to when plaintiff was first informed of the nature and work-related cause of his disease were irrelevant. Thus his claim, filed on February 2, 1983, was timely. Underwood v. Cone Mills Corp., 78 N.C. App. 155, 336 S.E.2d 634 (1985), cert. denied, 316 N.C. 202, 341 S.E.2d 583 (1986).

§ 97-59. Employer to pay for treatment.

Medical compensation shall be paid by the employer in cases in which awards are made for disability or damage to organs as a result of an occupational disease after bills for same have been approved by the Industrial Commission.

In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary. (1935, c. 123; 1945, c. 762; 1973, c. 1061; 1981, c. 339; 1991, c. 703, s. 5.)

Legal Periodicals. — For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

CASE NOTES

Section Controls over § 97-25. — This section, which is a more recent and specific statute dealing with awards of medical benefits in cases involving occupational disease, controls over G.S. 97-25, which is an older and more general statute. Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982).

Grounds for Award of Medical Benefits. — This section states two grounds upon which the Commission shall extend medical benefits; if either is found to exist by the Commissioner, an award for medical benefits must be made. Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982).

There is no provision in the Act allowing the Commission to limit the award of medical expenses under this section to the period of time in which disability is paid; moreover upon finding that the treatment would provide needed relief, it is not necessary under this section for the Commission to determine that such treatment would also lessen the period of disability. Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982).

"Needed Relief". — There is nothing talismanic about the phrase "needed relief." Where a medical expert's testimony is otherwise clear, he is not required to use those particular words to justify an award for future medical expenses. Heffner v. Cone Mills Corp., 83 N.C. App. 84, 349 S.E.2d 70 (1986).

Prior Approval Only Required Where Practicable. — The requirement in this section of prior approval of medical treatment applies only in cases where it is reasonably practicable to seek such prior approval. Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982).

Failure to obtain approval for payments of medical expenses does not raise an estoppel claim. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Evidence From Unauthorized Physicians. — North Carolina Industrial Commission did not err in relying upon the testimony of unauthorized physicians as, while the Commission could not require the employer to pay for treatment by an unauthorized physician, the fact that a physician was not authorized did not render his or her evidence incompetent. Branch v. Carolina Shoe Co., 172 N.C. App. 511, 616 S.E.2d 378, 2005 N.C. App. LEXIS 1802 (2005).

Plaintiff failed to properly preserve his right to appeal the failure of the Deputy Commissioner to order payment of medical expenses under this section, where there was no evidence in the record that the matter was ever addressed by the full commission, the plaintiff did not appeal from the Deputy Commissioner's opinion and award, and the sole issue on appeal before the full commission was the propriety of the amounts awarded for loss of lung function and attorneys' fees. Joyner v. Rocky Mount Mills, 85 N.C. App. 606, 355 S.E.2d 161 (1987).

Applied in Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985); Strickland v. Burlington Indus., Inc., 86 N.C. App. 598, 359 S.E.2d 19 (1987).

Cited in Smith v. American & Efird Mills, 51 N.C. App. 480, 277 S.E.2d 83 (1981); Robinson v. J.P. Stevens & Co., 57 N.C. App. 619, 292 S.E.2d 144 (1982); Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986); Joyner v. Rocky Mount Mills, 92 N.C. App. 478, 374 S.E.2d 610 (1988); Palmer v. Jackson, 157 N.C. App. 625, 579 S.E.2d 901, 2003 N.C. App. LEXIS 930 (2003).

§ 97-60: Repealed by Session Laws 2003-284, s. 10.33(a), effective July 1, 2003.

§ 97-61: Rewritten as §§ 97-61.1 to 97-61.7.

Editor's Note. — Session Laws 1955, c. 525, s. 2, rewrote G.S. 97-61 as G.S. 97-61.1 through 97-61.7. The rewritten section had been derived from Public Laws 1935, c. 123, and was amended by Session Laws 1945, c. 762.

§ 97-61.1. First examination of and report on employee having asbestosis or silicosis.

When the Industrial Commission is advised by an employer or employee that an employee has or allegedly has asbestosis or silicosis, the employee, when ordered by the Industrial Commission, shall submit to X rays and a physical examination by the advisory medical committee or other designated qualified physician who is not a member of the advisory medical committee. The employer shall pay the expenses connected with the examination by the advisory medical committee or other designated qualified physician who is not a member of the advisory medical committee in such amounts as shall be directed by the Industrial Commission. Within 30 days after the completion of the examination, the advisory medical committee or other designated qualified physician shall submit a written report to the Industrial Commission setting forth:

(1) The X rays and clinical procedures used.
(2) Whether or not the claimant has contracted asbestosis or silicosis.
(3) The advisory medical committee's or designated qualified physician's opinion expressed in percentages of the impairment of the employee's ability to perform normal labor in the same or any other employment.
(4) Any other matter deemed pertinent.

When a competent physician certifies to the Industrial Commission that the employee's physical condition is such that his movement to the place of examination ordered by the Industrial Commission as herein provided in G.S. 97-61.1, 97-61.3 and 97-61.4 would be harmful or injurious to the health of the employee, the Industrial Commission shall cause the examination of the employee to be made by the advisory medical committee or other designated qualified physician as herein provided at some place in the vicinity of the residence of the employee suitable for the purposes of making such examination. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2; 1973, c. 476, s. 128; 1989, c. 727, s. 219(15); 1997-443, s. 11A.37; 2003-284, s. 10.33(b).)

Cross References. — See Editor's note under G.S. 97-61.

CASE NOTES

An employer's status (or lack thereof) as a "dusty trade" does not impact the application of the examination and compensation scheme set forth in G.S. 97-61.1 through 97-61.7. Austin v. Continental Gen. Tire, 141 N.C. App. 397, 540 S.E.2d 824, 2000 N.C. App. LEXIS 1415 (2000), rev'd on other grounds, 354 N.C. 344, 553 S.E. 2d 680 (2001).

An employer need not be designated a "dusty trade" for §§ 97-61.1 through 97-61.7 to apply. Clark v. ITT Grinnell Indus. Piping, Inc., 141 N.C. App. 417, 539 S.E.2d 369, 2000 N.C. App. LEXIS 1416 (2000).

The "engaged or about to engage in" language of § 97-60 does not carry over to the examination and compensation provisions of G.S. 97-61.1 through 97-61.7. Austin v. Continental Gen. Tire, 141 N.C. App. 397, 540 S.E.2d 824, 2000 N.C. App. LEXIS 1415 (2000), rev'd on other grounds, 354 N.C. 344, 553 S.E. 2d 680 (2001).

The "engaged or about to engage in" language of § 97-60 does not carry over to the screening and reporting provisions of G.S. 97-61.1 through 97-61.7. Clark v. ITT Grinnell Indus. Piping, Inc., 141 N.C. App. 417, 539 S.E.2d 369, 2000 N.C. App. LEXIS 1416 (2000).

Opinion of Percent of Impairment. — The Advisory Medical Committee's final "impression" of "Silicosis, Grade II, 100% disability" was clearly a fulfillment of the statutory requirement that its written report include the Committee's opinion, expressed in percentages, of the impairment of the employee's ability to perform labor or earn wages in the same or any other employment. Pitman v. Feldspar Corp., 87 N.C. App. 208, 360 S.E.2d 696 (1987), cert. denied, 321 N.C. 474, 364 S.E.2d 924 (1988).

Remand to Deputy Commissioner Proper. — Commission's remand to a deputy commissioner for a hearing on the worker's disability did not violate the remand order from the supreme court of North Carolina because disability was not at issue at the first hearing, and no evidence was presented on the subject, but on remand the commission was directed to determine if the worker was entitled to benefits under G.S. 97-64; under G.S. 97-61.1 through G.S. 97-61.7, a diagnosis of asbestosis for purposes of determining eligibility to receive benefits was the equivalent of a finding of actual disability, and accordingly the issue of the worker's disability was not a contested issue at the first hearing. Austin v. Cont'l Gen. Tire, — N.C. App. —, 648 S.E.2d 570, 2007 N.C. App. LEXIS 1813 (2007).

Applied in Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957).

Cited in Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

§ 97-61.2. Filing of first report; right of hearing; effect of report as testimony.

The advisory medical committee shall file its report in triplicate with the Industrial Commission, which shall send one copy thereof to the claimant and one copy thereof to the employer by registered mail or certified mail. Unless within 30 days from receipt of the copy of said report the claimant and employer, or either of them, shall request the Industrial Commission in writing to set the case for hearing for the purpose of examining and cross-examining the members of the advisory medical committee respecting the report of said committee, and for the purpose of introducing additional testimony, said report shall become a part of the record of the case and shall be accepted by the Industrial Commission as expert medical testimony to be considered as such and in connection with all the evidence in the case in arriving at its decision. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2; 1963, c. 450, s. 5.)

Cross References. — See Editor's note under G.S. 97-61.

§ 97-61.3. Second examination and report.

As soon as practicable after the expiration of one year following the initial examination by the advisory medical committee and when ordered by the Industrial Commission, the employee shall again appear before the advisory medical committee, at least one of whom shall conduct the examination, and the member or members of the advisory medical committee conducting the examination shall forward the X rays and findings to the member or members of the committee not present for the physical examination. Within 30 days after the completion of the examination, the advisory medical committee shall make a written report to the Industrial Commission signed by all of its members, setting forth any change since the first report in the employee's condition which is due to asbestosis or silicosis, said report to be filed in triplicate with the Industrial Commission, which shall send one copy thereof to the claimant, and one copy to the employer by registered mail or certified mail. The claimant and employer, or either of them, shall have the right only at the final hearing provided for in G.S. 97-61.4 to examine or cross-examine the members of the advisory medical committee respecting the second report of the committee. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2; 1959, c. 863, s. 2.)

Cross References. — See Editor's note under G.S. 97-61.

CASE NOTES

Applied in Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957).

Cited in Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

§ 97-61.4. Third examination and report.

As soon as practicable after the expiration of two years from the first examination and when ordered by the Industrial Commission, the employee shall appear before the advisory medical committee, or at least two of them, for final X rays and physical examination. Upon completion of this examination and within 30 days, the advisory medical committee shall make a written report setting forth:

(1) The X rays and clinical procedures used by the committee.
(2) To what extent, if any, has the damage to the employee's lungs due to asbestosis or silicosis changed since the first examination.
(3) The opinion of the committee, expressed in percentages, with respect to the extent of impairment of the employee's ability to earn in the same or any other employment the wages which the employee was receiving at the time of his last injurious exposure to asbestosis or silicosis.
(4) Any other matter deemed pertinent by the committee.

Said report shall be filed in triplicate with the Industrial Commission which shall send one copy thereof to the claimant and one copy to the employer by registered mail or certified mail. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2; 1959, c. 863, s. 3.)

Cross References. — See Editor's note under G.S. 97-61.

CASE NOTES

Opinion of Percent of Impairment. — The Advisory Medical Committee's final "impression" of "Silicosis, Grade II, 100% disability" was clearly a fulfillment of the statutory requirement that its written report include the Committee's opinion, expressed in percentages, of the impairment of the employee's ability to perform labor or earn wages in the same or any other employment. Pitman v. Feldspar Corp., 87 N.C. App. 208, 360 S.E.2d 696 (1987), cert. denied, 321 N.C. 474, 364 S.E.2d 924 (1988).

Applied in Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957).

Cited in Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

§ 97-61.5. Hearing after first examination and report; removal of employee from hazardous occupation; compensation upon removal from hazardous occupation.

(a) After the employer and employee have received notice of the first committee report, the Industrial Commission, unless it has already approved an agreement between the employer and employee, shall set the matter for hearing at a time and place to be decided by it, to hear any controverted questions, determine if and to whom liability attaches, and where appropriate, file a written opinion with its findings of fact and conclusions of law and cause its award to be issued thereon, all of which shall be subject to modification as provided in G.S. 97-61.6.

(b) If the Industrial Commission finds at the first hearing that the employee has either asbestosis or silicosis or if the parties enter into an agreement to the effect that the employee has silicosis or asbestosis, it shall by order remove the employee from any occupation which exposes him to the hazards of asbestosis or silicosis, and if the employee thereafter engages in any occupation which exposes him to the hazards of asbestosis or silicosis without having obtained the written approval of the Industrial Commission as provided in G.S. 97-61.7, neither he, his dependents, personal representative nor any other person shall be entitled to any compensation for disablement or death resulting from asbestosis or silicosis; provided, that if the employee is removed from the industry the employer shall pay or cause to be paid as in this subsection provided to the employee affected by such asbestosis or silicosis a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of his average weekly wages before removal from the industry, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 or less than thirty dollars ($30.00) a week, which compensation shall continue for a period of 104 weeks. Payments made under this subsection shall be credited on the amounts payable under any final award in the cause entered under G.S. 97-61.6. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2; c. 1354; 1957, c. 1217; c. 1396, s. 8; 1963, c. 604, s. 6; 1967, c. 84, s. 7; 1969, c. 143, s. 6; 1971, c. 281, s. 5; 1973, c. 515, s. 6; c. 759, s. 5; 1981, c. 276, s. 1; c. 378, s. 1.)

Cross References. — See Editor's note under G.S. 97-61.

CASE NOTES

Constitutionality. — Assuming arguendo that defendant employer did have standing to assert a constitutional challenge to this section on the basis that it treats employees with asbestosis or silicosis differently than employees who contract occupational diseases other than asbestosis or silicosis, the court agreed with the Commission that the statute was not unconstitutional; enacted as an added benefit to employees suffering from asbestosis or silicosis, its purpose to account for the incurable, latent, and unique nature of asbestosis and silicosis, factors not apparent in other occupational diseases, the statute survives minimum scrutiny. Jones v. Weyerhaeuser Co., 141 N.C. App. 482, 539 S.E.2d 380, 2000 N.C. App. LEXIS 1413 (2000), appeal dismissed and cert. denied, 353 N.C. 525, 549 S.E.2d 858 (2001).

This section is in conflict with §§ 97-54 and former 97-58(a), thereby establishing an exception. This exception made the diagnosis of asbestosis or silicosis the same as disablement. The disease must therefore have developed within two years of the last exposure. Roberts v. Southeastern Magnesia & Asbestos Co., 61 N.C. App. 706, 301 S.E.2d 742 (1983), decided prior to the 1987 amendment to § 97-58, which repealed subsection (a) thereof.

It is clear from the language of this section and § 97-61.7 that a diagnosis of asbestosis, for purposes of determining eligibility to receive benefits, is the equivalent of a finding of actual disability. Roberts v. Southeastern Magnesia & Asbestos Co., 61 N.C. App. 706, 301 S.E.2d 742 (1983).

Purpose of Section. — One of the purposes of this section is the compensation of employees for the incurable nature of the disease of asbestosis. Roberts v. Southeastern Magnesia & Asbestos Co., 61 N.C. App. 706, 301 S.E.2d 742 (1983).

Legislative Intent. — There is no indication that the legislature intended to prohibit any recovery whatsoever to those employees who refused to remove themselves from contact with asbestos after being diagnosed as having asbestosis. The statutory language merely prohibits recovery for actual partial incapacity if the employee, after receiving initial compensation in the form of 104 weeks of installment payments, is shown to have remained in a job where he or she is exposed to asbestos. Roberts v. Southeastern Magnesia & Asbestos Co., 61 N.C. App. 706, 301 S.E.2d 742 (1983).

The intent of the legislature in providing for an automatic 104 installment payments was to encourage employees to remove themselves from hazardous exposure to asbestos and to provide for employee rehabilitation. Roberts v. Southeastern Magnesia & Asbestos Co., 61 N.C. App. 706, 301 S.E.2d 742 (1983).

The Workers' Compensation Act contemplates that an employee will not be allowed to remain exposed to silica dust or asbestos dust until he becomes actually incapacitated within the meaning of G.S. 97-54, and that if removed from the hazard before such incapacity, he will seek and obtain other remunerative employment. Brinkley v. United Feldspar & Minerals Corp., 246 N.C. 17, 97 S.E.2d 419 (1957).

Showing of Disability for Asbestosis. — The claimant could not recover compensation for total or partial incapacity to earn wages, both of which require a showing of disablement, where his prior award of 104-weeks compensation for asbestosis did not establish his disablement, but he was entitled to compensation for permanent injury to his lungs without offset for previous benefits received. Davis v. Weyerhaeuser Co., 132 N.C. App. 771, 514 S.E.2d 91 (1999).

Removal by Employer a Prerequisite. — Employee becoming disabled by asbestosis or silicosis within the terms of the specific definition embodied in G.S. 97-54, and who was no longer employed by the employer and had not been "removed" by the employer as required by G.S. 97-61.5(b), was entitled to be considered for ordinary compensation measured by the general provisions of the North Carolina Workmen's Compensation Act and not G.S.97-61.5(b). Abernathy v. Sandoz Chemicals/Clariant Corp., 151 N.C. App. 252, 565 S.E.2d 218, 2002 N.C. App. LEXIS 724 (2002), cert. denied, 356 N.C. 432, 572 S.E.2d 421 (2002).

Compensation Where Employee's Condition Is Complicated by Tuberculosis. — Where an employee is ordered to abstain from employment in an industry having the hazards of silica dust and directed to report for second and third medical examinations under G.S. 97-61.3 and 97-61.4, it is proper that he be awarded the compensation provided by subsection (b) of this section without consideration of the fact that his condition was complicated by pulmonary tuberculosis, since the total amount of compensation is to be determined on the hearing after the third medical report as provided in G.S. 97-61.6, at which time consideration should be given to the tubercular condition in accordance with G.S. 97-65. Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957).

Section Construed with § 97-31. — The acceptance of benefits under this section does not necessarily preclude an award under G.S. 97-31(24). Hicks v. Leviton Mfg. Co., 121 N.C. App. 453, 466 S.E.2d 78 (1996).

Calculation Based on Wage at Time of Diagnosis. — Plaintiff who was diagnosed with silicosis was entitled to compensation calculated based on his average weekly wage at the time he was diagnosed, not at the time of his last exposure or at the time he was "removed from the industry". Moore v. Standard Mineral Co., 122 N.C. App. 375, 469 S.E.2d 594 (1996).

Plaintiff was not barred from seeking disability benefits if his retirement was for reasons unrelated to his occupational disease; the pertinent issue was whether plaintiff, subsequent to retirement, experienced a loss in wage-earning capacity. Stroud v. Caswell Ctr., 124 N.C. App. 653, 478 S.E.2d 234 (1996).

An employee who retires prior to being diagnosed with asbestosis need not be "removed" from employment to be entitled to the 104 weeks compensation set forth in this section. Austin v. Continental Gen. Tire, 141 N.C. App. 397, 540 S.E.2d 824, 2000 N.C. App. LEXIS 1415 (2000), rev'd on other grounds, 354 N.C. 344, 553 S.E. 2d 680 (2001).

An employee need not be "removed" from employment to be entitled to the 104 weeks compensation set forth in this section; construing this section in para materia with G.S. 97-61.7 the court held that the General Assembly's intent was to allow an injured plaintiff to remain in the harmful work environment and receive the 104 weeks of compensation although the court acknowledged that the language of this section by itself appeared to restrict recovery to an employee who is removed from the industry. Clark v. ITT Grinnell Indus. Piping, Inc., 141 N.C. App. 417, 539 S.E.2d 369, 2000 N.C. App. LEXIS 1416 (2000).

Former Law. — As to removal from hazardous employment and rehabilitation under former G.S. 97-61, now rewritten as G.S. 97-61.1 to 97-61.7, see Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948); Bye v. Interstate Granite Co., 230 N.C. 334, 53 S.E.2d 274

(1949); Midkiff v. North Carolina Granite Corp., 235 N.C. 149, 69 S.E.2d 166 (1952); Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952).

Remand to Deputy Commissioner. Commission's remand to a deputy commissioner for a hearing on the worker's disability did not violate the remand order from the supreme court of North Carolina because disability was not at issue at the first hearing, and no evidence was presented on the subject, but on remand the commission was directed to determine if the worker was entitled to benefits under G.S. 97-64; under G.S. 97-61.1 through G.S. 97-61.7, a diagnosis of asbestosis for purposes of determining eligibility to receive benefits was the equivalent of a finding of actual disability, and accordingly the issue of the worker's disability was not a contested issue at the first hearing. Austin v. Cont'l Gen. Tire, — N.C. App. —, 648 S.E.2d 570, 2007 N.C. App. LEXIS 1813 (2007).

Applied in Allen v. Standard Mineral Co., 71 N.C. App. 597, 322 S.E.2d 644 (1984); Davis v. Weyerhaeuser Co., 96 N.C. App. 584, 386 S.E.2d 740 (1989).

Cited in Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963); Pitman v. Feldspar Corp., 87 N.C. App. 208, 360 S.E.2d 696 (1987).

§ 97-61.6. Hearing after third examination and report; compensation for disability and death from asbestosis or silicosis.

After receipt by the employer and employee of the advisory medical committee's third report, the Industrial Commission, unless it has approved an agreement between the employee and employer, shall set a final hearing in the cause, at which it shall receive all competent evidence bearing on the cause, and shall make a final disposition of the case, determining what compensation, if any, the employee is entitled to receive in addition to the 104 weeks already received.

Where the incapacity for work resulting from asbestosis or silicosis is found to be total, the employer shall pay, or cause to be paid, to the injured employee during such total disability a weekly compensation in accordance with G.S. 97-29.

When the incapacity for work resulting from asbestosis or silicosis is partial, the employer shall pay, or cause to be paid, to the affected employee, a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of the difference between his average weekly wages at the time of his last injurious exposure, and the average weekly wages which he is able to earn thereafter, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29, a week, and provided that the total compensation so paid shall not exceed a period of 196 weeks, in addition to the 104 weeks for which the employee has already been compensated.

Provided, however, should death result from asbestosis or silicosis within two years from the date of last exposure, or should death result from asbestosis or silicosis, or from a secondary infection or diseases developing from asbestosis or silicosis within 350 weeks from the date of last exposure and while the employee is entitled to compensation for disablement due to asbestosis or silicosis, either partial or total, then in either of these events, the employer shall pay, or cause to be paid compensation in accordance with G.S. 97-38.

Provided further that if the employee has asbestosis or silicosis and dies from any other cause, the employer shall pay, or cause to be paid by one of the methods set forth in G.S. 97-38 compensation for any remaining portion of the 104 weeks specified in G.S. 97-61.5 for which the employee has not previously been paid compensation, and in addition shall pay compensation for such number of weeks as the percentage of disability of the employee bears to 196 weeks. If the employee was totally disabled as a result of asbestosis or silicosis, compensation shall be paid for any remaining portion of the 104 weeks specified in G.S. 97-61.5 for which the employee has not previously been paid compensation, and in addition shall be paid for an additional 300 weeks. (1935,

c. 123; 1945, c. 762; 1955, c. 525, s. 2; c. 1354; 1957, c. 1271; 1963, c. 604, s. 7; 1965, c. 907; 1967, c. 84, s. 8; 1969, c. 143, s. 7; 1971, c. 281, s. 6; c. 631; 1973, c. 515, s. 7; c. 759, s. 6; c. 1308, ss. 6, 7; 1979, c. 246; 1981, c. 276, s. 1.)

Cross References. — See Editor's note under G.S. 97-61.

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

Purpose of Section. — Because of the difficulty of effecting a cure and the length of time necessary to ascertain the extent of the disability, this section fixes a time in the future when the total amount of compensation will be determined. Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957).

Constitutionality. — Court of Appeals of North Carolina holds that the time limitation in the fourth paragraph of G.S. 97-61.6 violates the Equal Protection Clauses of U.S. Const., Amend. XIV and N.C. Const., Art. I, § 19 under the rational basis test because the statute imposes an additional burden for recovery — a shorter time frame for death benefits claims — for asbestosis or silicosis, and no rational basis exists for treating such occupational diseases differently from other latent occupational diseases. Payne v. Charlotte Heating & Air Conditioning, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

The language of the fourth paragraph of this section is clear, positive and understandable. When the language of a statute is plain and free from ambiguity, expressing a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the legislature intended, and the statute must be interpreted accordingly. Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

The fourth paragraph of this section provides two conditions under which dependents of a deceased employee, who had silicosis, are entitled to compensation on account of his death: (1) If death results from silicosis within two years from the date of last exposure, or (2) if death results within 350 weeks from the date of last exposure and while the employee is entitled to compensation for disablement due to silicosis, either partial or total. These conditions are stated in independent clauses of a compound sentence, and neither clause is dependent upon the other. Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

"Death Resulting from Asbestosis" Construed. — "Death resulting from asbestosis" was construed to mean that a compensable death occurs when job-related asbestosis only accelerates and contributes to the death but is not the immediate or primary cause. Self v. Starr-Davis Co., 13 N.C. App. 694, 187 S.E.2d 466 (1972), decided prior to the 1971 amendment to this section.

When Compensation Allowed Although Death Does Not Result from Silicosis. — Under this section the dependents of a deceased employee are entitled to compensation if the employee dies within 350 weeks from the date of last exposure to silicosis and while he is receiving or is entitled to receive compensation for disability due to silicosis, either partial or total, notwithstanding that the death does not result from silicosis. Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

The clear intent of this section to provide compensation for death occurring within 350 weeks from the date of last exposure if the employee was at the time of death receiving compensation for disablement due to silicosis, even though the death does not result from silicosis, must be given effect notwithstanding G.S. 97-2, subdivisions (6) and (10), and G.S. 97-52, since the specific provisions relating to silicosis, which were enacted because of the peculiar course of the disease, must be construed as an exception to the general tenor of the Workers' Compensation Act to provide compensation for death only if it results from an accident arising out of and in the course of the employment. Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

Disability Refers to Diminished Capacity to Earn Money. — Under the Workers' Compensation Act disability refers not to physical infirmity but to a diminished capacity to earn money. Mabe v. North Carolina Granite Corp., 15 N.C. App. 253, 189 S.E.2d 804 (1972).

But Earning Capacity Must Be That of Particular Plaintiff. — With respect to disability, the question is what effect has the disease had upon the earning capacity of this particular plaintiff; not what effect a like physical impairment would have upon an employee of average age and intelligence. Mabe v. North Carolina Granite Corp., 15 N.C. App. 253, 189 S.E.2d 804 (1972).

Where the plaintiff is fully incapacitated because of silicosis to earn wages through work at hard labor, which is the only work he is qualified to do by reason of his age and education, the plaintiff is totally incapacitated because of silicosis to earn, in the same or any other employment, the wages he was earning at the time of his last injurious exposure. Mabe v. North Carolina Granite Corp., 15 N.C. App. 253, 189 S.E.2d 804 (1972).

Effect of Commission's Findings. — If the findings of fact of the Industrial Commission are supported by competent evidence and are determinative of all the questions at issue in the proceeding, the court must accept such findings as final truth and merely determine whether or not they justify the legal conclusions and decision of the Commission. Mabe v. North Carolina Granite Corp., 15 N.C. App. 253, 189 S.E.2d 804 (1972).

Applied in Allen v. Standard Mineral Co., 71 N.C. App. 597, 322 S.E.2d 644 (1984).

Cited in Woodell v. Starr Davis Co., 77 N.C. App. 352, 335 S.E.2d 48 (1985).

§ 97-61.7. Waiver of right to compensation as alternative to forced change of occupation.

An employee who has been compensated under the terms of G.S. 97-61.5(b) as an alternative to forced change of occupation, may, subject to the approval of the Industrial Commission, waive in writing his right to further compensation for any aggravation of his condition that may result from his continuing in an occupation exposing him to the hazards of asbestosis or silicosis, in which case payment of all compensation awarded previous to the date of the waiver as approved by the Industrial Commission shall bar any further claims by the employee, or anyone claiming through him, provided, that in the event of total disablement or death as a result of asbestosis or silicosis with which the employee was so affected, compensation shall nevertheless be payable, but in no case, whether for disability or death or both, for a longer period than 100 weeks in addition to the 104 weeks already paid. Such written waiver must be filed with the Industrial Commission, and the Commission shall keep a record of each waiver, which record shall be open to the inspection of any interested person. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2.)

Cross References. — See Editor's note under G.S. 97-61.

CASE NOTES

Construing § 97-61.5 in para materia with this section, the court held that the General Assembly's intent was to allow an injured plaintiff to remain in the harmful work environment and receive the 104 weeks of compensation. Clark v. ITT Grinnell Indus. Piping, Inc., 141 N.C. App. 417, 539 S.E.2d 369, 2000 N.C. App. LEXIS 1416 (2000).

It is clear from the language of § 97-61.5 and this section that a diagnosis of asbestosis, for purposes of determining eligibility to receive benefits, is the equivalent of a finding of actual disability. Roberts v. Southeastern Magnesia & Asbestos Co., 61 N.C. App. 706, 301 S.E.2d 742 (1983).

Waiver Inapplicable as to Subsequent Employment. — A waiver of an employee's right to compensation for silicosis signed by the employee upon his employment by one employer did not apply to or waive the employee's right to compensation for silicosis upon his subsequent employment by an entirely separate employer. Fetner v. Rocky Mount Marble & Granite Works, 251 N.C. 296, 111 S.E.2d 324 (1959).

§ 97-62. "Silicosis" and "asbestosis" defined.

The word "silicosis" shall mean the characteristic fibrotic condition of the lungs caused by the inhalation of dust of silica or silicates. "Asbestosis" shall mean a characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust. (1935, c. 123.)

Legal Periodicals. — For note, "Caulder v. Waverly Mills: Expanding the Definition of an Occupational Disease under the Last Injurious Exposure Rule," see 64 N.C.L. Rev. 1566 (1986).

CASE NOTES

Asbestosis is a disease of the lungs occurring in persons working in air laden with asbestos dust. It is infrequent as compared to silicosis, but has somewhat similar symptoms and consequences. Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948).

Sufficient evidence supported the Commission's finding that plaintiff had asbestosis as defined in this section. Austin v. Continental Gen. Tire, 141 N.C. App. 397, 540 S.E.2d 824, 2000 N.C. App. LEXIS 1415 (2000), rev'd on other grounds, 354 N.C. 344, 553 S.E. 2d 680 (2001).

Competent evidence supported the Industrial Commission's findings that plaintiff suffered from asbestosis, as defined in this section; an expert in pulmonary medicine affiliated with the North Carolina Industrial Commission's Advisory Medical Committee testified that plaintiff's x-rays indicated evidence of "pleural plaques and thickening" and opined that plaintiff had "fibrotic conditions of the lung [] characteristic of asbestos exposure" while a pulmonary specialist, who examined plaintiff, found that "chest x-ray reveal[ed] definite pleural plaques quite consistent with asbestos exposure" and an expert in pulmonary medicine observed "evidence on chest radiograph consistent with a significant asbestos exposure." Clark v. ITT Grinnell Indus. Piping, Inc., 141 N.C. App. 417, 539 S.E.2d 369, 2000 N.C. App. LEXIS 1416 (2000).

There was some competent evidence to support the North Carolina Industrial Commission's award of total disability benefits and death benefits, pursuant to G.S. 97-39, to an estate administratrix on behalf of her deceased husband, who had been an employee of the employer for a period of time, where it was determined that the employer was the place where the employee had his last injurious exposure to asbestos, pursuant to G.S. 97-57, and further, that he in fact had "asbestosis," as that term was defined under G.S. 97-62; credibility determinations were within the province of the Commission, and not for the court to redetermine. Payne v. Charlotte Heating & Air Conditioning, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

Cited in Midkiff v. North Carolina Granite Corp., 235 N.C. 149, 69 S.E.2d 166 (1952); Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957); Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

§ 97-63. Period necessary for employee to be exposed.

Compensation shall not be payable for disability or death due to silicosis and/or asbestosis unless the employee shall have been exposed to the inhalation of dust of silica or silicates or asbestos dust in employment for a period of not less than two years in this State, provided no part of such period of two years shall have been more than 10 years prior to the last exposure. (1935, c. 123.)

CASE NOTES

Constitutionality. — This statute denies equal protection of the law under both the North Carolina Constitution and the United States Constitution in that it treats persons with asbestosis differently than persons with other occupational diseases and does so without any valid reason. Walters v. Algernon Blair, 120 N.C. App. 398, 462 S.E.2d 232 (1995), aff'd per curiam, 344 N.C. 628, 476 S.E.2d 105 (1996), cert. denied, 520 U.S. 1196, 117 S. Ct. 1551, 137 L. Ed. 2d 700 (1997).

Court of Appeals of North Carolina holds that the time limitation in the fourth paragraph of G.S. 97-61.6 violates the Equal Protection Clauses of U.S. Const., Amend. XIV and N.C. Const., Art. I, § 19 under the rational basis test because, similar to the reasoning used for declaring G.S. 97-63 unconstitutional in the North Carolina Supreme Court's decision in Walters v. Algernon Blair, 120 N.C. App. 398, 462 S.E.2d 232 (1995), the statute imposes an additional burden for recovery — a shorter time frame for death benefits claims — for asbestosis or silicosis, and no rational basis exists for treating such occupational diseases differently from other latent occupational diseases. Payne v. Charlotte Heating & Air Conditioning, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

Findings Required to Support Award for Silicosis. — To support an award to one suffering from silicosis, the Industrial Commission must find, inter alia, that the employee had been exposed to the hazards of silicosis for the period provided by G.S. 97-57 and that the employee's work in the State must have exposed him to the inhalation of silica dust for the further period prescribed by this section. Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957); Woodell v. Starr Davis Co., 77 N.C. App. 352, 335 S.E.2d 48 (1985).

Employee Held Not Entitled to Rehabilitation Benefits Under Former § 97-61. — Employee had worked in granite industry from time to time during 18 years. However, from 1940 to 1946 he worked in a nondusty trade outside North Carolina and from 1946 to March, 1949, in a nondusty trade inside this State. From March, 1949, until June, 1950, he worked in defendant's granite shed. He then left the dusty trade and filed a claim for rehabilitation benefits, having developed silicosis. An award of rehabilitation benefits under former G.S. 97-61 by the Commission was reversed by the Supreme Court, which held that no benefits could be obtained under the act until the employee had worked at least two years in a dusty trade in this State within the preceding 10 years. Midkiff v. North Carolina Granite Corp., 235 N.C. 149, 69 S.E.2d 166 (1952).

Where the evidence showed that decedent's last possible exposure occurred in February, 1975, he was required to meet the statutory time limitations between February 1965, and February 1975. Exposure which occurred prior to 1964 could not be used to calculate his level of exposure, since it occurred over 10 years prior to the last exposure. Gosney v. Golden Belt Mfg., 89 N.C. App. 670, 366 S.E.2d 873, cert. denied, 322 N.C. 835, 371 S.E.2d 276 (1988), upholding Commission's finding that plaintiff failed to show the length of exposure to asbestos required by § 97-57 and this section.

Applied in Hicks v. North Carolina Granite Corp., 245 N.C. 233, 95 S.E.2d 506 (1956).

Cited in Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951); Long v. North Carolina Finishing Co., 82 N.C. App. 568, 346 S.E.2d 669 (1986).

§ 97-64. General provisions of act to control as regards benefits.

Except as herein otherwise provided, in case of disablement or death from silicosis and/or asbestosis, compensation shall be payable in accordance with the provisions of the North Carolina Workers' Compensation Act. (1935, c. 123; 1979, c. 714, s. 2.)

CASE NOTES

Purpose of Section. — With a view to averting the unjust and oppressive results of an indiscriminate transfer of workers affected by asbestosis or silicosis from their accustomed occupations to other employments under the economic threat of deprivation of compensation, the legislature established in this section the general rule that an employee becoming disabled by asbestosis or silicosis within the terms of the specific definition embodied in G.S. 97-54 should be entitled to ordinary compensation measured by the general provisions of the act. Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948).

Disablement from Asbestosis or Silicosis. — Employee becoming disabled by asbestosis or silicosis within the terms of the specific definition embodied in G.S. 97-54, and who was no longer employed by the employer and had not been "removed" by the employer as required by G.S. 97-61.5(b), was, under G.S. 97-64 entitled to be considered for ordinary compensation measured by the general provisions of the North Carolina Workmen's Compensation Act and not G.S. 97-61.5(b). Abernathy v. Sandoz Chemicals/Clariant Corp., 151 N.C. App. 252, 565 S.E.2d 218, 2002 N.C. App. LEXIS 724 (2002), cert. denied, 356 N.C. 432, 572 S.E.2d 421 (2002).

Commission's remand to a deputy commissioner for a hearing on the worker's disability did not violate the remand order from the supreme court of North Carolina because disability was not at issue at the first hearing, and no evidence was presented on the subject, but on remand the commission was directed to determine if the worker was entitled to benefits under G.S. 97-64; under G.S. 97-61.1 through G.S. 97-61.7, a diagnosis of asbestosis for purposes of determining eligibility to receive benefits was the equivalent of a finding of actual disability, and accordingly the issue of the worker's disability was not a contested issue at the first hearing. Austin v. Cont'l Gen. Tire, — N.C. App. —, 648 S.E.2d 570, 2007 N.C. App. LEXIS 1813 (2007).

Cited in Brinkley v. United Feldspar & Minerals Corp., 246 N.C. 17, 97 S.E.2d 419 (1957); Austin v. Continental Gen. Tire, 141 N.C. App. 397, 540 S.E.2d 824, 2000 N.C. App. LEXIS 1415 (2000), rev'd on other grounds, 354 N.C. 344, 553 S.E. 2d 680 (2001); Clark v. ITT

Grinnell Indus. Piping, Inc., 141 N.C. App. 417, 539 S.E.2d 369, 2000 N.C. App. LEXIS 1416 (2000).

§ 97-65. Reduction of rate where tuberculosis develops.

In case of disablement or death due primarily from silicosis and/or asbestosis and complicated with tuberculosis of the lungs compensation shall be payable as hereinbefore provided, except that the rate of payments may be reduced one sixth. (1935, c. 123.)

CASE NOTES

Time for Making Reduction in Award. — It is at the time of determining the total amount of compensation as provided in G.S. 97-61.6 that the Commission should take into consideration the fact that the employee's condition is complicated by pulmonary tuberculosis and determine in its wisdom the extent to which the provisions of this section should affect the compensation payable to the employee. Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957).

Reduction of Award Rests in Discretion of Commission. — Where the Industrial Commission found that a disabled employee was suffering from tuberculosis as well as from silicosis, whether the award for disability from silicosis should be reduced by one-sixth rested in the discretion of the Industrial Commission. Stewart v. Duncan, 239 N.C. 640, 80 S.E.2d 764 (1954); Fetner v. Rocky Mount Marble & Granite Works, 251 N.C. 296, 111 S.E.2d 324 (1959).

Cited in Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951).

§ 97-66. Claim where benefits are discontinued.

Where compensation payments have been made and discontinued, and further compensation is claimed, the claim for further compensation shall be made within two years after the last payment in all cases of occupational disease, provided, that claims for further compensation for asbestosis or silicosis shall be governed by the final award as set forth in G.S. 97-61.6. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 3; 1987, c. 729, s. 14.)

CASE NOTES

For decision under former provisions of this section, see Blassingame v. Southern Asbestos Co., 217 N.C. 223, 7 S.E.2d 478 (1940).

Cited in Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951).

§ 97-67. Postmortem examinations; notice to next of kin and insurance carrier.

Upon the filing of a claim for death from an occupational disease where in the opinion of the Industrial Commission a postmortem examination is necessary to accurately ascertain the cause of death, such examination shall be ordered by the Industrial Commission. A full report of such examination shall be certified to the Industrial Commission. The surviving spouse or next kin and the employer or his insurance carrier, if their identity and whereabouts can be reasonably ascertained, shall be given reasonable notice of the time and place of such postmortem examination, and, if present at such examination, shall be given an opportunity to witness the same. Any such person may be present at and witness such examination either in person or through a duly authorized representative. If such examination is not consented to by the surviving husband or wife or next of kin, all right to compensation shall cease. (1935, c. 123.)

§ 97-68. Controverted medical questions.

The Industrial Commission may at its discretion refer to the advisory medical committee controverted medical questions arising out of occupational disease claims other than asbestosis or silicosis. (1935, c. 123; 1955, c. 525, s. 4.)

CASE NOTES

Cited in Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951).

§ 97-69. Examination by advisory medical committee; inspection of medical reports.

The advisory medical committee, upon reference to it of a case of occupational disease shall notify the employee, or, in case he is dead, his dependents or personal representative, and his employer to appear before the advisory medical committee at a time and place stated in the notice. If the employee be living, he shall appear before the advisory medical committee at the time and place specified then or thereafter and he shall submit to such examinations including clinical and X-ray examinations as the advisory medical committee may require. The employee, or, if he be dead, the claimant and the employer shall be entitled to have present at all such examinations, a physician admitted to practice medicine in the State who shall be given every reasonable facility for observing every such examination whose services shall be paid for by the claimant or by the employer who engaged his services. If a physician admitted to practice medicine in the State shall certify that the employee is physically unable to appear at the time and place designated by the advisory medical committee, such committee may, upon the advice of the Industrial Commission, and on notice to the employer, change the place and/or time of the examination so as to reasonably facilitate the examination of the employee, and in any such case the employer shall furnish transportation and provide for other reasonably necessary expenses incidental to necessary travel. The claimant and the employer shall produce to the advisory medical committee all reports of medical and X-ray examinations which may be in their respective possession or control showing the past or present condition of the employee to assist the advisory medical committee in reaching its conclusions. Provided that this section shall not apply to a living employee who has contracted asbestosis or silicosis. (1935, c. 123; 1955, c. 525, s. 5.)

CASE NOTES

Cited in Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951); Ward v. Beaunit Corp., 56 N.C. App. 128, 287 S.E.2d 464 (1982).

§ 97-70. Report of committee to Industrial Commission.

The advisory medical committee, shall, as soon as practicable after it has completed its consideration of a case, report to the Industrial Commission its opinion regarding all medical questions involved in the case. The advisory medical committee shall include in its report a statement of what, if any, physician or physicians were present at the examination on behalf of the claimant or employer and what, if any, medical reports and X rays were produced by or on behalf of the claimant or employer. (1935, c. 123.)

CASE NOTES

Cited in Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951).

§ 97-71. Filing report; right of hearing on report.

The advisory medical committee shall file its report in triplicate with the Industrial Commission, which shall send one copy thereof to the claimant and one copy to the employer by registered mail. Unless within 30 days from receipt of the copy of said report the claimant and/or employer shall request the Industrial Commission in writing to set the case for further hearing for the purpose of examining and/or cross-examining the members of the advisory medical committee respecting the report of said committee, said report shall become a part of the record of the case and shall be accepted by the Industrial Commission as expert medical testimony to be considered as such in connection with all the evidence in the case in arriving at its decision. (1935, c. 123.)

CASE NOTES

Cited in Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951); Harrell v. J.P. Stevens & Co., 45 N.C. App. 197, 262 S.E.2d 830 (1980).

§ 97-72. Appointment of advisory medical committee; terms of office; duties and functions; salaries and expenses.

(a) There shall be an advisory medical committee consisting of three members, who shall be licensed physicians in good professional standing and peculiarly qualified in the diagnosis or treatment of occupational diseases. They shall be appointed by the Industrial Commission with the approval of the Governor, and one of them shall be designated as chairman of the committee by the Industrial Commission. The members of committee shall be appointed to serve terms as follows: one for a term of two years, one for a term of four years, and one for a term of six years. Upon the expiration of each term as above mentioned the Industrial Commission shall appoint a successor for a term of six years. The function of the committee shall be to conduct examinations and make reports as required by G.S. 97-61.1 through 97-61.6 and 97-68 through 97-71, and to assist in any postmortem examinations provided for in G.S. 97-67 when so directed by the Industrial Commission. Members of the committee shall devote to the duties of the office so much of their time as may be required in the conducting of examinations with reasonable promptness, and they shall attend hearings as scheduled by the Industrial Commission when their attendance is desired for the purpose of examining and cross-examining them respecting any report or reports made by them.

(b) Repealed by Session Laws 2003-284, s. 10.33(c), effective July 1, 2003.

(c) Notwithstanding any other provision of this Article, the Industrial Commission, in its discretion, may designate a qualified physician who is not a member of the advisory medical committee to perform an examination of an employee who has filed a claim for benefits for asbestosis or silicosis. This physician shall file his reports in the same manner a member of the advisory medical committee files reports; and these reports shall be deemed reports of the advisory medical committee. (1935, c. 123; 1955, c. 525, s. 7; 1981, c. 562, s. 2; 1989, c. 439; 1991, c. 481, s. 1; 1997-443, s. 11A.38; 1997-508, s. 1; 2003-284, s. 10.33(c).)

CASE NOTES

Applied in Clark v. ITT Grinnell Indus. Piping, Inc., 141 N.C. App. 417, 539 S.E.2d 369, 2000 N.C. App. LEXIS 1416 (2000).

Cited in Austin v. Continental Gen. Tire, 141 N.C. App. 397, 540 S.E.2d 824, 2000 N.C. App. LEXIS 1415 (2000), rev'd on other grounds, 354 N.C. 344, 553 S.E. 2d 680 (2001).

§ 97-73. Fees.

(a) The Industrial Commission may establish by rule a schedule of fees for examinations conducted, reports made, documents filed, and agreements reviewed under this Article. The fees shall be collected in accordance with rules adopted by the Industrial Commission.

(b), (c) Repealed by Session Laws 2003-284, s. 10.33(d), effective July 1, 2003. (1935, c. 123; 1955, c. 525, s. 8; 1991, c. 481, s. 2; 1991 (Reg. Sess., 1992), c. 1039, s. 2; 1997-443, s. 11A.39; 2003-284, s. 10.33(d); 2005-276, s. 45.1(a).)

CASE NOTES

Cited in Ward v. Beaunit Corp., 56 N.C. App. 128, 287 S.E.2d 464 (1982).

§ 97-74. Expense of hearings taxed as costs in compensation cases; fees collected directed to general fund.

In hearings arising out of claims for disability and/or death resulting from occupational diseases the Industrial Commission shall tax as a part of the costs in cases in which compensation is awarded a reasonable allowance for the services of members of the advisory medical committee attending such hearings and reasonable allowances for the services of members of the advisory medical committee for making investigations in connection with all claims for compensation on account of occupational diseases, including uncontested cases, as well as contested cases, and whether or not hearings shall have been conducted in connection therewith. All such charges, fees and allowances to be collected by the Industrial Commission shall be paid into the general fund of the State treasury to constitute a fund out of which to pay the expenses of the advisory medical committee. (1935, c. 123.)

§§ 97-75, 97-76: Repealed by Session Laws 2003-284, s. 10.33(f), effective July 1, 2003.

§ 97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.

(a) There is hereby created a commission to be known as the North Carolina Industrial Commission, consisting of seven commissioners who shall devote their entire time to the duties of the Commission. The Governor shall appoint the members of the Commission, one for a term of two years, one for a term of four years, and one for a term of six years. Of the additional appointments made in 1994, one shall be for a term expiring June 30, 1996, one for a term expiring June 30, 1998, and two for terms expiring June 30, 2000. Upon the expiration of each term as above mentioned, the Governor shall appoint a successor for a term of six years, and thereafter the term of office of each commissioner shall be six years. Not more than three appointees shall be persons who, on account of their previous vocations, employment or affiliations, can be classed as representatives of employers, and not more than three appointees shall be persons who, on account of their previous vocations, employment or affiliations, can be classed as representatives of employees.

(b) One member, to be designated by the Governor, shall act as chairman. The chairman shall be the chief judicial officer and the chief executive officer of the Industrial Commission; such authority shall be exercised pursuant to the provisions of Chapter 126 of the General Statutes and the rules and policies of the State Personnel Commission. Notwithstanding the provisions of this Chapter, the chairman shall have such authority as is necessary to direct and oversee the Commission. The chairman may delegate any duties and responsibilities as may be necessary to ensure the proper management of the Industrial Commission. Notwithstanding the provisions of this Chapter, Chapter 143A, and Chapter 143B of the General Statutes, the chairman may hire or fire personnel and transfer personnel within the Industrial Commission.

The Governor may designate one vice-chairman from the remaining commissioners. The vice-chairman shall assume the powers of the chairman upon request of the chairman or when the chairman is absent for 24 hours or more. The authority delegated to the vice-chairman shall be relinquished immediately upon the return of the chairman or at the request of the chairman. (1929, c. 120, s. 51; 1931, c. 274, s. 8; 1991, c. 264, s. 1; 1993, c. 399, s. 3; 1993 (Reg. Sess., 1994), c. 769, s. 28.15(a).)

Cross References. — For provision constituting Industrial Commission a court to hear and determine tort claims, see G.S. 143-291.

Editor's Note. — For act authorizing the Industrial Commission to hear and determine certain listed tort claims against certain State departments and agencies, see Session Laws 1949, c. 1138.

Session Laws 2003-284, ss. 12.6C(a)-(e), as amended by Session Laws 2004-174, s. 3, and Session Laws 2004-203, s. 77, provides: "(a) The North Carolina Industrial Commission may retain the additional revenue generated by raising the fee charged to parties for the filing of compromised settlements from two hundred dollars ($200.00) to an amount that does not exceed two hundred fifty dollars ($250.00) for the purpose of replacing existing computer hardware and software used for the operations of the Commission. These funds may also be used to prepare any assessment of hardware and software needs prior to purchase. The Commission may not retain any fees for the purpose of computer system replacement unless they are in excess of the current two-hundred-dollar ($200.00) fee charged by the Commission for filing a compromise settlement.

"(b) Nothing in this section shall be deemed to limit or restrict the Commission's authority to increase fees for purposes other than those indicated in subsection (a) of this section.

"(c) Unexpended and unencumbered fees retained by the Industrial Commission under subsection (a) of this section shall not revert to the General Fund on June 30 of each fiscal year, but shall remain available to the Commission for the purposes stated in subsection (a) of this section.

"(d) All plans and purchases by the Commission utilizing fees retained under subsection (a) of this section are subject to project certification by the Information Resources Management Commission, and the Commission in making purchases under subsection (a) of this section must follow the procurement process outlined in accordance with the provisions of 09 NCAC 06B. 0300. The Commission shall report its plans to replace existing computer hardware and software to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division prior to issuing any requests for proposals.

"(e) The Commission may retain additional fees as authorized by subsection (a) of this section until the 2009-2011 fiscal biennium."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2005-448, s. 9, provides: "It is the intent of the General Assembly to provide the North Carolina Industrial Commission with adequate resources by establishing new positions to assist the Commission in performing its important task."

CASE NOTES

The Industrial Commission is a creature of the General Assembly and was created by statute. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

The Industrial Commission is primarily an administrative agency of the State, charged with the duty of administering the provisions of the Workers' Compensation Act. Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936), citing In re Hayes, 200 N.C. 133, 156 S.E. 791 (1931). See Brice v. Robertson House Moving, Wrecking & Salvage Co., 249 N.C. 74, 105 S.E.2d 439 (1958).

The Commission is not a court of general jurisdiction. It can have no implied jurisdiction beyond the presumption that it is clothed with the power to perform the duties required of it by the law entrusted to it for administration. Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943); Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

The Industrial Commission is not a court of general jurisdiction. It is an administrative board with quasi-judicial functions and has a special or limited jurisdiction created by statute and confined to its terms. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962); Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967); Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

The Industrial Commission is not a court of general jurisdiction. It has no jurisdiction except that conferred upon it by statute. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Its Jurisdiction Is Limited. — In its functions as a court, the jurisdiction of the Industrial Commission is limited, and jurisdiction cannot be conferred on it by agreement or waiver. Chadwick v. North Carolina Dep't of Conservation & Dev., 219 N.C. 766, 14 S.E.2d 842 (1941).

The Industrial Commission has only the limited power and jurisdiction delegated to it by statute, as it is purely a creation of the General Assembly. Buck v. Procter & Gamble Mfg. Co., 58 N.C. App. 804, 295 S.E.2d 243 (1982), cert. denied, 308 N.C. 543, 304 S.E.2d 236 (1983).

The jurisdiction of the Industrial Commission may not be enlarged or extended by act or consent of parties, nor may jurisdiction be conferred by agreement or waiver. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962); Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

Continuing Jurisdiction. — It was the purpose of the General Assembly that the Industrial Commission should have a continuing jurisdiction of all proceedings begun before the Commission for compensation in accordance with its terms. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Hearing Commissioners Entitled To Absolute Quasi-Judicial Immunity. — Workers' compensation commissioners were entitled to absolute quasi-judicial immunity because their role as Deputy Commissioners was indisputably judicial in nature under G.S. 97-77, and safeguards in the form of appeals from Deputy Commissioners' decisions to the full Industrial Commission and the North Carolina Courts were available under G.S. 97-85 and G.S. 97-86. Sherwin v. Piner, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 26855 (E.D.N.C. July 21, 2003).

Commission Is Special Tribunal When Considering Claims. — When a claim for compensation has been filed and the employer and employee have failed to reach an agreement, the statute authorizes the Commission to hear and determine all matters in dispute. Thereupon, the Commission is constituted a special or limited tribunal, and is invested with certain judicial functions, and possesses the powers and incidents of a court, within the provisions of the act, and as are necessary to determine the rights and liabilities of employees and employers. Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936); Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

The Industrial Commission, while primarily an administrative agency of the State, is constituted a special or limited tribunal to hear and determine matters in dispute between employer and employee in a claim for compensation under the Workers' Compensation Act. Hodge v. Robertson, 2 N.C. App. 216, 162 S.E.2d 594 (1968).

In approving settlements the Commission acts in its judicial capacity. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962).

The legislature intended that the Industrial Commission should administer the Workers' Compensation Act under summary and simple procedure, distinctly its own, so as to furnish speedy, substantial, and complete relief to parties bound by the act. Greene v. Spivey, 236 N.C. 435, 73 S.E.2d 488 (1952).

The Commission may not ex mero motu institute a proceeding. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962).

Power to Order Rehearing. — The Commission has the power to order a rehearing on the basis of newly discovered evidence. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Power to Set Aside Judgment. — The Industrial Rule Commission has inherent power analogous to that conferred on courts by G.S. 1A-1, Rule 60(b)(6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a workers' compensation claim requires it. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Because the power to set aside a former judgment is vital to the proper functioning of the judiciary, the Legislature impliedly vested such power in the Commission in conjunction with the judicial power which the Legislature granted it to administer the Workers' Compensation Act. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

The Industrial Commission possesses such judicial power as is necessary to administer the Workers' Compensation Act. The Commission's judicial power includes the power to set aside a former judgment on the grounds of mutual mistake, misrepresentation, or fraud. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Finding that Appeal Untimely. — Panel of the North Carolina Industrial Commission which heard an employer's appeal from a decision by a deputy commissioner that awarded workers' compensation benefits to an employee was not barred from finding that the appeal was untimely because the chairman of the Commission had denied the employee's motion to dismiss the appeal. Cornell v. Western & Southern Life Ins. Co., 162 N.C. App. 106, 590 S.E.2d 294, 2004 N.C. App. LEXIS 4 (2004).

Majority of Commission. — The Commission is a continuing body. As a commission it acts by a majority of its qualified members at the time a decision is made. A vote of two members, therefore, would constitute a majority of the Commission empowered to act for the Commission. Gant v. Crouch, 243 N.C. 604, 91 S.E.2d 705 (1956).

A hearing commissioner has no authority to award plaintiff an attorneys' fee as part of the costs upon an initial hearing in a workers' compensation matter. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

Applied in N.C. Ins. Guar. Ass'n v. Int'l Paper Co., 152 N.C. App. 224, 569 S.E.2d 285, 2002 N.C. App. LEXIS 1092 (2002).

Cited in Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); Abels v. Renfro Corp., 108 N.C. App. 135, 423 S.E.2d 479 (1992); Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994); Arnett v. Leviton Mfg., Inc., 174 F. Supp. 2d 410 (W.D.N.C. 2001).

OPINIONS OF ATTORNEY GENERAL

The governor is not required to appoint a representative of employers and a representative of employees. See opinion of Attorney General to the Honorable Robert W. Scott, Governor of North Carolina, 40 N.C.A.G. 311 (1970).

§ 97-77.1. Expired.

Editor's Note. — Session Laws 1993, c. 679, s. 11.1, as amended by Session Laws 1997-483, s. 13.1, provided that this section, relating to an advisory council, would expire July 1, 2001.

§ 97-78. Salaries and expenses; administrator, executive secretary, deputy commissioners, and other staff assistance; annual report.

(a) The salary of each commissioner shall be the same as that fixed from time to time for district attorneys except that the commissioner designated as chair shall receive one thousand five hundred dollars ($1,500) additional per annum.

(b) The Commission may appoint an administrator whose duties shall be prescribed by the Commission, and who shall be subject to the State Personnel System. The Commission may appoint an executive secretary whose duties shall be prescribed by the Commission, and who shall be subject to the State Personnel System and who, upon entering upon his duties, shall give bond in such sum as may be fixed by the Commission. The Commission may also employ such clerical or other assistance as it may deem necessary, and fix the compensation of its staff, except that the salaries of the administrator and the executive secretary shall be fixed by subsection (b1) of this section. The compensation of Commission staff shall be in keeping with the compensation paid to the persons employed to do similar work in other State departments.

(b1) The salary of the administrator shall be ninety percent (90%) of the salary of a commissioner. The salary of the executive secretary shall be ninety percent (90%) of the salary of a commissioner.

(b2) The Chairman of the Industrial Commission shall designate one deputy commissioner as chief deputy commissioner. The salary of the chief deputy commissioner shall be ninety percent (90%) of the salary of a commissioner.

(b3) The salary of deputy commissioners shall be based upon years of experience as a deputy commissioner as follows:

(1) Seventy-five percent (75%) of the salary of a commissioner, with three years of experience or less.
(2) Seventy-seven percent (77%) of the salary of a commissioner, with more than three but less than seven years of experience.
(3) Eighty percent (80%) of the salary of a commissioner, with seven or more but less than 10 years of experience.
(4) Eighty-three percent (83%) of the salary of a commissioner, with 10 or more but less than 12 years of experience.
(5) Eighty-five percent (85%) of the salary of a commissioner, with 12 or more years experience.

(b4) In lieu of merit and other incremental raises, the administrator, executive secretary, chief deputy commissioner, and deputy commissioners shall receive longevity pay on the same basis as is provided to other employees subject to the State Personnel Act.

(c) The members of the Commission and its assistants shall be entitled to receive from the State their actual and necessary expenses while traveling on the business of the Commission, but such expenses shall be certified by the person who incurred the same, and shall be approved by the chairman of the Commission before payment is made.

(d) All salaries and expenses of the Commission shall be audited and paid out of the State treasury, in the manner prescribed for similar expenses in other departments or branches of the State service, and to defray such salaries and expenses a sufficient appropriation shall be made under the General Appropriation Act as made to other departments, commissions and agencies of the State government.

(e) No later than October 1 of each year, the Commission shall publish annually for free distribution a report of the administration of this Article, together with such recommendations as the Commission deems advisable. No later than October 1 of each year, the Commission shall submit this report to the Joint Legislative Commission on Governmental Operations.

(f) No later than April 1, 2008, the Commission shall prepare and implement a strategic plan for accomplishing all of the following:

(1) Tracking compliance with the provisions of G.S. 97-18(b), (c), and (d), and establishing a procedure to enforce compliance with the requirements of these subsections.
(2) Expeditiously resolving requests for, or disputes involving, medical compensation under G.S. 97-25, including selection of a physician, change of physician, the specific treatment involved, and the provider of such treatment.

(g) The Commission shall demonstrate its success in implementing its strategic plan under subsection (f) of this section by including all of the following in its annual report under subsection (e) of this section:

(1) The total number of claims made during the preceding calendar year, the total number of claims in which compliance was not timely made,

and, for each claim, the date the claim was filed, the date by which compliance was required, the date of actual compliance, and any sanctions or other remedial action imposed by the Commission.

(2) The total number of requests for, and disputes involving, medical compensation under G.S. 97-25 in which final disposition was not made within 45 days of the filing of the motion with the Commission, and, for each such request or dispute, the date the motion or other initial pleading was filed, the date on which final disposition was made and, where reasonably ascertainable, the date on which any ordered medical treatment was actually provided. (1929, c. 120, s. 52; 1931, c. 274, s. 9; 1941, c. 358, s. 2; 1947, c. 823; 1957, c. 541, s. 6; 1971, c. 527, s. 1; c. 1147, s. 1; 1983, c. 717, s. 20; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1997-443, s. 33.4; 1998-212, s. 28.18(a); 2005-276, s. 29.20(b); 2007-323, ss. 13.4A(a), (b).)

Editor's Note. — Session Laws 2005-448, s. 9, provides: "It is the intent of the General Assembly to provide the North Carolina Industrial Commission with adequate resources by establishing new positions to assist the Commission in performing its important task."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 13.4A(a) and (b), effective July 1, 2007, in subsection (e), substituted "No later than October 1 of each year, the" for "The" at the beginning of the first sentence, and added the second sentence; and added subsections (f) and (g).

§ 97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.

(a) The Commission shall be provided with adequate offices in which the records shall be kept and its official business transacted during regular business hours; it shall also be provided with necessary office furniture, stationery, and other supplies.

(b) The Commission may appoint deputies who shall have the same power as members of the Commission pursuant to G.S. 97-80 and the same power to take evidence, and enter orders, opinions, and awards based thereon as is possessed by the members of the Commission. The deputies shall be subject to the State Personnel System.

(c) The Commission or any member thereof may hold sessions at any place within the State as may be deemed necessary by the Commission.

(d) Hearings before the Commission shall be open to the public and shall be stenographically reported, and the Commission is authorized to contract for the reporting of such hearings. The Commission shall by regulation provide for the preparation of a record of the hearings and other proceedings. Notwithstanding the provisions of this subsection, informal hearings conducted pursuant to the provisions of G.S. 97-18.1, whether by telephone or in person, shall not be open to the public nor stenographically reported unless the Commission orders otherwise.

(e) The Commission, or any member thereof, or any deputy is authorized by appropriate order, to make additional parties plaintiff or defendant in any proceeding pending before the Commission when it is made to appear that such new party is either a necessary party or a proper party to a final determination of the proceeding.

(f) The Commission shall create an ombudsman program to assist unrepresented claimants, employers, and other parties, to enable them to protect their rights under this Article. In addition to other duties assigned by the Commission, the ombudsman shall meet with, or otherwise provide information to, injured employees, investigate complaints, and communicate with employers' insurance carriers and physicians at the request of the claimant. Assistance provided under this subsection shall not include representing the claimant in a compensation hearing. (1929, c. 120, s. 53; 1931, c. 274, s. 10; 1951, c. 1059, s. 7; 1955, c. 1026, s. 11; 1971, c. 527, s. 2; c. 1147, s. 2; 1981 (Reg. Sess., 1982), c. 1243, s. 1; 1993 (Reg. Sess., 1994), c. 679, s. 5.2.)

Legal Periodicals. — For comment on the 1951 amendment, which rewrote subsection (b), see 29 N.C.L. Rev. 416 (1951).

For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

CASE NOTES

Appointment of Deputies Discretionary. — It is inherent in this section that the Commission has the discretion to appoint deputies for such purposes as are appropriate for the conduct of its business. Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968).

No Particular Title Need Be Conferred on Deputy. — The authority to appoint a deputy does not require that any particular title be conferred upon the deputy, nor does it require that his title must include the word "deputy." Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968).

Deputy Commissioner's Authority to Order Deposition. — When a deputy commissioner ordered the deposition of an unrepresented claimant's physician, she did not indicate a disqualifying personal bias or deprive the employer of an impartial decision maker in violation of the employer's due process rights because, under G.S. 97-80(d), the Industrial Commission could order the deposition of a witness, under G.S. 97-79(b), the deputy commissioner had the same powers as members of the Industrial Commission, and, under G.S. 8C-1, N.C. R. Evid. 614(a), a court was permitted to call witnesses, with or without a request from a party. Handy v. PPG Indus., 154 N.C. App. 311, 571 S.E.2d 853, 2002 N.C. App. LEXIS 1442 (2002).

The Commission has the authority to appoint a chief claims examiner as its deputy to act for it in approval or disapproval of agreements for compensation. Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968).

Representing the Claimant in a Compensation Hearing. — Deputy commissioner's actions, after a hearing, treating an unrepresented claimant's case as an occupational disease claim and ordering the deposition of the claimant's physician, to whom she submitted a written hypothetical and written follow-up questions, did not violate the prohibition in G.S. 97-79(f) against a deputy commissioner representing a claimant in a compensation hearing. Handy v. PPG Indus., 154 N.C. App. 311, 571 S.E.2d 853, 2002 N.C. App. LEXIS 1442 (2002).

View of Premises and Method of Doing Work. — In Johnson v. Erwin Cotton Mills Co., 232 N.C. 321, 59 S.E.2d 828 (1950), the hearing commissioner, claimant and defendant viewed the premises and the method of doing the work in which plaintiff had been employed. Although apparently approved by the court, the point was not discussed. See also Rewis v. New York Life Ins. Co., 226 N.C. 325, 38 S.E.2d 97 (1946).

Cited in Moore v. City of Raleigh, 135 N.C. App. 332, 520 S.E.2d 133 (1999).

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

(a) The Commission may make rules, not inconsistent with this Article, for carrying out the provisions of this Article. The Commission shall request the Office of State Budget and Management to prepare a fiscal note for a proposed new or amended rule that has a substantial economic impact, as defined in G.S. 150B-21.4(b1). The Commission shall not take final action on a proposed rule change that has a substantial economic impact until at least 60 days after the fiscal note has been prepared.

Processes, procedure, and discovery under this Article shall be as summary and simple as reasonably may be.

(b) The Commission or any member thereof, or any person deputized by it, shall have the power, for the purpose of this Article, to tax costs against the parties, to administer or cause to have administered oaths, to preserve order at hearings, to compel the attendance and testimony of witnesses, and to compel the production of books, papers, records, and other tangible things.

(c) The Commission may order parties to participate in mediation, under rules substantially similar to those approved by the Supreme Court for use in the Superior Court division, except the Commission shall determine the manner in which payment of the costs of the mediated settlement conference is assessed.

(d) The Commission may order testimony to be taken by deposition and any party to a proceeding under this Article may, upon application to the Commission, which application shall set forth the materiality of the evidence to be given, cause the depositions of witnesses residing within or without the State to be taken, the costs to be taxed as other costs by Commission. Depositions ordered by the Commission upon application of a party shall be taken after giving the notice and in the manner prescribed by law for depositions in action at law, except that they shall be directed to the Commission, the commissioner, or the deputy commissioner before whom the proceedings may be pending.

(e) A subpoena may be issued by the Commission and served in accordance with G.S. 1A-1, Rule 45. Upon a motion, the Commission may quash a subpoena if it finds that the evidence the production of which is required does not relate to a matter in issue, the subpoena does not describe with sufficient particularity the evidence the production of which is required, or for any other reason sufficient in law the subpoena may be quashed. Each witness who appears in obedience to such subpoena of the Commission shall receive for attendance the fees and mileage for witnesses in civil cases in courts of the county where the hearing is held.

(f) The Commission may by rule provide for and limit the use of interrogatories and other forms of discovery, and it may provide reasonable sanctions for failure to comply with a Commission order compelling discovery.

(g) The Commission or any member or deputy thereof shall have the same power as a judicial officer pursuant to Chapter 5A of the General Statutes to hold a person in civil contempt, as provided thereunder, for failure to comply with an order of the Commission, Commission member, or deputy. A person held in civil contempt may appeal in the manner provided for appeals pursuant to G.S. 97-85 and G.S. 97-86. The provisions of G.S. 5A-24 shall not apply to appeals pursuant to this subsection.

(h) The Commission or any member or deputy thereof shall also have the same power as a judicial officer pursuant to Chapter 5A of the General Statutes to punish for criminal contempt, subject to the limitations thereunder, (i) for wilful behavior committed during the sitting of the commissioner or deputy commissioner and directly tending to interrupt the proceedings; (ii) for wilful disobedience of a lawful order of the Commission or a member or deputy thereof; or (iii) for wilful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, wilful refusal to answer any legal and proper question when refusal is not legally justified. The Commission or any member or deputy thereof may issue an order of arrest as provided by G.S. 15A-305 when authorized by G.S. 5A-16 in connection with contempt proceedings. When the commissioner or deputy commissioner chooses not to proceed summarily pursuant to G.S. 5A-14, the proceedings shall be before a district court judge, and venue lies throughout the district where the order was issued directing the person charged to appear. A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions to the superior court of the district in which the order of contempt was issued, and the appeal is by hearing de novo before a superior court judge. (1929, c. 120, s. 54; 1977, cc. 456, 505;

1981 (Reg. Sess., 1982), c. 1243, s. 2; 1993, c. 321, s. 25(b); c. 399, s. 1; 1993 (Reg. Sess., 1994), c. 679, ss. 5.3, 5.4; 1995, c. 358, s. 8(a), (b); c. 437, s. 6(a), (b); c. 467, s. 5(a), (b); c. 507, ss. 25.13, 27.8(o); c. 509, s. 48; 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

Cross References. — As to medical committee fees, see G.S. 97-74. As to costs on review, see G.S. 97-88. As to medical fees, see G.S. 97-89.

Editor's Note. — Session Laws 1993, c. 321, s. 25(b) provides that, if HB 658 (Session Laws 1993, c. 399) is enacted, the first sentence of s. 4 of c. 399 is amended by deleting "only if the General Assembly appropriates funds to implement the purpose of this act." However, this language is in the second sentence of section 5 of Chapter 399 and reads "only if the General Assembly appropriates funds to implement the purpose of these sections." The Revisor of Statutes was informed that appropriation was made in 1994.

Legal Periodicals. — For discussion of this section, see 8 N.C.L. Rev. 427 (1930).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

For article, "Mediation of Industrial Commission Cases," see 17 Campbell L. Rev. 395 (1995).

CASE NOTES

I. In General.
II. Rules and Rule Making.
III. Evidence.
IV. Findings.

I. IN GENERAL.

Determination of Jurisdiction Is First Order of Business. — In every proceeding before the Commission, determination of jurisdiction is the first order of business. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962).

Continuing Jurisdiction. — It was the purpose of the General Assembly that the Industrial Commission should have a continuing jurisdiction of all proceedings begun before the Commission for compensation in accordance with its terms. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Power to Order Rehearing. — While there is no direct statutory provision giving the Industrial Commission power to order a rehearing of an award made by it for newly discovered evidence, the Commission has such power in proper instances in accordance with its rules and regulations, as provided by this section, it being the intent of the legislature, as gathered from the whole act, to give the Industrial Commission continuing jurisdiction of all proceedings begun before it with appellate jurisdiction in the superior court on matters of law only. Butts v. Montague Bros., 208 N.C. 186, 179 S.E. 799 (1935).

The Commission has the power to order a rehearing on the basis of newly discovered evidence. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Power to Set Aside Judgment. — The Industrial Rule Commission has inherent power analogous to that conferred on courts by G.S. 1A-1, Rule 60(b)(6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a workers' compensation claim requires it. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Because the power to set aside a former judgment is vital to the proper functioning of the judiciary, the Legislature impliedly vested such power in the Commission in conjunction with the judicial power which the Legislature granted it to administer the Workers' Compensation Act. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

The Industrial Commission possesses such judicial power as is necessary to administer the Workers' Compensation Act. The Commission's judicial power includes the power to set aside a former judgment on the grounds of mutual mistake, misrepresentation, or fraud. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Compromise Settlement. — Signed memorandum of settlement fully complied with the workers' compensation rules, and was a valid compromise settlement agreement subject to approval by the Industrial Commission, even though the worker had not signed a clincher agreement. Lemly v. Colvard Oil Co., 157 N.C. App. 99, 577 S.E.2d 712, 2003 N.C. App. LEXIS 372 (2003).

Power to Force Witness to Testify. — This section does not deprive the Commission of the power to force a witness who is before it to testify and to punish for contempt a witness who refuses to testify. In re Hayes, 200 N.C. 133, 156 S.E. 791, 73 A.L.R. 1179 (1931).

When a deputy commissioner ordered the deposition of an unrepresented claimant's physician, she did not indicate a disqualifying personal bias or deprive the employer of an impartial decision maker in violation of the employer's due process rights because, under G.S. 97-80(d), the Industrial Commission could order the deposition of a witness, under G.S. 97-79(b), the deputy commissioner had the same powers as members of the Industrial Commission, and, under G.S. 8C-1, N.C. R. Evid. 614(a), a court was permitted to call witnesses, with or without a request from a party. Handy v. PPG Indus., 154 N.C. App. 311, 571 S.E.2d 853, 2002 N.C. App. LEXIS 1442 (2002).

The Industrial Commission did not exceed its authority by the repeal of the Blue Cross Blue Shield rule. — Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

Attorney's Travel Expenses in Taking Deposition Out-of-State. — The travel expenses of the attorney who took a deposition of a witness out-of-state by order of the Commissioner were part of the cost of taking the deposition under this section, and should have been so taxed by the full Commission. Cloutier v. State, 57 N.C. App. 239, 291 S.E.2d 362, cert. denied, 306 N.C. 555, 294 S.E.2d 222 (1982).

Taxing Costs of Taking Medical Expert's Deposition. — There is no restriction in either the Workers' Compensation Act or the Rules of the Industrial Commission on the commission's discretion to tax costs of a deposition when the plaintiff requests the deposition of its own medical expert. Harvey v. Raleigh Police Dep't, 85 N.C. App. 540, 355 S.E.2d 147, cert. denied, 320 N.C. 631, 360 S.E.2d 86 (1987), affirming commission's order requiring defendant to pay the costs of expert's deposition.

Enumeration of Rules Violations. — An order dismissing a workers' compensation action or proceeding for violation of the Workers' Compensation Rules must specifically enumerate which of the Rules has been violated and what actions constitute the violations. Matthews v. Charlotte-Mecklenburg Hosp. Auth., 132 N.C. App. 11, 510 S.E.2d 388 (1999).

Full Commission's Reservation of Decision. — Full Commission of the North Carolina Industrial Commission did not abuse its discretion by reserving its decision regarding the issue of an injured employee's wage-earning capacity because the full extent of the employee's injuries had not yet been determined, and the employee was entitled to an opportunity to gather that information necessary to determine which of her conditions was causing her continuing incapacity for work. Brown v. Kroger Co., 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005).

Applied in McPhaul v. Sewell, 36 N.C. App. 312, 244 S.E.2d 158 (1978); Grantham v. R.G. Barry Corp., 115 N.C. App. 293, 444 S.E.2d 659 (1994); Whitfield v. Lab. Corp., 158 N.C. App. 341, 581 S.E.2d 778, 2003 N.C. App. LEXIS 1192 (2003).

Cited in Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); Tucker v. Lowdermilk, 233 N.C. 185, 63 S.E.2d 109 (1951); Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960); McGinnis v. Old Fort Finishing Plant, 253 N.C. 493, 117 S.E.2d 490 (1960); White v. Shoup Boat Corp., 261 N.C. 495, 135 S.E.2d 216 (1964); Hodge v. Robertson, 2 N.C. App. 216, 162 S.E.2d 594 (1968); Sides v. G.B. Weaver & Sons Elec. Co., 12 N.C. App. 312, 183 S.E.2d 308 (1971); Caesar v. Piedmont Publishing Co., 46 N.C. App. 619, 265 S.E.2d 474 (1980); Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985); Timmons v. North Carolina DOT, 123 N.C. App. 456, 473 S.E.2d 356 (1996), aff'd, 346 N.C. 173, 484 S.E.2d 551 (1997); Matthews v. Charlotte-Mecklenburg Hosp. Auth., 132 N.C. App. 11, 510 S.E.2d 388 (1999); Cornell v. Western & Southern Life Ins. Co., 162 N.C. App. 106, 590 S.E.2d 294, 2004 N.C. App. LEXIS 4 (2004).

II. RULES AND RULE MAKING.

Application of Judicial Rules of Evidence. — Strictly speaking, the rules of evidence applicable in the general courts do not govern the Industrial Commission's own administrative factfinding. Haponski v. Constructor's Inc., 87 N.C. App. 95, 360 S.E.2d 109 (1987).

Rule-Making Power Relates Only to Administrative Matters. — The rule-making power here granted relates only to administrative matters. There can be no delegation of the power to make law. Motsinger v. Perryman, 218 N.C. 15, 9 S.E.2d 511 (1940).

Construction and Application of Rules. — Under this section the Industrial Commission has the power not only to make rules governing its administration of the act, but also to construe and apply such rules. Its construction and application of its rules, duly made and promulgated, in proceedings pending before the Commission, ordinarily is final and conclusive and not subject to review by the courts of this State on an appeal from an award made by the Commission. Winslow v. Carolina Conference Ass'n, 211 N.C. 571, 191 S.E. 403 (1937); Shore v. Chatham Mfg. Co., 54 N.C. App. 678, 284 S.E.2d 179 (1981), cert. denied, 304 N.C. 729, 287 S.E.2d 902 (1982).

Statutory authority existed to promulgate rules for the assessment of attorney's fees in a case where a party's attorney failed to stipulate as to medical reports prepared by a doctor and a deputy commissioner had to order a deposition of the doctor. Hawley v. Wayne Dale Constr., 146 N.C. App. 423, 552 S.E.2d 269, 2001 N.C. App. LEXIS 944 (2001).

Workers' Comp. R. N.C. Indus. Comm'n art. VI, R. 601 was properly enacted under G.S. 97-80, was presumed valid, and did not shift the burden of proof to the employer by requiring it to come forward with any evidence to rebut an employee's claim. D'Aquisto v. Mission St. Joseph's Health Sys., 171 N.C. App. 216, 614 S.E.2d 583, 2005 N.C. App. LEXIS 1269 (2005), rev'd on other grounds, review improvidently denied, in part, 360 N.C. 567, 633 S.E.2d 89 (2006).

Rules promulgated by the Commission are for the benefit of the Commission and must be complied with by the parties to a proceeding brought pursuant to the provisions of the Workers' Compensation Act. Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962); Petty v. Associated Transp., 4 N.C. App. 361, 167 S.E.2d 38 (1969), rev'd on other grounds, 276 N.C. 417, 173 S.E.2d 321 (1970).

And Do Not Limit Its Power to Review Findings of Fact. — Rules promulgated by the Commission do not limit the power of the Commission to review, modify, adopt, or reject the findings of fact found by a deputy commissioner or by an individual member of the Commission when acting as a hearing commissioner. Petty v. Associated Transp., 4 N.C. App. 361, 167 S.E.2d 38 (1969), rev'd on other grounds, 276 N.C. 417, 173 S.E.2d 321 (1970).

The Commission was not entitled to relax its rule that fees for practical nursing would not be allowed unless written authority was obtained from the Commission in advance, so as to award mother of injured employee an amount for practical nursing services rendered to injured employee, where the record showed that the Commission never gave its written or oral permission for rendition of services. Hatchett v. Hitchcock Corp., 240 N.C. 591, 83 S.E.2d 539 (1954).

The Commission may not use its own rules to deprive a plaintiff of the right to have his case fully determined; thus, the Commission's statement in an order dismissing plaintiff's motions that "the issue of payment of future medical expenses is not properly preserved" would not support the order. Joyner v. Rocky Mount Mill, 92 N.C. App. 478, 374 S.E.2d 610 (1988).

Rules Inconsistent with Article. — The power to make rules may not be exercised when the rule is inconsistent with this Article. Evans v. Asheville Citizens Times Co., 246 N.C. 669, 100 S.E.2d 75 (1957), holding that Rule XVI of the Commission was inconsistent with § 97-30.

Commission Held Without Authority to Allow Claim. — To allow an employee's claim for additional compensation for the reason that such claim was made within 12 months from the time he was furnished a copy of Form 28B would be allowing the Commission by its rulemaking authority to amend G.S. 97-47; this would exceed the authority granted the Commission by this section. Willis v. J.M. Davis Indus., Inc., 280 N.C. 709, 186 S.E.2d 913 (1972), decided prior to 1973 amendment to § 97-47.

Rule requiring notice of cancellation of policy to be given to the Commission does not become a part of the policy contract. Motsinger v. Perryman, 218 N.C. 15, 9 S.E.2d 511 (1940).

Rule Relative to New Evidence on Review. — The rules of the Industrial Commission, adopted pursuant to this section, relative to the introduction of new evidence on review by the full Commission, are in accord with the decisions of the Supreme Court as to granting new trials for newly discovered evidence. Tindall v. American Furn. Co., 216 N.C. 306, 4 S.E.2d 894 (1939); Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965); McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966).

Procedure before the Industrial Commission need not necessarily conform strictly to judicial procedure in courts of law unless the statute so requires or the court of last resort shall consider such procedure indispensable to the preservation of the essentials of justice and the principles of due process of law, and procedure adopted by the Commission with respect to the reception and consideration of evidence will be given liberal treatment by the courts, since this section empowers the Commission to make rules for carrying out the provisions of the act, and requires processes and procedure to be summary and simple. Maley v. Thomasville Furn. Co., 214 N.C. 589, 200 S.E. 438 (1939).

Sanctions. — G.S. 97-80(a) gave the North Carolina Industrial Commission (commission) the power to make rules consistent with the Workers' Compensation Act for carrying out its provisions, Workers' Comp. R. N.C. Indus. Comm'n 605(1), 2002 Ann. R. N.C. 765 provided that the commission was allowed to order discovery and impose discovery sanctions, and Workers' Comp. R. N.C. Indus. Comm'n 802 provided that "failure to comply" with the Workers' Compensation Rules may have subjected the violator to any of the sanctions outlined in G.S. 1A-1, N.C. R. Civ. P. 37; a discovery sanction which struck the employer's defenses was proper and was affirmed where the sanction was imposed three and a half months after the employer had been ordered to respond to the interrogatories and was warned that his refusal to answer may have resulted in sanctions. Joyner v. Mabrey Smith Motor Co., 161

N.C. App. 125, 587 S.E.2d 451, 2003 N.C. App. LEXIS 1994 (2003).

III. EVIDENCE.

Basis of Facts Found. — Determinative facts upon which rights of parties are made to rest must be found from judicial admissions made by the parties, facts agreed, stipulations entered into and noted at the hearing, and evidence offered in open court, after all parties have been given full opportunity to be heard. Recourse may not be had to records, files, evidence, or data not thus presented to the court. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962).

Hearsay evidence is not competent to establish either that an accident arose out of or in the course of the employment. Plyer v. Charlotte Country Club, 214 N.C. 453, 199 S.E. 622 (1938).

The award of the Commission will not be disturbed because of the presence of hearsay testimony when there is other competent evidence upon which to base the findings. Hearsay evidence offered without objection may serve to corroborate and explain the other evidence in the case. Maley v. Thomasville Furn. Co., 214 N.C. 589, 200 S.E. 438 (1939).

The report of an accident filed by the employer with the Commission, being in the nature of an admission, is competent evidence in a hearing involving the accident. Russell v. Western Oil Co., 206 N.C. 341, 174 S.E. 101 (1934).

Even if a report filed by defendant's manager contained some statement of fact not of his personal knowledge, it was competent as a declaration against interest. Carlton v. Bernhardt-Seagle Co., 210 N.C. 655, 188 S.E. 77 (1936), where the only evidence to show the cause of injury was that contained in the employer's report.

Unsigned Letter from Doctor Reporting on Employee's Condition. — Pending hearing in the superior court, a copy of an unsigned letter from a doctor reporting the condition of employee's eye was added to the record by the Commission's supplemental certificate. On later appeal and reversal for other reasons, the Supreme Court declared that this letter was "incompetent" and "had no place in the record and evidence." Logan v. Johnson, 218 N.C. 200, 10 S.E.2d 653 (1940). See note, "Evidence before North Carolina Tribunals," 19 N.C.L. Rev. 568 (1941).

Evidence as to the course of dealing between employer and employee is of value to show the interpretation which they put upon the character of the employment and their intention regarding it. Smith v. City of Gastonia, 216 N.C. 517, 5 S.E.2d 540 (1939).

The Commission is the sole judge of the credibility of witnesses, and there is no obligation to accord unquestioned credence to any testimony, even if uncontradicted. Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951).

The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. West v. Stevens, 6 N.C. App. 152, 169 S.E.2d 517 (1969).

The function of the Industrial Commission is to weigh and evaluate the entire evidence and determine as best it can where the truth lies. West v. Stevens, 6 N.C. App. 152, 169 S.E.2d 517 (1969).

And It Is Not Compelled to Find According to Testimony of Any Particular Witness. — In its consideration of claims, the Industrial Commission is not compelled to find in accordance with testimony of any particular witness. West v. Stevens, 6 N.C. App. 152, 169 S.E.2d 517 (1969).

IV. FINDINGS.

The Commission is the fact-finding body under the Workers' Compensation Act. Petty v. Associated Transp., 4 N.C. App. 361, 167 S.E.2d 38 (1969), rev'd on other grounds, 276 N.C. 417, 173 S.E.2d 321 (1970).

Findings Required. — To enable a proper review of a conclusion concerning disability, the Industrial Commission is required to make specific findings of fact as to a plaintiff's earning capacity. Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

The finding of facts is one of the primary duties of the Commission. Petty v. Associated Transp., 4 N.C. App. 361, 167 S.E.2d 38 (1969), rev'd on other grounds, 276 N.C. 417, 173 S.E.2d 321 (1970).

Conclusive Effect of Findings of Fact. — The findings of fact by the Industrial Commission are conclusive and binding upon the courts when supported by competent evidence. West v. Stevens, 6 N.C. App. 152, 169 S.E.2d 517 (1969).

Judicial Review of Findings of Fact of Hearing Commissioner. — A finding of fact by a hearing commissioner or by a deputy commissioner never reaches the superior court or the Court of Appeals unless it has been affirmed by the Commission. Petty v. Associated Transp., 4 N.C. App. 361, 167 S.E.2d 38 (1969), rev'd on other grounds, 276 N.C. 417, 173 S.E.2d 321 (1970).

§ 97-81. Blank forms and literature; statistics; safety provisions; accident reports; studies and investigations and recommendations to General Assembly; to cooperate with other agencies for prevention of injury.

(a) The Commission shall prepare and cause to be printed, and upon request furnish, free of charge to any employee or employer, such blank forms and literature as it shall deem requisite to facilitate or prompt the efficient administration of this Article. The Commission may authorize the use of electronic submission of forms and other means of transmittal of forms and notices when it deems appropriate:

(b) The Commission shall tabulate the accident reports received from employers in accordance with G.S. 97-92 and shall publish the same in the annual report of the Commission and as often as it may deem advisable, in such detailed or aggregate form as it may deem best. The name of the employer or employee shall not appear in such publications, and the employers' reports shall be private records of the Commission, and shall not be open for public inspection except for the inspection of the parties directly involved, and only to the extent of such interest, and except for inspection by the Department of Labor and other State or federal agencies pursuant to subsections (d) and (e) of this section. These reports shall not be used as evidence against any employer in any suit at law brought by any employee for the recovery of damages.

(c) The Commission shall make studies and investigations with respect to safety provisions and the causes of injuries in employments covered by this Article, and shall from time to time make to the General Assembly and to employers and carriers such recommendations as it may deem proper as to the best means of preventing such injuries.

(d) In making such studies and investigations the Commission shall:

(1) Cooperate with any agency of the United States charged with the duty of enforcing any law securing safety against injury in any employment covered by this Article, or with any State agency engaged in enforcing any laws to assure safety for employees, and

(2) Permit any such agency to have access to the records of the Commission.

In carrying out the provisions of this section the Commission or any officer or employee of the Commission is authorized to enter at any reasonable time upon any premises, tracks, wharf, dock, or other landing place, or to enter any building, where an employment covered by this Article is being carried on, and to examine any tool, appliance, or machinery used in such employment.

(e) The Commission shall, upon written request from the Commissioner of Labor, provide from the Commission's records the following information from claims filed by employees, and from employer reports of injury to an employee required by G.S. 97-92:

(1) Name and business address of the employer;

(2) Type of business of the employer;

(3) Date the accident, illness, or injury occurred;

(4) Nature of the injury or disease reported; and

(5) Whether compensation for disability or medical expenses was paid to the injured employee.

Information provided to the Commissioner of Labor pursuant to this subsection, and to other State and federal agencies pursuant to subsection (d) of this section, shall be private and exempt from public inspection to the same extent that records of the Commission are so exempt. (1929, c. 120, s. 55; 1991 (Reg. Sess., 1992), c. 894, s. 2; 1993 (Reg. Sess., 1994), c. 679, s. 10.2.)

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval; direct payment as award.

(a) If the employer and the injured employee or his dependents reach an agreement in regard to compensation under this Article, they may enter into a memorandum of the agreement in the form prescribed by the Commission.

An agreement, however, shall be incorporated into a memorandum of agreement in regard to compensation: (i) for loss or permanent injury, disfigurement, or permanent and total disability under G.S. 97-31, (ii) for death from a compensable injury or occupational disease under G.S. 97-38, or (iii) when compensation under this Article is paid or payable to an employee who is incompetent or under 18 years of age.

The memorandum of agreement, accompanied by the material medical and vocational records, shall be filed with and approved by the Commission; otherwise such agreement shall be voidable by the employee or his dependents.

(b) If approved by the Commission, a memorandum of agreement shall for all purposes be enforceable by the court's decree as hereinafter specified. Payment pursuant to G.S. 97-18(b), or payment pursuant to G.S. 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice, shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury for which payment was made. Compensation paid in these circumstances shall constitute payment of compensation pursuant to an award under this Article. (1929, c. 120, s. 56; 1993 (Reg. Sess., 1994), c. 679, s. 3.2; 2005-448, s. 7.)

Effect of Amendments. — Session Laws 2005-448, s. 7, effective September 29, 2005, and applicable to claims pending and filed on or after that date, substituted "the material medical and vocational records" for "a full and complete medical report" in the third paragraph of subsection (a).

Legal Periodicals. — For survey of 1976 case law on workers' compensation, see 55 N.C.L. Rev. 1116 (1977).

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

For note, "The Fairness Requirement for a Workers' Compensation Agreement — The Effect of Vernon v. Steven L. Mabe Builders," see 17 Campbell L. Rev. 521 (1995).

CASE NOTES

Purpose and Effect of Section. — This section was inserted in the act to protect the employees of the State against the disadvantages arising out of their economic status and give assurance that their settlements are in accord with the intent and purpose of the act. Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953).

The legislature anticipated that employers and employees would, in most cases, be able to reach an agreement with respect to the employee's right to compensation; hence, it inserted in the act a provision authorizing such agreements, when made in the manner prescribed by the Industrial Commission. White v. Shoup Boat Corp., 261 N.C. 495, 135 S.E.2d 216 (1964).

When Jurisdiction of Commission Is Invoked. — The jurisdiction of the Commission is invoked either when a claim for compensation is filed or a voluntary settlement is submitted for approval. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962); Tabron v. Gold Leaf Farms, Inc., 269 N.C. 393, 152 S.E.2d 533 (1967).

Section Contemplates Only Settlement in Respect of Amount of Compensation. — The only "settlement" contemplated by this section is a settlement in respect of the amount of compensation to which claimants are entitled under the act. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

And Does Not Apply to Compromise and Settlement of Common-Law Claim. — Compromise and settlement of the common-law claim of the administratrix of a deceased employee for the wrongful death of the employee, executed under the mistaken belief that the act was not applicable, would not be disturbed on the ground that the Industrial Commission did not approve such settlement as provided in this section. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

In approving settlements the Commission acts in a judicial capacity. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962).

And Approved Settlements Are Enforceable by Court Decree. — In approving a settlement agreement, the Industrial Commission acts in a judicial capacity, and the settlement as approved becomes an award enforceable, if necessary, by a court decree. Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953); Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

An agreement for the payment of compensation approved by the Commission is enforceable by a court decree. Dalton v. Anvil Knitwear, 119 N.C. App. 275, 458 S.E.2d 251 (1995).

Conclusiveness of Commission's Approval. — The Commission's approval of stipulated facts and payments is as conclusive as if made upon a determination of facts in an adversary proceeding. Stanley v. Brown, 261 N.C. 243, 134 S.E.2d 321 (1964); Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

An agreement for the payment of compensation, when approved by the Industrial Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

An agreement for compensation, when approved by the Commission, is binding on the parties. Roberts v. Carolina Tables of Hickory, 76 N.C. App. 148, 331 S.E.2d 757 (1985).

An agreement for the payment of compensation, when approved by the Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal. Brookover v. Borden, Inc., 100 N.C. App. 754, 398 S.E.2d 604 (1990).

Until Set Aside. — An approved compensation agreement is binding on the parties unless and until it is set aside by the Industrial Commission. Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976).

Required Inquiry Not Conducted in Claim for Additional Benefits. — In the employee's claim for additional compensation benefits for injuries sustained while working for the employer, because the North Carolina Industrial Commission's reliance on the evaluation for permanent disability and not on the full and complete medical report was statutorily impermissible, the original compensation agreement was set aside. Atkins v. Kelly Springfield Tire Co., 154 N.C. App. 512, 571 S.E.2d 865, 2002 N.C. App. LEXIS 1443 (2002), cert. granted, 357 N.C. 61, 579 S.E.2d 284 (2003) (decided prior to 2005 amendment to this section).

Commission May Not Set Aside a Duly Executed Agreement. — Absent a showing of fraud, misrepresentation, mutual mistake, or undue influence, the Industrial Commission may not set aside a settlement agreement duly executed by the parties, properly submitted to the Industrial Commission for approval, and approved by the Chairman of the Commission in accordance with G.S. 97-17 and this section. The fact that defense counsel had attempted to revoke its consent to the agreement after it was submitted to the Commission was immaterial. Glenn v. McDonald's, 109 N.C. App. 45, 425 S.E.2d 727 (1993).

Interlocutory Award. — The approval by the Industrial Commission of an agreement of the parties for compensation was not, under the circumstances, a final award, but an interlocutory award, and the Industrial Commission retained jurisdiction to enter a final award upon the filing of a full and complete medical report. Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960).

Waiver of Right to Contest Compensability of Injuries. — Defendants waived their right to contest the compensability of claimant's injuries, and thus, the award of compensation became final, where the defendants knew that claimant might have been a subcontractor on the day of the accident, but although they made payments without prejudice to their rights, they did not investigate the claimant's status within the prescribed time. Higgins v. Michael Powell Bldrs., 132 N.C. App. 720, 515 S.E.2d 17 (1999).

Change of Condition Following Complete Settlement. — After plaintiff had been awarded compensation for partial disability, a hearing was had to determine whether there had been a change of condition. Plaintiff alleged partial deafness. The matter was heard several times, and finally a compromise was approved whereby plaintiff was paid a lump sum "as a full and complete settlement." Later plaintiff asked for another hearing because of another change of condition. It was held that in the absence of fraud or mutual mistake, or in the absence of consent on defendant's part, the agreement was binding. Recovery was denied.

Morgan v. Town of Norwood, 211 N.C. 600, 191 S.E. 345 (1937).

Where plaintiff's initial compensation award for temporary total disabilities was determined by agreement prior to the time plaintiff became fully aware of the extent of his injuries, and plaintiff's initial claim was closed upon the filing of Form 28B, the proper procedure for presenting plaintiff's claim for his alleged permanent disabilities was through the statutorily prescribed procedure for compensation for substantial change of condition. Chisholm v. Diamond Condominium Constr. Co., 83 N.C. App. 14, 348 S.E.2d 596 (1986), cert. denied, 319 N.C. 103, 353 S.E.2d 106 (1987).

Where an employee accepts benefits from an agreement for compensation executed by himself, his employer, and the insurance carrier, which agreement was duly approved by the commission, the employee may attack and have such agreement set aside only for fraud, misrepresentation, undue influence, or mutual mistake. Brookover v. Borden, Inc., 100 N.C. App. 754, 398 S.E.2d 604 (1990).

A Form 21 agreement constitutes an award by the Commission and such an award is conclusive and binding as to all questions of fact. Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996).

Where the North Carolina Industrial Commission invalidated a Form 26 agreement because no medical documentation was submitted, it was not obliged under G.S. 97-91 to determine whether the claimant had undergone a G.S. 97-47 change of condition. Clawson v. Phil Cline Trucking, Inc., 168 N.C. App. 108, 606 S.E.2d 715, 2005 N.C. App. LEXIS 152 (2005).

The Full Industrial Commission erred in concluding that plaintiff was entitled to total and permanent disability benefits where the plaintiff did not meet his burden of showing, as required by G.S. 97-31, unless a presumption has been established through the filing of a Form 21, pursuant to this section, that he was totally disabled and therefore unable to earn any of the wages he was receiving at the time of his injury in the same or any other employment. Demery v. Converse, Inc., 138 N.C. App. 243, 530 S.E.2d 871, 2000 N.C. App. LEXIS 599 (2000).

Effect of Litigation of Earning Capacity on Review of Form 26 Agreement. — Where plaintiff's earning capacity was actually litigated and necessary to the outcome of his G.S. 97-47 hearing, the Industrial Commission was bound by that finding in determining if a Form 26 agreement was fair and just; therefore, its finding that the agreement was "improvidently approved" on the grounds that plaintiff had no earning capacity, thus qualifying him for benefits under G.S. 97-29, would be reversed. Lewis v. Craven Reg'l Med. Ctr., 134 N.C. App. 438, 518 S.E.2d 1 (1999).

North Carolina Industrial Commission properly invalidated a Form 26 Agreement because the only medical report accompanying it, as required by G.S. 97-82(a), was a one-paragraph note to the claimant's medical file, and the Commission lacked the relevant medical records necessary to properly determine whether to approve the agreement. Clawson v. Phil Cline Trucking, Inc., 168 N.C. App. 108, 606 S.E.2d 715, 2005 N.C. App. LEXIS 152 (2005).

No Determination of Whether Agreement Was Fair and Just. — North Carolina Industrial Commission erred by failing to undertake a full investigation to determine if the settlement agreement was fair and just, as required by G.S. 97-17 and G.S. 97-82; determination that there was insufficient evidence to justify setting aside the settlement agreements was not supported by competent evidence. Smythe v. Waffle House, 170 N.C. App. 361, 612 S.E.2d 345, 2005 N.C. App. LEXIS 999 (2005), cert. denied, 360 N.C. 66, 621 S.E.2d 876 (2005).

Findings of Fact and Conclusions of Law on Remand. — North Carolina Industrial Commission did not err by vacating an order approving a settlement agreement on remand and then awarding full disability benefits effective to the date of the approval of the settlement agreement, without making findings of fact or conclusions of law to support the award, as the commission's conclusions of law were merely a formalization of the appellate court's conclusions of law so that independent fact-finding and conclusions of law were inappropriate. Smythe v. Waffle House, — N.C. App. —, 643 S.E.2d 407, 2007 N.C. App. LEXIS 807 (2007).

Applied in Williams v. Insurance Repair Specialists of N.C., Inc., 32 N.C. App. 235, 232 S.E.2d 5 (1977); Shah v. Johnson, 140 N.C. App. 58, 535 S.E.2d 577, 2000 N.C. App. LEXIS 1089 (2000); Sims v. Charmes/Arby's Roast Beef, 142 N.C. App. 154, 542 S.E.2d 277, 2001 N.C. App. LEXIS 46 (2001), cert. denied, 353 N.C. 729, 550 S.E.2d 782 (2001).

Cited in Hooper v. Liberty Mut. Ins. Co., 84 N.C. App. 549, 353 S.E.2d 248 (1987); Vernon v. Steven L. Mabe Bldrs., 110 N.C. App. 552, 430 S.E.2d 676 (1993); Calhoun v. Wayne Dennis Heating & Air Conditioning, 129 N.C. App. 794, 501 S.E.2d 346 (1998); Dancy v. Abbott Labs., 139 N.C. App. 553, 534 S.E.2d 601, 2000 N.C. App. LEXIS 982 (2000), review dismissed, 353 N.C. 370 (2001), aff'd, 353 N.C. 446, 545 S.E.2d 211 (2001); Lewis v. Sonoco Prods. Co., 137 N.C. App. 61, 526 S.E.2d 671, 2000 N.C. App. LEXIS 257 (2000); Watts v. Hemlock Homes of the Highlands, Inc., 141 N.C. App. 725, 544 S.E.2d 1, 2001 N.C. App. LEXIS 22 (2001), cert. denied, 353 N.C. 398, 547 S.E.2d 431 (2001); Shockley v. Cairn Studios Ltd., 149 N.C. App. 961, 563 S.E.2d 207, 2002 N.C. App. LEXIS 363 (2002), cert. dismissed, 356 N.C. 678, 577 S.E.2d 887 (2003), cert. denied, 356 N.C. 678, 577 S.E.2d 888 (2003); Devlin v. Apple Gold, Inc., 153 N.C. App. 442, 570 S.E.2d 257, 2002 N.C. App. LEXIS 1187 (2002); Barbour v. Regis Corp., 167 N.C. App. 449, 606 S.E.2d 119, 2004 N.C. App. LEXIS 2336 (2004); Perez v. Am. Airlines/AMR Corp., 174 N.C. App. 128, 620 S.E.2d 288, 2005 N.C. App. LEXIS 2304 (2005).

§ 97-83. Commission is to make award after hearing.

If the employer and the injured employee or his dependents fail to reach an agreement in regard to benefits under this Article within 14 days after the employer has written or actual notice of the injury or death, or upon the arising of a dispute under this Article, either party may make application to the Commission for a hearing in regard to the matters at issue, and for a ruling thereon.

Immediately after such application has been received the Commission shall set the date of a hearing, which shall he held as soon as practicable and shall notify the parties at issue of the time and place of such hearing. The hearing or hearings shall be held in the city or county where the injury occurred, unless otherwise authorized by the Commission. (1929, c. 120, s. 57; 1955, c. 1026, s. 121/2; 1977, c. 743; 1993 (Reg. Sess., 1994), c. 679, s. 3.3.)

CASE NOTES

Provisions for Settlement of Any Matter in Dispute. — In this section and G.S. 97-84 through 97-86 the General Assembly prescribed an adequate remedy by which any matter in dispute and incident to any claim under the provisions of the Workers' Compensation Act may be determined and settled. Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

Remedy Is Exclusive. — The remedy provided by this section and G.S. 97-84 through 97-86 is exclusive. Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

The Industrial Commission has exclusive authority to find facts except in matters determinative of jurisdiction. Hargus v. Select Foods, Inc., 271 N.C. 369, 156 S.E.2d 737 (1967).

Determination of Conflicting Claims to Compensation Already Paid. — While the Industrial Commission has jurisdiction to amend its award in regard to persons entitled to receive compensation awarded by it, it has no jurisdiction to enter a judgment in favor of a party to recover compensation theretofore paid to another; rather, the superior court has jurisdiction to determine conflicting claims of persons in regard to compensation which has already been paid. Hill v. Cahoon, 252 N.C. 295, 113 S.E.2d 569 (1960).

Physician's Claim for Services. — The sole remedy of a physician seeking to recover for services to an injured employee, where the employee and employer are subject to the Workers' Compensation Act, is by application to the Industrial Commission in accordance with this section and G.S. 97-84 through 97-86 to consider plaintiff's bill for such services, notwithstanding the fact that the employer denies liability for the injury on the ground that it did not arise out of and in the course of the employment. The physician may not challenge the constitutionality of the relevant provisions of this Chapter by an independent suit against the employee to recover for the medical services. Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1948).

Where a physician renders services to an injured employee under private contract without knowledge that the injury was covered by the Workers' Compensation Act, and thereafter upon discovery that the injury is compensable files claim for such services with the Industrial Commission in order that the employee may get the benefit thereof, his remedy upon approval by the Industrial Commission in a sum less than the full amount of his claim is to request a hearing before the Commission, with right of appeal to the courts for review, pursuant to this section and G.S. 97-84 through 97-86; this remedy is exclusive and precludes the physician from maintaining an action against the employee to recover the full contractual amount for the services and attacking the constitutionality of the relevant provisions of the act. Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

How Minor Under 18 May Prosecute Claim. — While, for the purposes of the act, a minor becomes sui juris upon attaining the age of 18 years, until then he may prosecute his proceeding for compensation only when represented by general guardian or other legal representative. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

Proceeding Should Not Be in Name of Deceased Employee. — A proceeding under the act to determine the liability of defendants to the next of kin of a deceased employee should not be brought in the name of the deceased employee. Slade v. Willis Hosiery Mills, 209 N.C. 823, 184 S.E. 844 (1936).

When Administratrix Is Proper Claimant. — The administratrix of the decedent is the proper claimant in a proceeding for compensation only when there are no dependents, whole or partial. However, the joinder of the administratrix with the dependents in the prosecution of a claim will be treated as surplusage. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957). See § 97-40.

Failure to File Claim Did Not Bar Father's Participation in Award. — A father was not barred from participation in a workers' compensation award for the death of his son by his failure to file a claim therefor, where the matter was heard by the Industrial Commission upon the request of the employer's insurance carrier pursuant to this section. Smith v. Allied Exterminators, Inc., 279 N.C. 583, 184 S.E.2d 296 (1971).

The Commission used the wrong criteria when it denied defendants' request under this section to modify disability payments, because the employee's continued entitlement to benefits must be based on his post-injury earning capacity, not his post-injury wages. McGee v. Estes Express Lines, 125 N.C. App. 298, 480 S.E.2d 416 (1997).

Applied in Long v. Reeves, 77 N.C. App. 830, 336 S.E.2d 98 (1985); Saums v. Raleigh Community Hosp., 346 N.C. 760, 487 S.E.2d 746 (1997); Reinhardt v. Key Risk Mgmt., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 1727 (Feb. 6, 2003).

Cited in Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936); Brice v. Robertson House Moving, Wrecking & Salvage Co., 249 N.C. 74, 105 S.E.2d 439 (1958); Smith v. Allied Exterminators, Inc., 11 N.C. App. 76, 180 S.E.2d 390 (1971); Samuel v. Claude Puckett/Lincoln Used Cars, 55 N.C. App. 463, 285 S.E.2d 876 (1982); Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994); Phillips v. U.S. Air, Inc., 120 N.C. App. 538, 463 S.E.2d 259 (1995); Andrews v. Fulcher Tire Sales & Serv., 120 N.C. App. 602, 463 S.E.2d 425 (1995); Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996); Lewis v. Sonoco Prods. Co., 137 N.C. App. 61, 526 S.E.2d 671, 2000 N.C. App. LEXIS 257 (2000).

§ 97-83.1. Facilities for hearings; security.

The senior resident superior court judge shall provide suitable facilities for the conduct of hearings under this Article in the county or counties within the judge's district at the time the Commission schedules hearings therein. The senior resident superior court judge shall, to the extent the judge determines necessary and practicable, provide or arrange for security at Commission hearings upon the request of a member or deputy of the Commission. (1993 (Reg. Sess., 1994), c. 679, s. 5.7.)

§ 97-84. Determination of disputes by Commission or deputy.

The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, within 180 days of the close of the hearing record unless time is extended for good cause by the Commission, and a copy of the award shall immediately be sent to the parties in dispute. The parties may be heard by a deputy, in which event the hearing shall be conducted in the same way and manner prescribed for hearings which are conducted by a member of the Industrial Commission, and said deputy shall proceed to a complete determination of the matters in dispute, file his written opinion within 180 days of the close of the hearing record unless time is extended for good cause by the Commission, and the deputy shall cause to be issued an award pursuant to such determination. (1929, c. 120, s. 58; 1951, c. 1059, s. 7; 1987, c. 729, s. 15.)

Legal Periodicals. — For comment on the 1951 amendment, which gave a deputy authority to make a complete determination of a dispute, see 29 N.C.L. Rev. 416 (1951).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

The Industrial Commission has exclusive original jurisdiction of the rights and remedies afforded by this Chapter. Carpenter v. Hawley, 53 N.C. App. 715, 281 S.E.2d 783, cert. denied and appeal dismissed, 304 N.C. 587, 289 S.E.2d 564 (1981).

And Is Constituted a Special Tribunal. — The Industrial Commission is primarily an administrative agency of the State, but when a claim for compensation is presented the Commission is constituted a special tribunal, is invested with certain judicial functions, and possesses the powers and incidents of a court. Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936).

The Commission is the sole fact-finding agency in cases in which it has jurisdiction. The finding of facts is one of the primary duties of the Commission. Morgan v. Thomasville Furn. Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

Under this section the Commission is made a fact-finding body. The finding of facts is one of its primary duties. Beach v. McLean, 219 N.C. 521, 14 S.E.2d 515 (1941); Brice v. Robertson House Moving, Wrecking & Salvage Co., 249 N.C. 74, 105 S.E.2d 439 (1958).

The Commission is without authority to sit en banc; the Full Commission shall be composed of three member panels. Sims v. Charmes/Arby's Roast Beef, 142 N.C. App. 154, 542 S.E.2d 277, 2001 N.C. App. LEXIS 46 (2001), cert. denied, 353 N.C. 729, 550 S.E.2d 782 (2001).

And Determines Credibility and Weight of Testimony. — The Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. It may accept all the testimony of a witness or reject all the testimony of a witness. It may accept a part of the testimony of a witness and reject a part of the testimony of such witness. It is not required to accept the uncontradicted testimony of a witness. Morgan v. Thomasville Furn. Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

In passing upon issues of fact, the Commission, like any other trier of facts, is the sole judge of the credibility of the witnesses, and of the weight to be given to their testimony. It may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same. Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951); Moses v. Bartholomew, 238 N.C. 714, 78 S.E.2d 923 (1953); Smith v. William Muirhead Constr. Co., 27 N.C. App. 286, 218 S.E.2d 717 (1975).

The Industrial Commission is the sole judge of the truthfulness and weight of the testimony of the witnesses in the discharge of its function as the fact-finding authority under the act. Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950).

Contradictions in the testimony go to its weight, which is for the fact-finding body, the Industrial Commission. Evans v. Topstyle, Inc., 270 N.C. 134, 153 S.E.2d 851 (1967).

Remedy Is Exclusive. — The remedy provided by this section and G.S. 97-83, 97-85, and 97-86 is exclusive. Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

Prerogative of Commission to Determine Credibility and Weight of Evidence. — The full Commission has the authority to make additional findings of fact, and where it found that plaintiff failed to prove that he was injured while making an arrest was supported by competent evidence, plaintiff's case was left without a foundation. In not accepting plaintiff's contrary version of the event involved, the Commission exercised it prerogative under the law to determine the credibility and weight of the evidence presented. Griffey v. Town of Hot Springs, 87 N.C. App. 290, 360 S.E.2d 457 (1987).

Duty and Responsibility of Commission to Decide All Matters of Controversy Between Parties. — Plaintiff's claim, initially decided by a hearing officer, embodied a claim for future medical expenses, and when the matter was appealed to the full Commission by defendants it was the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties, indeed, if necessary, the full Commission should have conducted a full evidentiary hearing to resolve all matters embodied in plaintiff's claim; inasmuch as the Industrial Commission decides claims without formal pleadings, it was the duty of the Commission to consider every aspect of plaintiff's claim whether before a hearing officer or on appeal to the full Commission. Joyner v. Rocky Mount Mills, 92 N.C. App. 478, 374 S.E.2d 610 (1988).

Duty of Commission to Make Detailed Findings of Fact to Every Aspect of Case. — The "full Commission" is not an appellate court in the sense that it reviews decisions of a trial court; it is the duty and responsibility of the full Commission to make detailed findings of fact and conclusions of law with respect to every aspect of the case before it. Joyner v. Rocky Mount Mills, 92 N.C. App. 478, 374 S.E.2d 610 (1988).

The full Commission has the authority to determine a case from the written transcript of the hearing before the deputy commissioner or hearing officer; however, when that transcript is insufficient to resolve all the issues, the full Commission must conduct its own hearing or remand the matter for further hearing. Joyner v. Rocky Mount Mills, 92 N.C. App. 478, 374 S.E.2d 610 (1988).

After review of a transcript of a hearing before a deputy commissioner or hearing officer, the full Commission must make findings of fact, draw conclusions of law therefrom and enter the appropriate order; the better practice would be for the full Commission to make its own findings of fact and not adopt the findings of fact of the deputy commissioner or hearing officer. Joyner v. Rocky Mount Mills, 92 N.C. App. 478, 374 S.E.2d 610 (1988).

Duty of Commission as Fact-Finder. — Appellate courts must follow the "any competent evidence" standard in deciding whether the evidence permits a determination by the Commission, which is the fact-finder. The fact-finder, however, is not required so to view the evidence. Rather, its duty is to weigh the evidence, resolve conflicts therein, and make its own determination as to weight and credibility. Wagoner v. Douglas Battery Mfg. Co., 80 N.C. App. 163, 341 S.E.2d 120 (1986), aff'd, 89 N.C. App. 67, 365 S.E.2d 298, cert. denied, 322 N.C. 486, 371 S.E.2d 274 (1988).

Function of the Commission necessarily includes determining paternity of an illegitimate child when such a determination is necessary to resolve a dispute as to who is entitled to the compensation due under this Chapter. Carpenter v. Hawley, 53 N.C. App. 715, 281 S.E.2d 783, cert. denied and appeal dismissed, 304 N.C. 587, 289 S.E.2d 564 (1981).

Specific findings of fact by the Industrial Commission are required. These must cover the crucial questions of fact upon which plaintiff's right to compensation depends. Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955); State v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963); Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963); Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965); Morgan v. Thomasville Furn. Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968); State ex rel. Utils. Comm'n v. Queen City Coach Co., 4 N.C. App. 116, 166 S.E.2d 441 (1969); Cannady v. Gold Kist, 43 N.C. App. 482, 259 S.E.2d 342 (1979).

It is impossible to exaggerate how essential the proper exercise of the fact-finding authority of the Industrial Commission is to the due administration of the act. The findings of fact of the Industrial Commission should tell the full story of the event giving rise to the claim for compensation. They must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. It is obvious that the court cannot ascertain whether the findings of fact are supported by the evidence unless the Industrial Commission reveals with at least a fair degree of positiveness what facts it finds. It is likewise plain that the court cannot decide whether the conclusions of laws and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend. Morgan v. Thomasville Furn. Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968); Cannady v. Gold Kist, 43 N.C. App. 482, 259 S.E.2d 342 (1979).

But the Commission is not required to make a finding as to each detail of the evidence or at every inference or shade of meaning to be drawn therefrom. Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955).

The Commission must make specific findings of fact regarding each material fact upon which a plaintiff's right to compensation depends. The Commission is not required, however, to make findings as to facts presented by the evidence that are not material to plaintiff's claim. Guy v. Burlington Indus., 74 N.C. App. 685, 329 S.E.2d 685 (1985).

The Commission must make specific findings of fact as to each material fact upon which the rights of the parties in a case involving a claim for compensation depend. Moore v. J.P. Stevens & Co., 47 N.C. App. 744, 269 S.E.2d 159, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980); Walston v. Burlington Indus., 49 N.C. App. 301, 271 S.E.2d 516 (1980), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982).

When evidence is presented in support of a material issue that has been raised, it becomes necessary for the Commission to make a finding one way or the other. Smith v. William Muirhead Constr. Co., 27 N.C. App. 286, 218 S.E.2d 717 (1975).

Where the Commission awards compensation for disablement due to an occupational disease encompassed by G.S. 97-53(13), the opinion and award must contain explicit findings as to the characteristics, symptoms and manifestations of the disease from which the plaintiff suffers, as well as a conclusion of law as to whether the disease falls within the statutory provision. Moore v. J.P. Stevens & Co., 47 N.C. App. 744, 269 S.E.2d 159, cert.

denied, 301 N.C. 401, 274 S.E.2d 226 (1980).

Where the record contains conflicting evidence concerning the claimant's capacity to work because of his disability, the Commission is required to make findings of fact which support its conclusion as to the presence or absence of disability as defined by G.S. 97-2(9). Priddy v. Cone Mills Corp., 58 N.C. App. 720, 294 S.E.2d 743 (1982).

Although the Industrial Commission is free to accept or reject any or all of plaintiff's evidence in making its award, it must make specific findings as to the facts upon which a compensation claim is based, including the extent of a claimant's disability. The order must contain more than mere recitals of medical opinion to resolve these basic issues. Priddy v. Cone Mills Corp., 58 N.C. App. 720, 294 S.E.2d 743 (1982).

Findings May Not Rest upon Evidence Not Presented to Commission. — In judicial proceedings before the Commission, the facts found must rest upon admissions made by the parties, facts agreed, stipulations entered into and noted at the hearing, and evidence offered in open court, after all parties have been given full opportunity to be heard. Recourse may not be had to records, files, evidence, or data not thus presented to the Commission for consideration. Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953); Little v. Anson County Schools Food Serv., 295 N.C. 527, 246 S.E.2d 743 (1978).

Findings and Conclusions Outside Scope of Hearing Are Improper. — Where a full Commission limited the initial hearing to defendant's motion to dismiss for lack of jurisdiction, given the limited scope of the hearing it was patently improper for the deputy commissioner to find and conclude that plaintiff had suffered an injury arising from his employment with defendant, and it was similarly improper for the full Commission, on appeal from the opinion and award of the deputy commissioner, to find and conclude that plaintiff had a compensable injury, regardless of its ruling with respect to jurisdiction. Weston v. Sears Roebuck & Co., 65 N.C. App. 309, 309 S.E.2d 273 (1983), cert. denied, 311 N.C. 407, 319 S.E.2d 281 (1984).

Cause May Be Remanded for Findings. — If the findings of fact of the Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the cause must be remanded to the Commission for proper findings of fact. Moore v. J.P. Stevens & Co., 47 N.C. App. 744, 269 S.E.2d 159, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980).

Conclusive Effect of Findings. — The Industrial Commission is the judge of the credibility of the evidence and is the fact-finding body under the act. Where the evidence before the Commission is contradictory, the findings of fact by the Commission, which are nonjurisdictional, are conclusive on appeal to the Court of Appeals. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Right of Party to Testify and Present Evidence. — Under this section, a party to workers' compensation proceedings is afforded the right to testify and present such relevant evidence as he may choose. Little v. Anson County Schools Food Serv., 295 N.C. 527, 246 S.E.2d 743 (1978).

When a claimant refrains from presenting evidence in reliance on an inaccurate statement by a deputy commissioner that a certain matter is uncontested, the right guaranteed by this section has been abridged and the claimant's failure to present such evidence may not be used against him. Little v. Anson County Schools Food Serv., 295 N.C. 527, 246 S.E.2d 743 (1978).

Agreement Approved by Commission Is as Binding as Award. — An agreement for the payment of compensation, when approved by the Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed on appeal. Neal v. Clary, 259 N.C. 163, 130 S.E.2d 39 (1963).

Commission May Vacate Award Entered Contrary to Law. — The Commission is privileged to vacate an award which the Commission itself admits was entered contrary to law. Ruth v. Carolina Cleaners, 206 N.C. 540, 174 S.E. 445 (1934).

Deputy Commissioner May Set Aside Opinion and Award. — Where, in order to allow defendants to depose a physician, the Deputy Commissioner entered an order to keep the record open, but before defendants had an opportunity to depose the physician, the Deputy Commissioner entered an Opinion and Award, this Act vested the Deputy Commissioner with the inherent authority to set aside his Opinion and Award once informed of the omission of the physician's testimony. Plummer v. Henderson Storage Co., 118 N.C. App. 727, 456 S.E.2d 886 (1995).

Motions for Additional Evidence and for Rehearing Held Properly Denied. — The Industrial Commission properly denied employee's motion to take additional evidence on appeal and motion for a rehearing on all issues, where employee's claim was denied by the hearing commissioner on the ground that he did not sustain an injury by accident arising out of and in the course of his employment, and where additional medical testimony proposed had no bearing on how the accident occurred and was only more elaborative than the testimony at the original hearing. Cooke v. Thurston Motor Lines, 13 N.C. App. 342, 185 S.E.2d 445 (1971), appeal dismissed, 280 N.C. 721, 186 S.E.2d 923 (1972).

True Copy to Be Sent to Parties. — This section requires that when the Commission or one of its deputies determines a dispute before it, a copy of the opinion and award be sent to the parties; this necessarily means a true copy. Crawford v. McLaurin Trucking Co., 78 N.C. App. 219, 336 S.E.2d 647 (1985).

Incorrect Notice Did Not Affect Right to Appeal. — Since the law permits appeals only from actual rather than supposed decisions, the incorrect notice of a decision that had not been made had no effect on plaintiff's right to appeal from the decision that was made. Crawford v. McLaurin Trucking Co., 78 N.C. App. 219, 336 S.E.2d 647 (1985).

Findings Held Insufficient to Support Award Determination. — Although an employee's doctor had not released the employee to return to work, that fact alone was not sufficient to permit an award of benefits under the North Carolina Workers' Compensation Act G.S. 97-1 et seq., and the North Carolina Industrial Commission erred by awarding the employee temporary total disability benefits without determining whether the employee had the capacity to return to work at pre-injury wages in the same or some other job. Parker v. Wal-Mart Stores, Inc., 156 N.C. App. 209, 576 S.E.2d 112, 2003 N.C. App. LEXIS 70 (2003).

The North Carolina Industrial Commission erred in finding that an employee was entitled to a presumption of disability due to the employer and its carrier failing to accept or deny the claim within the time period after filing a Form 63, because the commission improperly shifted to the employer the burden of proving that suitable jobs were available to the employee; since the burden remained on the employee to prove his disability, the commission was obligated to make specific findings as to the existence and extent of any disability, and since evidence was presented that the employee was still able to perform some jobs, the commission's findings were inadequate to establish that the employee was disabled because of pain. Johnson v. Southern Tire Sales & Serv., 358 N.C. 701, 599 S.E.2d 508, 2004 N.C. LEXIS 915 (2004).

Award Determination Upheld. — Award of workers' compensation benefits by the Industrial Commission was upheld as the Commission's finding that a per diem "allowance" paid to the employee was "in lieu of wages" under G.S. 97-2(5) was supported by evidence; the allowance was paid regardless of whether employee traveled and was spent at the employee's complete discretion. Greene v. Conlon Constr. Co., — N.C. App. —, 646 S.E.2d 652, 2007 N.C. App. LEXIS 1430 (2007).

Applied in Jenkins v. Public Serv. Co. of N.C., 134 N.C. App. 405, 518 S.E.2d 6, 1999 N.C. App. LEXIS 805 (1999), cert. granted, 351 N.C. 106, 541 S.E.2d 147 (1999).

Cited in Champion v. Vance County Bd. of Health, 221 N.C. 96, 19 S.E.2d 239 (1942); Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952); Parsons v. Alleghany County Bd. of Educ., 4 N.C. App. 36, 165 S.E.2d 776 (1969); Smith v. Allied Exterminators, Inc., 279 N.C. 583, 184 S.E.2d 296 (1971); Lynch v. M.B. Kahn Constr. Co., 41 N.C. App. 127, 254 S.E.2d 236 (1979); Shaffner v. Westinghouse Elec. Corp., 101 N.C. App. 213, 398 S.E.2d 657 (1990); Viergegge v. North Carolina State Univ., 105 N.C. App. 633, 414 S.E.2d 771 (1992); Allen v. Food Lion, Inc., 117 N.C. App. 289, 450 S.E.2d 571 (1994); Lewis v. Sonoco Prods. Co., 137 N.C. App. 61, 526 S.E.2d 671, 2000 N.C. App. LEXIS 257 (2000); Chambers v. Transit Mgmt., 360 N.C. 609, 636 S.E.2d 553, 2006 N.C. LEXIS 1195 (2006).

§ 97-85. Review of award.

If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award: Provided, however, when application is made for review of an award, and such an award has been heard and determined by a commissioner of the North Carolina Industrial Commission, the commissioner who heard and determined the dispute in the first instance, as specified by G.S. 97-84, shall be disqualified from sitting with the full Commission on the review of such award, and the chairman of the Industrial Commission shall designate a deputy commissioner to take such commissioner's place in the review of the particular award. The deputy commissioner so designated, along with the two other commissioners, shall compose the full Commission upon review. Provided further, the chairman of the Industrial Commission shall have the authority to designate a deputy commissioner to take the place of a commissioner on the review of any case, in which event the deputy commissioner so designated shall have the same authority and duty as does the commissioner whose place he occupies on such review. (1929, c. 120, s. 59; 1963, c. 402; 1977, cc. 390, 431.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Continuing Jurisdiction of Commission. — The Industrial Commission has, within the limits prescribed by statute, continuing jurisdiction, and hence as an administrative agency empowered to hear evidence and render awards thereon affecting the rights of workers, has and ought to have authority to make its own records speak the truth in order to protect its own decrees from mistake of material facts and the blight of fraud; therefore, when the full Commission finds and asserts that the award was not made in compliance with the provisions of the statute, then manifestly the Commission is entitled to vacate an award which the Commission itself admits was contrary to law. McDowell v. Town of Kure Beach, 251 N.C. 818, 112 S.E.2d 390 (1960).

Remedy Is Exclusive. — The remedy provided by this section and G.S. 97-83, 97-84, and 97-86 is exclusive. Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

The Commission is the fact-finding body under the act. The finding of facts is one of the primary duties of the Commission. Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962).

As the full Commission is the ultimate fact finder, it does not have to make specific findings of fact when it modifies a hearing commissioner's findings. Arp v. Parkdale Mills, Inc., 150 N.C. App. 266, 563 S.E.2d 62, 2002 N.C. App. LEXIS 510 (2002).

Whether the full Industrial Commission conducts a hearing or reviews a cold record, G.S. 97-85 places the ultimate fact-finding function with the Commission and not the hearing officer; it is the Commission that ultimately determines credibility, whether from a cold record or from live testimony. In affirming a denial of worker's compensation benefits, where the full Commission did not rely solely upon a deputy commissioner's credibility determination, and where it considered all the evidence and made factual findings different from the findings of the deputy commissioner, it fulfilled its duty to be the ultimate fact-finder. Dunn v. Marconi Communs., Inc., 161 N.C. App. 606, 589 S.E.2d 150, 2003 N.C. App. LEXIS 2260 (2003).

Whether the full North Carolina Industrial Commission conducts a hearing or reviews a cold record, G.S. 97-85 places the ultimate fact-finding function with the commission, not the hearing officer, and it is the commission that ultimately determines credibility, whether from a cold record or from live testimony; the commission did not err by failing to consider the deputy commissioner's personal observations that an employee was exaggerating any pain he was experiencing at the hearing before the deputy and by failing to place sufficient weight on a doctor's opinion that the employee had reached maximum medical improvement. Johnson v. Southern Tire Sales & Serv., 358 N.C. 701, 599 S.E.2d 508, 2004 N.C. LEXIS 915 (2004).

The Commission is without authority to sit en banc; the Full Commission shall be composed of three member panels. Sims v. Charmes/Arby's Roast Beef, 142 N.C. App. 154, 542 S.E.2d 277, 2001 N.C. App. LEXIS 46 (2001), cert. denied, 353 N.C. 729, 550 S.E.2d 782 (2001).

Commission Can Accept Deputy Commissioner's Credibility Determinations. — It was properly within the province of the Commission to elect, in several instances, to accept the deputy commissioner's credibility determinations. Fuller v. Motel 6, 136 N.C. App. 727, 526 S.E.2d 480, 2000 N.C. App. LEXIS 150 (2000).

Deputy Commissioner's Findings of Fact Not Conclusive. — The deputy commissioner's findings of fact are not conclusive; only the Full Commission's findings of fact are conclusive. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Upon appeal from a deputy commissioner's award, the Commission may receive further evidence regardless of whether it was newly discovered evidence. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

The Commission may weigh the evidence presented to the deputy commissioner and make its own determination as to the weight and credibility of the evidence. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

The Commission may strike the deputy commissioner's findings of fact even if no exception was taken to the findings. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

The Commission is the fact-finding body under the Workers' Compensation Act. Watkins v.

City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976).

Adams v. AVX Corp., 349 N.C. 676, 509 S.E.2d 411 (1998), which overruled Sanders v. Broyhill Furniture Industries, 124 N.C. App. 637, 478 S.E.2d 223 (996), which had required the commission to give deference to the credibility findings of the deputy commissioner, was to be applied retroactively to cases remanded by it to the Industrial Commission. Brice v. Sheraton Inn, 137 N.C. App. 131, 527 S.E.2d 323, 2000 N.C. App. LEXIS 258 (2000).

Full Commission of the North Carolina Industrial Commission was entitled to reverse a deputy commissioner's determination of credibility, even if that reversal was based upon an examination of the cold record rather than live testimony; therefore, the Full Commission did not err by reassessing the evidence and, contrary to the deputy commissioner, finding that an injured employee's fall at her home was a direct and natural result of the employee's prior fall and injury at work. Brown v. Kroger Co., 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005).

Failure of Commission to Review Evidence. — Without the depositions containing the medical evidence necessary to resolve the issues, the full Commission could not have determined what issues might have been raised by the evidence; therefore, before the full Commission attempted to address the merits of plaintiff's claim it should have requested the parties to submit the missing depositions. Slatton v. Metro Air Conditioning, Inc., 117 N.C. App. 226, 450 S.E.2d 550 (1994).

Plenary Powers of Commission to Review Awards. — Giving the language of this section the liberal construction to which it is entitled, the powers which are granted therein to the full Commission to "review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award," are plenary powers to be exercised in the sound discretion of the Commission. Lynch v. M.B. Kahn Constr. Co., 41 N.C. App. 127, 254 S.E.2d 236, cert. denied, 298 N.C. 298, 259 S.E.2d 914 (1979).

Under its plenary powers the Commission may adopt, modify, or reject the findings of fact of the hearing commissioner, and in doing so may weigh the evidence and make its own determination as to the weight and credibility of the evidence. Hobgood v. Anchor Motor Freight, 68 N.C. App. 783, 316 S.E.2d 86 (1984); Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Whether "good ground be shown therefore" in any particular case is a matter within the sound discretion of the Commission, and the Commission's determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of discretion. Lynch v. M.B. Kahn Constr. Co., 41 N.C. App. 127, 254 S.E.2d 236, cert. denied, 298 N.C. 298, 259 S.E.2d 914 (1979); Thompson v. Burlington Indus., 59 N.C. App. 539, 297 S.E.2d 122 (1982), cert. denied, 307 N.C. 582, 299 S.E.2d 650 (1983).

Power to Resolve Conflicts. — The Industrial Commission has the duty and authority to resolve conflicts in the testimony, whether medical or not, and the conflict should not always be resolved in favor of the claimant. Cauble v. Macke Co., 78 N.C. App. 793, 338 S.E.2d 320 (1986).

Scope of Issues on Appeals to Full Commission. — When a matter is "appealed" to the full North Carolina Industrial Commission pursuant to to G.S. 97-85, it was the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties. Abernathy v. Sandoz Chemicals/Clariant Corp., 151 N.C. App. 252, 565 S.E.2d 218, 2002 N.C. App. LEXIS 724 (2002), cert. denied, 356 N.C. 432, 572 S.E.2d 421 (2002).

North Carolina Industrial Commission's decision that a workers' compensation claimant had sustained a change in condition was reversed as an employer did not have notice that the Commission would address a change in condition or the claimant's inability to comply with a mandated work schedule as the Commission had concluded that evidence that the claimant's condition had worsened was not relevant. Branch v. Carolina Shoe Co., 172 N.C. App. 511, 616 S.E.2d 378, 2005 N.C. App. LEXIS 1802 (2005).

Where an employee who filed a total disability benefits claim in a North Carolina Industrial Commission (NCIC) proceeding died before the determination was made by the deputy commissioner, and the decedent's estate administratrix filed a form in order to be substituted in and to seek death benefits, the issue of death benefits was properly before the NCIC for determination, as the necessary form for review was filed and pursuant to G.S. 97-85, the administratrix was entitled to have the full NCIC respond to the questions directly raised by the appeal from the commissioner's determination; the employer and its insurer did not show that they were denied an opportunity to be heard, as they chose not to ask the NCIC for the opportunity to present additional evidence at a time when they were aware that death benefits would be at issue. Payne v. Charlotte Heating & Air Conditioning, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

Commission to Decide All Matters in Controversy. — When the matter is "appealed" to the full commission pursuant to this section, it is the duty and responsibility of the full commission to decide all of the matters in controversy between the parties. Viergegge v.

North Carolina State Univ., 105 N.C. App. 633, 414 S.E.2d 771 (1992).

Review of Findings of Hearing Commissioner. — The full Commission, upon reviewing an award by the hearing commissioner, is not bound by findings of fact supported by the evidence, but may reconsider evidence and adopt or reject findings and conclusions of the hearing commissioner. Robinson v. J.P. Stevens & Co., 57 N.C. App. 619, 292 S.E.2d 144 (1982); Pollard v. Krispy Waffle #1, 63 N.C. App. 354, 304 S.E.2d 762 (1983); Godley v. Hackney & Sons, 65 N.C. App. 155, 308 S.E.2d 492 (1983).

The plenary powers of the Commission are such that upon review, it may adopt, modify, or reject the findings of fact of the hearing commissioner, and in doing so may weigh the evidence and make its own determination as to the weight and credibility of the evidence. Hollar v. Montclair Furn. Co., 48 N.C. App. 489, 269 S.E.2d 667 (1980); Pollard v. Krispy Waffle #1, 63 N.C. App. 354, 304 S.E.2d 762 (1983).

The hearing officer is the best judge of the credibility of witnesses because he is a first-hand observer of witnesses whose testimony he must weigh and accept or reject. However, the full Commission has the power to review determinations made by deputy commissioners on the credibility of witnesses. Pollard v. Krispy Waffle #1, 63 N.C. App. 354, 304 S.E.2d 762 (1983).

Only the findings of the Commission are conclusive, not those of the hearing officer. Hobgood v. Anchor Motor Freight, 68 N.C. App. 783, 316 S.E.2d 86 (1984).

Workers' compensation commissioners were entitled to absolute quasi-judicial immunity because their role as Deputy Commissioners was indisputably judicial in nature under G.S. 97-77, and safeguards in the form of appeals from Deputy Commissioners' decisions to the full Industrial Commission and the North Carolina Courts were available under G.S. 97-85 and G.S. 97-86. Sherwin v. Piner, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 26855 (E.D.N.C. July 21, 2003).

The Industrial Commission's credibility determinations made in response to Sanders v. Broyhill Furn. Indus., 124 N.C. App. 637, 478 S.E.2d 223 cannot be the Court of Appeals' basis for reversing the commission's order absent other error; in other words, if the commission's conclusions are otherwise supported by competent evidence, the court may not scrutinize the commission's reasons for believing a witness while engaged in its fact-finding role and overturn its decision on the basis of those reasons. Deese v. Champion Int'l Corp., 352 N.C. 109, 530 S.E.2d 549, 2000 N.C. LEXIS 432 (2000).

The opinion and award of the Industrial Commission was valid where it was only signed and filed by two commissioners voting in the majority because the third commissioner participated in the review of the case before he retired prior to the filing of the decision. Tew v. E.B. Davis Elec. Co., 142 N.C. App. 120, 541 S.E.2d 764, 2001 N.C. App. LEXIS 30 (2001).

Findings Regarding Rejection of Credibility Determination. — When the Industrial Commission rejects a credibility determination made by the Commissioner, it must enter findings showing why the credibility determination should be rejected. Holcomb v. Pepsi Cola Co., 128 N.C. App. 323, 494 S.E.2d 609 (1998).

Credibility Determinations. — In reversing the deputy commissioner's credibility findings, the full Commission is not required to demonstrate that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observer was the only one to see the witnesses. Adams v. AVX Corp., 349 N.C. 676, 509 S.E.2d 411 (1998).

Where the Industrial Commission weighed the evidence and determined the credibility of the witnesses before it and made findings of fact as to its award of temporary disability to an employee who had fallen at his workplace, this satisfied the fact-finding of G.S. 97-85; the finding that the employee suffered a back injury within G.S. 97-2(6) was presumed to be correct on appeal, pursuant to N.C. R. App. P. 10(b) where the employer did not preserve that issue for review by separately contesting each particular finding of fact. Johnson v. Herbie's Place, 157 N.C. App. 168, 579 S.E.2d 110, 2003 N.C. App. LEXIS 640 (2003), cert. denied, 357 N.C. 460, 585 S.E.2d 760 (2003).

Industrial Commission's determination that an employee who suffered injury during a slip and fall was entitled to additional disability benefits was supported by the findings of fact and credibility determinations of the Commission, pursuant to G.S. 97-85, and where the conclusions of one treating doctor were found to be credible and not speculative, the Commission was entitled to rely on that evidence, despite the contrary conclusions of four other treating physicians. Whitfield v. Lab. Corp., 158 N.C. App. 341, 581 S.E.2d 778, 2003 N.C. App. LEXIS 1192 (2003).

Rules promulgated by the Commission do not limit the power of the Commission to review, modify, adopt, or reject the findings of fact found by a deputy commissioner or by an individual member of the Commission when acting as a hearing commissioner. Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962).

In reviewing the findings found by a deputy commissioner or by an individual member of the Commission when acting as a hearing commissioner, the Commission may review, modify, adopt or reject the findings of fact found by the hearing commissioner. Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976); Pollard v. Krispy Waffle #1, 63 N.C. App. 354, 304 S.E.2d 762 (1983).

Substitution of Commissioners on Panel. — Although there is no express statutory authority for the substitution of two Commissioners, neither is there a statutory provision in the Workers' Compensation Act expressly prohibiting such action, and if the legislature intended such restrictions on the Commissioner's authority, they would have expressly provided for such. Poe v. Raleigh/Durham Airport Auth., 121 N.C. App. 117, 464 S.E.2d 689 (1995).

Construction with Other Sections. — Where plaintiff's motion for reconsideration was made after the 15 days allowed under this section, Rule 60(b) merely requires that a motion for relief from the judgment be filed within a reasonable time. Thus, the Commission should have considered the motion as a Rule 60(b) motion for relief from the judgment. Jones v. Yates Motor Co., 121 N.C. App. 84, 464 S.E.2d 479 (1995).

Power to Modify or Strike Out Findings of Fact. — The power to review the evidence, reconsider it, receive evidence, rehear the parties or their representatives, and, if proper, to amend the award, carries with it the power to modify or strike out findings of fact made by the deputy commissioner or hearing commissioner if in the judgment of the Commission such findings are not proper. Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962); Lee v. F.M. Henderson & Assocs., 284 N.C. 126, 200 S.E.2d 32 (1973).

The power of the Commission to review and reconsider the evidence carries with it the power to modify or strike out findings of fact made by the hearing commissioner. Smith v. William Muirhead Constr. Co., 27 N.C. App. 286, 218 S.E.2d 717 (1975).

The Industrial Commission has authority to review, modify, adopt, or reject findings of a hearing commissioner and may ex mero motu strike out a finding of the hearing commissioner and his conclusion of law based thereon in order to make the record comply with the law, even though there is no exception to the finding or conclusion. Garmon v. Tridair Indus., Inc., 14 N.C. App. 574, 188 S.E.2d 523 (1972).

The power to review and reconsider evidence and amend awards carries with it the power to modify or strike out findings of fact and conclusions made by the deputy commissioner or hearing commissioner, even though no exception has been made by the parties. Nash v. Conrad Indus., Inc., 62 N.C. App. 612, 303 S.E.2d 373, aff'd, 309 N.C. 629, 308 S.E.2d 334 (1983).

The Industrial Commission erred in deciding not to review the record to determine whether plaintiff's post-traumatic stress disorder caused an aggravation of his diabetes where the defendant's application for review prevented the commissioner's decision from becoming final, and the commission's failed to satisfy its statutory duty when it held that res judicata barred the defendant's appeal on that issue. Lewis v. North Carolina Dep't of Corr., 138 N.C. App. 526, 531 S.E.2d 468, 2000 N.C. App. LEXIS 616 (2000).

Taking of Additional Evidence on Review. — The Industrial Commission, upon an appeal to it from an opinion and award of the hearing commissioner, has the discretionary authority to receive further evidence, regardless of whether it is newly discovered evidence. Harris v. Frank L. Blum Constr. Co., 10 N.C. App. 413, 179 S.E.2d 148 (1971).

An appellant to the full Commission has no substantive right to require it to hear new additional testimony, but the Commission's duty to do so applies only if good ground therefor be shown, and its rules in regard thereto, adopted pursuant to G.S. 97-80, are in accord with the decision of the Supreme Court relating to the granting of new trials for newly discovered evidence. Tindall v. American Furn. Co., 216 N.C. 306, 4 S.E.2d 894 (1939).

The plaintiff does not have a substantial right to require the Commission to hear additional testimony, and the duty to do so applies only if good ground therefor is shown. Eaton v. Klopman Mills, Inc., 2 N.C. App. 363, 163 S.E.2d 17 (1968).

The party against whom an award has been made does not have a substantive right to require the Full Commission to hear new or additional testimony. It may, and should, do so if the due administration of justice requires. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

The rules of the Industrial Commission, adopted pursuant to the act, relative to the introduction of new evidence at a review by the full Commission, are in accord with the decisions of the Supreme Court as to granting new trials on newly discovered evidence. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

The Commission's power to receive additional evidence is a plenary power to be exercised in the sound discretion of the Commission. Moore v. Davis Auto Serv., 118 N.C. App. 624, 456 S.E.2d 847 (1995).

In exercising its discretion to receive additional evidence, the Industrial Commission should consider all the circumstances of the case, including the delay involved in taking additional evidence, and should not encourage a lack of pre-deposition preparation by counsel or witnesses. Pittman v. International Paper Co., 132 N.C. App. 151, 510 S.E.2d 705, 1999 N.C. App. LEXIS 92 (1999), cert. denied, 350 N.C. 310, 534 S.E.2d 596 (1999), aff'd, 351 N.C.

42, 519 S.E.2d 524 (1999).

Whether good ground is shown for the taking of further evidence is within the sound discretion of the Commission, and its ruling in that regard will not be reviewed on appeal absent a showing of manifest abuse of discretion. Guy v. Burlington Indus., 74 N.C. App. 685, 329 S.E.2d 685 (1985); Chisholm v. Diamond Condominium Constr. Co., 83 N.C. App. 14, 348 S.E.2d 596 (1986), cert. denied, State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

The question of whether to reopen a case for the taking of additional evidence is addressed to the sound discretion of the Commission, and its decision is not reviewable on appeal in the absence of a manifest abuse of that discretion. Pickrell v. Motor Convoy, Inc., 82 N.C. App. 238, 346 S.E.2d 164 (1986), rev'd on other grounds, 322 N.C. 363, 368 S.E.2d 582 (1988).

The Industrial Commission was not required to receive additional evidence and to overturn the findings of fact and conclusions of law reached by the deputy commissioner merely because it reconsidered the evidence considered by the deputy commissioner, where the Commission reached the same facts and conclusions as the deputy commissioner. Porter v. Fieldcrest Cannon, Inc., 133 N.C. App. 23, 514 S.E.2d 517 (1999).

North Carolina Industrial Commission did not abuse its discretion and deprive a hospital and its insurance carrier of due process because the hospital and the carrier had the opportunity to, and did, cross-examine an injured nurse's doctor during his deposition on review of the Deputy Commissioner's decision; further, the hospital and the carrier never requested the opportunity to re-depose their witnesses, and the Commission did not rule that the hospital and the carrier could not present additional argument. Legette v. Scotland Mem'l Hosp., — N.C. App. —, 640 S.E.2d 744, 2007 N.C. App. LEXIS 361 (2007).

Because the Deputy Commissioner of the North Carolina Industrial Commission determined that a nurse did not suffer an injury by accident, the nurse's grounds for appeal focused on that determination; therefore, when the nurse made application to the Commission, the Commission had the discretion, pursuant to G.S. 97-85, to reopen the record to take additional evidence on the issue of causation, especially where the Deputy Commissioner did not reach that issue. Legette v. Scotland Mem'l Hosp., — N.C. App. —, 640 S.E.2d 744, 2007 N.C. App. LEXIS 361 (2007).

New Evidence Not Required. — The Industrial Commission is not required to receive new evidence and may simply decide a case on the record before the Deputy Commissioner; however, the commission is required to consider that the Deputy Commissioner is in a better position to judge the credibility of the witnesses. Holcomb v. Pepsi Cola Co., 128 N.C. App. 323, 494 S.E.2d 609 (1998).

Commission may decide to exclude evidence which it has previously seen fit to hear, where the decision to take additional evidence is discretionary in nature and neither party has put forth good cause for such evidence to be considered. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Where it was within the Commission's power to ask for additional medical evidence, it was also within its power to exclude such evidence. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Refusal to Remand Upheld. — The Industrial Commission did not abuse its discretion and did not commit error in denying plaintiff's motion to remand to the hearing commissioner for the purpose of taking testimony which was not newly discovered evidence. Harris v. Frank L. Blum Constr. Co., 10 N.C. App. 413, 179 S.E.2d 148 (1971).

Denial of Motion Upheld. — Where new evidence, testimony by a private investigator, was the same type of evidence that defendants introduced at the first hearing and the testimony did not provide any new revelations regarding plaintiff's disability, defendants suffered no prejudice by the Commission's denial of their motion to consider the new evidence. Andrews v. Fulcher Tire Sales & Serv., 120 N.C. App. 602, 463 S.E.2d 425 (1995).

Plaintiff's contention that the Commission erred in remanding the proceeding for further hearing was waived by the plaintiff when she stipulated the questions to be determined at that hearing. Grigg v. Pharr Yarns, Inc., 15 N.C. App. 497, 190 S.E.2d 285 (1972).

Party moving to reopen case must show good grounds for allowance of the motion. Pickrell v. Motor Convoy, Inc., 82 N.C. App. 238, 346 S.E.2d 164 (1986), rev'd on other grounds, 322 N.C. 363, 368 S.E.2d 582 (1988).

Rehearing on Grounds of Newly Discovered Evidence. — The Industrial Commission has the power to grant a rehearing of a proceeding before it and in which it has made an award on the grounds of newly discovered evidence. Harris v. Frank L. Blum Constr. Co., 10 N.C. App. 413, 179 S.E.2d 148 (1971).

Where an issue has been fairly litigated, with proof offered by both parties upon an issue, a claimant should not be entitled to a further hearing to introduce cumulative evidence, unless its character or force be such that it would be likely to produce a different result. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

In view of the fact that the act does not require all damages to be assessed at one time and awarded in a lump sum, the rules in regard to res judicata are not to be so strictly enforced as in civil cases generally, and an award will not preclude a review for newly discovered evidence relating to the extent of disability, particularly when claimant, because of his disability and the circumstances of the case, could not reasonably have obtained the additional evidence at the time of the hearing. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Objection to the admission of incompetent evidence should be made before the hearing commissioner, and objection taken for the first time at the hearing before the full Commission on appeal is too late. Maley v. Thomasville Furn. Co., 214 N.C. 589, 200 S.E. 438 (1939).

Preservation of Issue of Attorney's Fees. — Where the motion of the husband of a murdered employee for attorney's fees was denied by the deputy commissioner, the issue of entitlement to attorney's fees was preserved, although it was not raised as an assignment of error on appeal to the Industrial Commission from the deputy commissioner's denial of benefits. Hauser v. Advanced Plastiform, Inc., 133 N.C. App. 378, 514 S.E.2d 545 (1999).

Failure of Employer to File Notice of Appeal. — Defendant carrier filed apt notice of appeal to the full Commission and later to the superior court. The employer failed to file such notice. It was held that the employer's liability, he not being a party to the appeal, would not have been affected even if the case were reversed. McPherson v. Henry Motor Sales Corp., 201 N.C. 303, 160 S.E. 283, appeal dismissed, 286 U.S. 527, 52 S. Ct. 499, 76 L. Ed. 1269 (1932).

Judicial Review of Findings of Fact of Hearing Commissioner. — A finding of fact by a hearing commissioner or by a deputy commissioner never reaches the superior court or the Supreme Court unless it has been affirmed by the Commission. Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962).

When Application for Review Is Timely. — Application by an employer for review of an award by the Industrial Commission is timely when the application is mailed to the full Commission within 15 days from the date when notice of the award is received. Hubbard v. Burlington Indus., 76 N.C. App. 313, 332 S.E.2d 746 (1985).

Time for Appeal Based on Presumption of Correct Notice. — Though this section requires that appeal from an opinion and award of a Deputy Commissioner be taken within 15 days from the date a party is notified of the Deputy Commissioner's opinion and award, this requirement is based on the presumption that the notice given was correct. Crawford v. McLaurin Trucking Co., 78 N.C. App. 219, 336 S.E.2d 647 (1985).

Incorrect Notice Did Not Affect Right to Appeal. — Since the law permits appeals only from actual rather than supposed decisions, the incorrect notice of a decision that had not been made had no effect on plaintiff's right to appeal from the decision that was made. Crawford v. McLaurin Trucking Co., 78 N.C. App. 219, 336 S.E.2d 647 (1985).

Motion for New Hearing on Ground That Notice Not Given. — Since the North Carolina Industrial Commission has no rule comparable to G.S. 1A-1, Rule 60(b), and because the Rules of Civil Procedure are applicable, the Industrial Commission should have treated defendant's motion pursuant to this section and Industrial Commission Rule XXI for a new hearing on the ground that he had not received notice of hearing in which plaintiff was awarded compensation as one made pursuant to G.S. 1A-1, Rule 60(b) to be relieved from a judgment. Long v. Reeves, 77 N.C. App. 830, 336 S.E.2d 98 (1985).

Waiver of Right to Remand. — Where plaintiff had not assigned as error the failure of the Industrial Commission to afford him the review to which he was entitled under this section, and where plaintiff failed to argue that he was prejudiced in any way by any error upon the part of the full Commission, remand was not required. Faircloth v. North Carolina DOT, 106 N.C. App. 303, 416 S.E.2d 409 (1992).

Remand for Misapprehension of Law. — Where facts were found by the Commission under the misapprehension that the law required a finding for the plaintiff if there was any competent evidence to support such a finding, the Court of Appeals was empowered to remand the case so that the evidence could be considered in its true legal light. Cauble v. Macke Co., 78 N.C. App. 793, 338 S.E.2d 320 (1986).

Failure of Commission to Make Findings and Conclusions. — The Industrial Commission failed to carry out its statutory duties pursuant to this section by not making its own findings of fact and conclusions of law to support its disposition of plaintiff's claim. However, despite the failure of the Commission to make its own findings and conclusions, there was no prejudice to plaintiff. Jauregui v. Carolina Vegetables, 112 N.C. App. 593, 436 S.E.2d 268 (1993).

Full Commission of the North Carolina Industrial Commission did not abuse its discretion by reserving its decision regarding the issue of an injured employee's wage-earning capacity because the full extent of the employee's injuries had not yet been determined, and the employee was entitled to an opportunity to gather that information necessary to determine which of her conditions was causing her continuing incapacity for work. Brown v. Kroger Co., 169 N.C. App. 312, 610 S.E.2d 447, 2005

N.C. App. LEXIS 611 (2005).

For preferred format of Industrial Commission's review of awards by deputy commissioner, see Crump v. Independence Nissan, 112 N.C. App. 587, 436 S.E.2d 589 (1993).

Excusable Neglect. — The commission has the inherent power and authority, in its discretion, to consider defendant's motion for relief due to excusable neglect. Allen v. Food Lion, Inc., 117 N.C. App. 289, 450 S.E.2d 571 (1994).

The Industrial Commission had authority to grant relief from a judgment entered against the employee, even though the employee filed his notice of appeal after expiration of the time limit, where he showed excusable neglect in that his counsel was on vacation when the workers' compensation opinion arrived, the opinion was filed by the attorney's clerical staff, and no entry was made on the office calendar showing the date the opinion arrived. Murray v. Ahlstrom Indus. Holdings, Inc., 131 N.C. App. 294, 506 S.E.2d 724 (1998).

Excusable Neglect Not Shown. — The Industrial Commission erred by concluding that excusable neglect existed where plaintiff represented himself before the deputy commissioner and was unacquainted with the complexities of the Workers' Compensation Act; furthermore, the Commission did not have the authority, under Industrial Commission Rule 801, to excuse plaintiff from complying with this section and thus disregard the holdings of the appellate court as to what constituted "excusable neglect." Moore v. City of Raleigh, 135 N.C. App. 332, 520 S.E.2d 133 (1999).

Employer's Appeal Dismissed as Untimely. — Panel of the North Carolina Industrial Commission which heard an employer's appeal from a decision by a deputy commissioner which awarded workers' compensation benefits to an employee was not barred from finding that the appeal was untimely because the chairman of the Commission had denied the employee's motion to dismiss the appeal, and the record supported the panel's findings that the appeal was untimely because it was filed more than 15 days after the deputy commissioner faxed his decision to a law firm that represented the employer and that counsel's failure to file the appeal on time should not be excused under the doctrine of excusable neglect. Cornell v. Western & Southern Life Ins. Co., 162 N.C. App. 106, 590 S.E.2d 294, 2004 N.C. App. LEXIS 4 (2004).

Payment of Settlement Award. — To calculate the date a compromise settlement award becomes due under the Workers' Compensation Act, a party must: (1) allow the 15 day appeal time of this section; (2) then add ten days pursuant to G.S. 97-18(e); and (3) finally, add 14 days as required under G.S. 97-18(g); thus, a paying party liable under a compromise settlement has 39 days from the date the compromise settlement is approved to tender payment, with liability for non-payment attaching on the fortieth day. Felmet v. Duke Power Co., 131 N.C. App. 87, 504 S.E.2d 815 (1998).

Applied in Crawford v. Wayne County Bd. of Educ., 275 N.C. 354, 168 S.E.2d 33 (1969); Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970); Lewallen v. National Upholstery Co., 27 N.C. App. 652, 219 S.E.2d 798 (1975); Watkins v. City of Wilmington, 28 N.C. App. 553, 221 S.E.2d 910 (1976); Wood v. J.P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (1979); Yelverton v. Kemp Furn. Co., 51 N.C. App. 675, 277 S.E.2d 441 (1981); Nash v. Conrad Indus., Inc., 309 N.C. 629, 308 S.E.2d 334 (1983); Glynn v. Pepcom Indus., Inc., 122 N.C. App. 348, 469 S.E.2d 588 (1996); Brown v. Family Dollar Distribution Ctr., 129 N.C. App. 361, 499 S.E.2d 197 (1998); Smith v. Champion Int'l, 134 N.C. App. 180, 517 S.E.2d 164 (1999); Calloway v. Memorial Mission Hosp., 137 N.C. App. 480, 528 S.E.2d 397, 2000 N.C. App. LEXIS 409 (2000); Norton v. Waste Mgt., Inc., 146 N.C. App. 409, 552 S.E.2d 702, 2001 N.C. App. LEXIS 938 (2001); Barbour v. Regis Corp., 167 N.C. App. 449, 606 S.E.2d 119, 2004 N.C. App. LEXIS 2336 (2004).

Cited in Champion v. Vance County Bd. of Health, 221 N.C. 96, 19 S.E.2d 239 (1942); Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965); Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969); Smith v. Dacotah Cotton Mills, Inc., 31 N.C. App. 687, 230 S.E.2d 772 (1976); Peeler v. State Hwy. Comm'n, 48 N.C. App. 1, 269 S.E.2d 153 (1980); Harrell v. J.P. Stevens & Co., 54 N.C. App. 582, 284 S.E.2d 343 (1981); Hyatt v. Waverly Mills, 56 N.C. App. 14, 286 S.E.2d 837 (1982); Cockman v. PPG Indus., 84 N.C. App. 101, 351 S.E.2d 771 (1987); Kennedy v. Duke Univ. Medical Center, 101 N.C. App. 24, 398 S.E.2d 677 (1990); Pernell v. Piedmont Circuits, 104 N.C. App. 289, 409 S.E.2d 618 (1991); Hardin v. Venture Constr. Co., 107 N.C. App. 758, 421 S.E.2d 601 (1992); Brewington v. North Carolina Dep't of Cor., 111 N.C. App. 833, 433 S.E.2d 798 (1993); Craver v. Dixie Furn. Co., 115 N.C. App. 570, 447 S.E.2d 789 (1994); Agee v. Thomasville Furn. Prods., 119 N.C. App. 77, 457 S.E.2d 886 (1995); Tucker v. Workable Co., 129 N.C. App. 695, 501 S.E.2d 360 (1998); Morris v. L.G. Dewitt Trucking, Inc., 143 N.C. App. 339, 545 S.E.2d 474, 2001 N.C. App. LEXIS 271 (2001); Skillin v. Magna Corporation/Greene's Tree Serv., Inc., 152 N.C. App. 41, 566 S.E.2d 717, 2002 N.C. App. LEXIS 877 (2002); Hummel v. Univ. of N.C., 156 N.C. App. 108, 576 S.E.2d 124, 2003 N.C. App. LEXIS 72 (2003); Carroll v. Living Ctrs. Southeast, Inc., 157 N.C. App. 116, 577 S.E.2d 925, 2003 N.C.

App. LEXIS 379 (2003), cert. denied, 357 N.C. 249, 582 S.E.2d 29 (2003).

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.

The award of the Industrial Commission, as provided in G.S. 97-84, if not reviewed in due time, or an award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within 30 days from the date of such award or within 30 days after receipt of notice to be sent by registered mail or certified mail of such award, but not thereafter, appeal from the decision of said Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. The procedure for the appeal shall be as provided by the rules of appellate procedure.

The Industrial Commission of its own motion may certify questions of law to the Court of Appeals for decision and determination by said Court. In case of an appeal from the decision of the Commission, or of a certification by said Commission of questions of law, to the Court of Appeals, said appeal or certification shall operate on a supersedeas except as provided in G.S. 97-86.1, and no employer shall be required to make payment of the award involved in said appeal or certification until the questions at issue therein shall have been fully determined in accordance with the provisions of this Article. If the employer is a noninsurer, then the appeal of such employer shall not act as a supersedeas and the plaintiff in such case shall have the same right to issue execution or to satisfy the award from the property of the employer pending the appeal as obtains to the successful party in an action in the superior court.

When any party to an appeal from an award of the Commission is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, any member of the Commission or any deputy commissioner shall enter an order allowing said party to appeal from the award of the Commission without giving security therefor. The party appealing from the judgment shall, within 30 days from the filing of the appeal from the award, make an affidavit that he is unable by reason of his poverty to give the security required by law. The request shall be passed upon and granted or denied by a member of the Commission or deputy commissioner within 20 days from receipt of the affidavit specified above. (1929, c. 120, s. 60; 1947, c. 823; 1957, c. 1396, s. 9; 1959, c. 863, s. 4; 1967, c. 669; 1971, c. 1189; 1975, c. 391, s. 15; 1977, c. 521, s. 1; 1993 (Reg. Sess., 1994), c. 679, s. 10.5; 1995 (Reg. Sess., 1996), c. 552, s. 1.)

Legal Periodicals. — For note on "jurisdictional fact" review by superior courts, see 37 N.C.L. Rev. 219 (1959).

For survey of case law as to findings of jurisdictional facts upon judicial review of decisions of Industrial Commission, see 44 N.C.L. Rev. 892 (1966).

For case law survey as to judicial review of decisions of administrative agencies, see 45 N.C.L. Rev. 816 (1967).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

I. In General.
II. Review, Generally.
III. Jurisdiction.
IV. Findings of Commission.
V. Scope of Review.

VI. Review of Particular Findings.
VII. Remand and Rehearing.

I. IN GENERAL.

Editor's Note. *— Many of the cases below were decided before the 1967 amendment gave appellate jurisdiction over decisions of the Industrial Commission to the Court of Appeals. Formerly the superior court had appellate jurisdiction.*

Remedy Is Exclusive. — The remedy provided by this section and G.S. 97-83 through 97-85 is exclusive. Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

Effect of Appeal on Commission's Jurisdiction. — An appeal of an award of the Industrial Commission does not suspend that agency's authority to accept notification of an employee's decision to select his own doctor; neither does an appeal deprive the Commission of its jurisdiction to accept the submission of a claim. It may well be that the determination of the particular claim will be delayed until the outcome of the appeal. Nevertheless, the Commission has jurisdiction to receive the claim and is, in fact, the only agency vested with that jurisdiction. Schofield v. Great Atl. & Pac. Tea Co., 299 N.C. 582, 264 S.E.2d 56 (1980).

Modification of Award Under § 97-17 Is Not Subject to Collateral Attack. — The action of the Industrial Commission in modifying an award pursuant to G.S. 97-17 is a quasi-judicial act which cannot be collaterally attacked in an independent action. In the absence of a direct appeal, the modified order of the Industrial Commission is conclusively presumed to be correct and cannot be collaterally attacked. Travelers Ins. Co. v. Rushing, 36 N.C. App. 226, 243 S.E.2d 420 (1978).

Recovery in Wrongful Death Action Not Exempt from Disbursement by Commission. — There is no authority either in the statutes or in case law for holding that recovery in a wrongful death action is exempt from disbursement by the Industrial Commission if the act is applicable to the injured employee. Byers v. North Carolina State Hwy. Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

Applied in Smith v. S.E. Hauser & Co., 206 N.C. 562, 174 S.E. 455 (1934); Latham v. Southern Fish & Grocery Co., 208 N.C. 505, 181 S.E. 640 (1935); Lewis v. Kentucky Cent. Life Ins. Co., 20 N.C. App. 247, 201 S.E.2d 228 (1973); Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976); Key v. Wagner Woodcraft, Inc., 33 N.C. App. 310, 235 S.E.2d 254 (1977); Jones v. Service Roofing & Sheet Metal Co., 63 N.C. App. 772, 306 S.E.2d 460 (1983); Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993); Adams v. AVX Corp., 349 N.C. 676, 509 S.E.2d 411 (1998); Smith v. Champion Int'l, 134 N.C. App. 180, 517 S.E.2d 164 (1999); Timmons v. North Carolina DOT, 351 N.C. 177, 522 S.E.2d 62 (1999); Clark v. ITT Grinnell Indus. Piping, Inc., 141 N.C. App. 417, 539 S.E.2d 369, 2000 N.C. App. LEXIS 1416 (2000); Trivette v. Mid-South Mgmt., 154 N.C. App. 140, 571 S.E.2d 692, 2002 N.C. App. LEXIS 1408 (2002); Barbour v. Regis Corp., 167 N.C. App. 449, 606 S.E.2d 119, 2004 N.C. App. LEXIS 2336 (2004).

Cited in Hollowell v. North Carolina Dep't of Conservation & Dev., 201 N.C. 616, 161 S.E. 89 (1931); Early v. W.H. Basnight & Co., 214 N.C. 103, 198 S.E. 577 (1938); Raynor v. Commissioners of Louisburg, 220 N.C. 348, 17 S.E.2d 495 (1941); Champion v. Vance County Bd. of Health, 221 N.C. 96, 19 S.E.2d 239 (1942); Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960); State ex rel. N.C. Utils. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965); Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969); In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979); Harrell v. J.P. Stevens & Co., 45 N.C. App. 197, 262 S.E.2d 830 (1980); Humphries v. Cone Mills Corp., 52 N.C. App. 612, 279 S.E.2d 56 (1981); Church v. G.G. Parsons Trucking Co., 304 N.C. 193, 288 S.E.2d 803 (1981); Bingham v. Smith's Transf. Corp., 55 N.C. App. 538, 286 S.E.2d 570 (1982); Ward v. Beaunit Corp., 56 N.C. App. 128, 287 S.E.2d 464 (1982); In re Vandiford, 56 N.C. App. 224, 287 S.E.2d 912 (1982); Key v. McLean Trucking, 61 N.C. App. 143, 300 S.E.2d 280 (1983); West v. Bladenboro Cotton Mills, Inc., 62 N.C. App. 267, 302 S.E.2d 645 (1983); Chapman v. Southern Import Co., 63 N.C. App. 194, 303 S.E.2d 824 (1983); Gallimore v. Daniels Constr. Co., 78 N.C. App. 747, 338 S.E.2d 317 (1986); Carothers v. Ti-Caro, 83 N.C. App. 301, 350 S.E.2d 95 (1986); Suggs v Snow Hill Milling Co., 100 N.C. App. 527, 397 S.E.2d 240 (1990); Goins v. Sanford Furn. Co., 105 N.C. App. 244, 412 S.E.2d 172 (1992); Blankley v. White Swan Uniform Rentals, 107 N.C. App. 751, 421 S.E.2d 603 (1992); Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992); Craver v. Dixie Furn. Co., 115 N.C. App. 570, 447 S.E.2d 789 (1994); McAnelly v. Wilson Pallet & Crate Co., 120 N.C. App. 127, 460 S.E.2d 894 (1995); Walters v. Algernon Blair, 120 N.C. App. 398, 462 S.E.2d 232 (1995); Andrews v. Fulcher Tire Sales & Serv., 120 N.C. App. 602, 463 S.E.2d 425 (1995); Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996); Riggins v. Elkay S. Corp., 132 N.C. App. 232, 510 S.E.2d 674 (1999); Davis v. Weyerhaeuser Co., 132 N.C. App. 771, 514 S.E.2d 91 (1999); Perkins v. Arkansas Trucking Servs., 351 N.C.

634, 528 S.E.2d 902, 2000 N.C. LEXIS 356 (2000); Pearson v. C.P. Buckner Steel Erection, 139 N.C. App. 394, 533 S.E.2d 532, 2000 N.C. App. LEXIS 912 (2000), cert denied, 353 N.C. 379, 547 S.E.2d 434 (2001); Skillin v. Magna Corporation/Greene's Tree Serv., Inc., 152 N.C. App. 41, 566 S.E.2d 717, 2002 N.C. App. LEXIS 877 (2002); Hatcher v. Daniel Int'l Corp., 153 N.C. App. 776, 571 S.E.2d 20, 2002 N.C. App. LEXIS 1261 (2002); Johnson v. Herbie's Place, 157 N.C. App. 168, 579 S.E.2d 110, 2003 N.C. App. LEXIS 640 (2003), cert. denied, 357 N.C. 460, 585 S.E.2d 760 (2003); Adams v. Metals USA, 168 N.C. App. 469, 608 S.E.2d 357, 2005 N.C. App. LEXIS 343 (2005), aff'd, — N.C. —, 619 S.E.2d 495 (N.C. 2005).

II. REVIEW, GENERALLY.

Appeal Lies Only from Final Order of Commission. — No appeal lies from an interlocutory order of the Industrial Commission. Only from a final order or decision of the Commission is there an appeal of right to the appellate court. Lynch v. M.B. Kahn Constr. Co., 41 N.C. App. 127, 254 S.E.2d 236, cert. denied, 298 N.C. 298, 259 S.E.2d 914 (1979).

Only from a final order or decision of the Industrial Commission is there an appeal of right to the Court of Appeals. Ledford v. Asheville Hous. Auth., 125 N.C. App. 597, 482 S.E.2d 544 (1997).

Dismissal of Appeal as Interlocutory. — Appeal must be dismissed as interlocutory where the Industrial Commission determines only that plaintiff sustained an injury by accident and no final award has been entered. Fisher v. E.I. Du Pont De Nemours, 54 N.C. App. 176, 282 S.E.2d 543 (1981).

In a workers' compensation proceeding, an appeal by an employer and its insurance carrier was dismissed as interlocutory where the North Carolina Industrial Commission specifically reserved the issue of the amount of the compensation award for the employee. Watts v. Hemlock Homes of the Highlands, Inc., 160 N.C. App. 81, 584 S.E.2d 97, 2003 N.C. App. LEXIS 1666 (2003).

Motion to Dismiss Appeal as Interlocutory Denied. — Therapist's motion to dismiss defendants' appeal of an award of benefits for medical treatment as interlocutory was denied because the order resolved all issues surrounding the disputed medical treatment, and thus the order was appealable pursuant to G.S. 97-86. Cash v. Lincare Holdings, — N.C. App. —, 639 S.E.2d 9, 2007 N.C. App. LEXIS 92 (2007).

Procedure Provided by Section Must Be Followed. — When the applicable statute provides an appeal from an administrative agency, the procedure provided in the Act must be followed. McDowell v. Town of Kure Beach, 251 N.C. 818, 112 S.E.2d 390 (1960).

Hence, a writ of certiorari cannot be used as a substitute for an appeal either before or after the time of appeal has expired. McDowell v. Town of Kure Beach, 251 N.C. 818, 112 S.E.2d 390 (1960).

Conclusive Effect of Award Which Is Not Timely Appealed. — An award of the Commission, if not reviewed in due time as provided in the Act, is conclusive and binding as to all questions of fact. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Dismissal Where Notice of Appeal Is Untimely. — Defendant's purported appeal from a workers' compensation proceeding would be dismissed where notice of appeal was filed after expiration of the 30-day period provided by this section. Fisher v. E.I. Du Pont De Nemours, 54 N.C. App. 176, 282 S.E.2d 543 (1981).

Exceptions and Objections. — Where appellant on appeal to the superior court (now the Court of Appeals) does not except to any finding of the Industrial Commission or to the award, but merely gives notice of appeal for review as to errors of law, the single question presented to the court is whether the facts found were sufficient to support the award. Likewise, a sole exception to the judgment of the court presents only the question of whether the facts found support the judgment. Wyatt v. Sharp, 239 N.C. 655, 80 S.E.2d 762 (1954).

Questions of law which appellant desires the Supreme Court to review, including questions of whether specific findings of fact are supported by the evidence, must be presented by exceptions duly taken and assignments of error duly made which point out specifically and distinctly the alleged error; the Supreme Court, upon a broadside exception, will not make a voyage of discovery through the record to ascertain if error was committed at some time in some way during the progress of the trial or case. Worsley v. S. & W. Rendering Co., 239 N.C. 547, 80 S.E.2d 467 (1954).

The effect of an exception to the judgment of the Industrial Commission is only to challenge the correctness of the judgment, and presents the single question of whether the facts found are sufficient to support the judgment. Hatchell v. Cooper, 266 N.C. 345, 146 S.E.2d 62 (1966).

Certification of Questions of Law. — When employers and insurers objected to paying hospitals certain amounts which had been approved by the Industrial Commission, in workers' compensation claims, and the employers and insurers challenged the constitutionality of the statute under which these amounts were approved, the Industrial Commission could have certified the question of the statute's constitutionality to the appellate court before making its final decision. Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A, 172

N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

When the North Carolina Industrial Commission exceeded its authority by finding a prior version of G.S. 97-26(b) unconstitutional, the question of the statute's constitutionality was not properly presented to an appellate court on appeal of the Commission's decision because, among other reasons, no party filed a certiorari petition, pursuant to N.C. R. App. P. 21, nor did a party seek suspension of the Rules of Appellate Procedure, under N.C. R. App. P. 2, nor did the Commission certify the question to the appellate court, under G.S. 97-86. Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

Fact Finding Prerogative Extends to Credibility Determinations. — The Industrial Commission's credibility determinations made in response to Sanders v. Broyhill Furn. Indus., 124 N.C. App. 637, 478 S.E.2d 223 cannot be the Court of Appeals' basis for reversing the commission's order absent other error; in other words, if the commission's conclusions are otherwise supported by competent evidence, the court may not scrutinize the commission's reasons for believing a witness while engaged in its fact-finding role and overturn its decision on the basis of those reasons. Deese v. Champion Int'l Corp., 352 N.C. 109, 530 S.E.2d 549, 2000 N.C. LEXIS 432 (2000).

Judgment Should Refer to Specific Assignments of Error. — Where, upon an appeal from the Industrial Commission, the exceptions point out specific assignments of error, the judgment in the superior court (now the Court of Appeals) thereon properly should overrule or sustain respectively each of the exceptions on matters of law thus designated. And where the judgment merely decrees that the award be in all respects affirmed, the Supreme Court will presume that the judge below considered each of the assignments of error and overruled them. Fox v. Cramerton Mills, 225 N.C. 580, 35 S.E.2d 869 (1945).

III. JURISDICTION.

A jurisdictional question may be raised at any stage of the proceeding. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

The Commission's jurisdiction may be questioned at any stage and even where an appeal, by stipulation, raises only the question of who was claimant's employer. If the record fails to show by testimony or admission that appellant had the requisite number of employees, the Commission is not shown to have acquired jurisdiction. The making of a stipulation that there was only one question at issue would not serve as an admission of the jurisdictional fact. Chadwick v. North Carolina Dep't of Conservation & Dev., 219 N.C. 766, 14 S.E.2d 842 (1941).

The reviewing court is not bound by the findings of jurisdictional facts by the Industrial Commission, and must make its own finding from a consideration of all the evidence in the case. Lloyd v. Jenkins Context Co., 46 N.C. App. 817, 266 S.E.2d 35 (1980).

Where the jurisdiction of the Industrial Commission to hear and consider a claim for compensation is challenged by an employer on the ground that he is not subject to the provisions of the act, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the superior court (now the Court of Appeals). The court has both the power and the duty, on the appeal of either party to the proceeding, to consider all the evidence in the record, and to find therefrom the jurisdictional facts, without regard to the finding of such facts by the Commission. Aycock v. Cooper, 202 N.C. 500, 163 S.E. 569 (1932); Aylor v. Barnes, 242 N.C. 223, 87 S.E.2d 269 (1955).

The Commission's findings of jurisdictional facts are not conclusive on appeal, even if they are supported by competent evidence. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965); Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968); Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976).

Notwithstanding this section, the finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal, even if there is evidence in the record to support such finding. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record. Dockery v. McMillan, 85 N.C. App. 469, 355 S.E.2d 153, cert. denied, 320 N.C. 167, 358 S.E.2d 49 (1987).

The court has the right and the duty to make its own independent findings of jurisdictional facts from its consideration of all the evidence in the record. Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965); Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965); Lucas v. Li'l Gen. Stores, 289 N.C. 212, 221 S.E.2d 257 (1976).

Where the judge is of the opinion, upon a fair and impartial consideration of the evidence in the record, that the Commission's findings of jurisdictional facts lead to an improper assumption or rejection of jurisdiction by the Commission, he has the duty to make independent findings of jurisdictional facts and to set them out in the judgment. Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968).

If a party to the proceedings requests the court to make independent findings of jurisdictional facts, it is error to fail to do so. Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968).

Ordinarily, the findings of fact of the Commission are binding on appeal if supported by any competent evidence. However, where a party challenges the jurisdiction of the Commission, the findings of fact are not conclusive and the reviewing court may consider all of the evidence in the record and make its own findings of fact. Weston v. Sears Roebuck & Co., 65 N.C. App. 309, 309 S.E.2d 273 (1983), cert. denied, 311 N.C. 407, 319 S.E.2d 281 (1984).

Certification of Questions of Law. — G.S. 97-86 allows an appellate court to consider questions of law certified to it by the Industrial Commission, but it does not presume to allow the court to certify matters to itself for review and consideration. Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

Findings of the Commission that employee received notice from competent medical authority that she had an occupational disease on June 25, 1977, at an occupational respiratory problem screening clinic and that her claim, filed on July 11, 1980, was barred by the two-year statute of limitations, G.S. 97-58, were jurisdictional findings of fact and were fully reviewable by the Court of Appeals. Dawkins v. Mills, 74 N.C. App. 712, 329 S.E.2d 688 (1985).

The award should be set aside if the fact found by the Commission was jurisdictional and there was no evidence tending to support such finding. Poole v. Sigmon, 202 N.C. 172, 162 S.E. 198 (1932).

IV. FINDINGS OF COMMISSION.

Findings Required on Crucial Facts. — While the Commission is not required to make findings as to each fact presented by the evidence, it is required to make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends. Gaines v. L.D. Swain & Son, 33 N.C. App. 575, 235 S.E.2d 856 (1977).

It is required that the Industrial Commission find all the crucial and specific facts upon which the right to compensation depends, in order that it may be determined on appeal whether an adequate basis exists for the ultimate findings as to whether plaintiff was injured by accident arising out of and in the course of his employment, but it is not required that the Commission make a finding as to each detail of the evidence or as to every shade of meaning to be drawn therefrom. Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955). See also, Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

Findings Must Be Specific and Definite. — It is the duty of the Commission to make such specific and definite findings upon the evidence as will enable the court to determine whether its general findings or conclusions should stand. Singleton v. Durham Laundry Co., 213 N.C. 32, 195 S.E. 34 (1938).

The Industrial Commission is required to make specific findings as to the facts upon which a compensation claim is based, including the extent of a claimant's disability. Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

The findings of fact should tell the full story of the event giving rise to the claim for compensation. They must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952); Gaines v. L.D. Swain & Son, 33 N.C. App. 575, 235 S.E.2d 856 (1977).

Mere recitals of medical opinion are not sufficiently specific to enable a reviewing court to judge the propriety of the Commission's order, and therefore cannot properly form the basis for a conclusion of law as to compensation. Harrell v. J.P. Stevens & Co., 54 N.C. App. 582, 284 S.E.2d 343 (1981), cert. denied, 305 N.C. 152, 289 S.E.2d 379 (1982).

Finding Held Too Indefinite to Serve as Basis for Valid Award. — Where it was found by the Commission that the deceased was killed while acting either as deputy sheriff or jailer, the court held that the finding was too indefinite to serve as a basis for a valid award. Gowens v. Alamance County, 214 N.C. 18, 197 S.E. 538 (1938), decided prior to the 1939 amendment to § 97-2.

V. SCOPE OF REVIEW.

Certain Matters Are Not Reviewable. — There are completely unreviewable matters in compensation procedures, just as there are in ordinary judicial procedure. Morse v. Curtis, 6 N.C. App. 620, 170 S.E.2d 491 (1969).

Review of Questions of Fact and of Law Distinguished. — When the assignments of error bring up for review the findings of fact of the Commission, the court will review the evidence to determine as a matter of law whether there is any competent evidence tending to support the findings; if so, the findings of fact are conclusive on the court. If a finding of fact is a mixed question of fact and law, it is conclusive also, if there is sufficient evidence to sustain the facts involved. If a question of law alone, it is reviewable. Lewter v. Abercrombie Enters., Inc., 240 N.C. 399, 82 S.E.2d 410 (1954).

An appeal from the Industrial Commission is permitted only on matters of law. Fox v. Cramerton Mills, 225 N.C. 580, 35 S.E.2d 869 (1945).

The appellate court has jurisdiction to review only for errors of law. Byers v. North Carolina State Hwy. Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968), aff'd, 275 N.C. 229, 166 S.E.2d 649 (1969). See also, Byrd v. Gloucester Lumber Co., 207 N.C. 253, 176 S.E. 572 (1934).

On appeal from the Industrial Commission, the court has no power to review the findings of fact by the Commission. It can consider only errors of law appearing in the record, as certified by the Commission. Winslow v. Carolina Conference Ass'n, 211 N.C. 571, 191 S.E. 403 (1937).

The award of the Industrial Commission is conclusive and binding as to all questions of fact, and the appeal to the court is for error of law only. Ballenger Paving Co. v. North Carolina State Hwy. Comm'n, 258 N.C. 691, 129 S.E.2d 245 (1963).

The Court of Appeals has appellate jurisdiction to review an award of the Industrial Commission for errors of law when a party to the proceeding in which the appeal is made appeals to it. Morgan v. Thomasville Furn. Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

While findings of fact by the Industrial Commission, when supported by competent evidence, are conclusive, the rulings of the Commission are subject to review on questions of law, i.e., whether the Industrial Commission has jurisdiction, whether the findings are supported by evidence, and whether upon the facts established the decision is correct. Smith v. Southern Waste Paper Co., 226 N.C. 47, 36 S.E.2d 730 (1946).

Appellate review of opinions and awards of the Commission is strictly limited to the discovery and correction of legal errors. Godley v. County of Pitt, 306 N.C. 357, 293 S.E.2d 167 (1982).

As to review of errors of law prior to 1967 amendment, see Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952).

Discretion to Consider Excusable Neglect. — The commission has the inherent power and authority, in its discretion, to consider defendant's motion for relief due to excusable neglect. Allen v. Food Lion, Inc., 117 N.C. App. 289, 450 S.E.2d 571 (1994).

The Commission's legal conclusions are subject to court review. Jackson v. North Carolina State Hwy. Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968); Porterfield v. RPC Corp., 47 N.C. App. 140, 266 S.E.2d 760 (1980); Peeler v. State Hwy. Comm'n, 48 N.C. App. 1, 269 S.E.2d 153 (1980), aff'd, 302 N.C. 183, 273 S.E.2d 705 (1981); Pollard v. Krispy Waffle #1, 63 N.C. App. 354, 304 S.E.2d 762 (1983); Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Workers' compensation commissioners were entitled to absolute quasi-judicial immunity because their role as Deputy Commissioners was indisputably judicial in nature under G.S. 97-77, and safeguards in the form of appeals from Deputy Commissioners' decisions to the full Industrial Commission and the North Carolina Courts were available under G.S. 97-85 and G.S. 97-86. Sherwin v. Piner, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 26855 (E.D.N.C. July 21, 2003).

Even If Denominated "Findings of Fact". — A conclusion of law is made no less reviewable by virtue of the fact that it is denominated a "finding of fact". Walston v. Burlington Indus., 49 N.C. App. 301, 271 S.E.2d 516 (1980), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982).

As Conclusions of Law Are Not Binding on the Court. — Conclusions of law entered by the Industrial Commission are not binding on the Court of Appeals, and are reviewable for purposes of determining their evidentiary basis and the reasonableness of the legal inferences made therefrom. Walston v. Burlington Indus., 49 N.C. App. 301, 271 S.E.2d 516 (1980), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982).

Where the facts are not in dispute, the effect to be given such facts is a matter of law reviewable on appeal. Perkins v. Sprott, 207 N.C. 462, 177 S.E. 404 (1934).

Findings of fact made by the Commission are, when supported by any evidence, conclusive on appeal. But when all the evidence and the inferences to be drawn therefrom result in only one conclusion, liability is a question of law subject to review. Hensley v. Farmers Fed'n Coop., 246 N.C. 274, 98 S.E.2d 289 (1957).

In passing upon an appeal from an award of the Commission, the reviewing court is limited to two questions of law, namely: (1) Whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the findings of fact of the Commission justify its legal conclusions and decisions. Brice v. Robertson House Moving, Wrecking & Salvage Co., 249 N.C. 74, 105 S.E.2d 439 (1958); Moore v. Adams Elec. Co., 259 N.C. 735, 131 S.E.2d 356 (1963); Byers v. North Carolina State Hwy. Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969); Waggoner v. North Carolina Bd. of Alcoholic Control, 7 N.C. App. 692, 173 S.E.2d 548 (1970); Inscoe v. DeRose Indus., Inc., 292 N.C. 210, 232 S.E.2d 449 (1977); Barham v. Food World, Inc., 300 N.C. 329, 266 S.E.2d 676, rehearing denied, 300 N.C. 562, 270 S.E.2d 105 (1980); King v. Forsyth County, 45 N.C. App. 467, 263 S.E.2d 283, cert. denied, 300 N.C. 374, 267 S.E.2d 676 (1980); Walston v. Burlington Indus., 49 N.C.

App. 301, 271 S.E.2d 516 (1980), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982); Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981); Buck v. Procter & Gamble Mfg. Co., 52 N.C. App. 88, 278 S.E.2d 268 (1981); Chandler v. Nello L. Teer Co., 53 N.C. App. 766, 281 S.E.2d 718 (1981), aff'd, 305 N.C. 292, 287 S.E.2d 890 (1982); Hilliard v. Apex Cabinet Co., 54 N.C. App. 173, 282 S.E.2d 828 (1981), rev'd on other grounds, 305 N.C. 593, 290 S.E.2d 682 (1982); Anderson v. A.M. Smyre Mfg. Co., 54 N.C. App. 337, 283 S.E.2d 433 (1981); Rutledge v. Tultex Corp., 56 N.C. App. 345, 289 S.E.2d 72, aff'd in part and rev'd in part, 308 N.C. 85, 301 S.E.2d 359 (1983); Hundley v. Fieldcrest Mills, 58 N.C. App. 184, 292 S.E.2d 766 (1982); Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983), cert. denied, 310 N.C. 308, 312 S.E.2d 651 (1984); Roper v. J.P. Stevens & Co., 65 N.C. App. 69, 308 S.E.2d 485 (1983), cert. denied, 310 N.C. 309, 312 S.E.2d 652 (1984); Mills v. Mills, 68 N.C. App. 151, 314 S.E.2d 833 (1984); Sanderson v. Northeast Constr. Co., 77 N.C. App. 117, 334 S.E.2d 392 (1985); McBride v. Peony Corp., 84 N.C. App. 221, 352 S.E.2d 236 (1987).

In appeals from the Industrial Commission, the superior court (now the Court of Appeals) may determine upon proper exceptions that the facts found by the Industrial Commission were or were not supported by competent evidence and that the findings so supported do or do not sustain the legal conclusions and the award of the Industrial Commission. Byers v. North Carolina State Hwy. Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

The role of the appellate court in reviewing an appeal from the Industrial Commission is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings. Guy v. Burlington Indus., 74 N.C. App. 685, 329 S.E.2d 685 (1985); Woodell v. Starr Davis Co., 77 N.C. App. 352, 335 S.E.2d 48 (1985).

Court May Determine Whether There Is Any Evidence to Support Commission's Findings. — The findings of fact of the Industrial Commission are conclusive on appeal only when supported by evidence, and the court, on appeal, may review the evidence to determine as a matter of law whether there is any evidence tending to support the findings. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951); Eller v. Porter-Hayden Co., 48 N.C. App. 610, 269 S.E.2d 284, cert. denied, 301 N.C. 527, 273 S.E.2d 452 (1980).

When the party aggrieved appeals to court from a decision of the full Commission on the theory that the underlying findings of fact of the full Commission are not supported by competent evidence, the court does not retry the facts. The court merely determines from the proceedings had before the Commission whether there was sufficient competent evidence before the Commission to support the findings of fact of the full Commission. Moses v. Bartholomew, 238 N.C. 714, 78 S.E.2d 923 (1953).

It is the duty of the court to determine whether, in any reasonable view of the evidence, such evidence is sufficient to support the critical findings necessary to permit an award of compensation. Keller v. Electric Wiring Co., 259 N.C. 222, 130 S.E.2d 342 (1963).

The court's duty in a compensation case goes no further than to determine whether the record contains any evidence tending to support the finding. Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968); Inscoe v. DeRose Indus., Inc., 292 N.C. 210, 232 S.E.2d 449 (1977); Ivory v. Greer Bros., 45 N.C. App. 455, 263 S.E.2d 290 (1980); Taylor v. M.L. Hatcher Pick-Up & Delivery Serv., 45 N.C. App. 682, 263 S.E.2d 788, cert. denied, 300 N.C. 379, 267 S.E.2d 684 (1980); Click v. Pilot Freight Carriers, Inc., 300 N.C. 164, 265 S.E.2d 389 (1980).

Conclusions of law are reviewable by the Court of Appeals to determine their evidentiary basis. Lucas v. Thomas Built Buses, Inc., 88 N.C. App. 587, 364 S.E.2d 147 (1988).

A review of the record indicated there was competent evidence to support the Commission's findings of fact, and the findings of fact justified the Commission's legal conclusions. Lowe v. BE & K Constr. Co., 121 N.C. App. 570, 468 S.E.2d 396 (1996).

Although an employee testified that he sustained his back injury in a work-related accident, there was enough evidence in the record to support the North Carolina Industrial Commission's conclusion that the employee sustained the injury while he was on vacation, and the court of appeals upheld the Commission's decision denying the employee's claim for workers' compensation benefits. Holcomb v. Butler Mfg. Co., 158 N.C. App. 267, 580 S.E.2d 376, 2003 N.C. App. LEXIS 1048 (2003).

And Whether Findings Support Commission's Conclusions and Decision. — On appeal from an award of the Industrial Commission the jurisdiction of the courts is limited to the questions of law as to whether there was competent evidence before the Commission to support its findings of fact and whether such findings justify the legal conclusions and decision of the Commission. Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950); Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952); Green v. Eastern Constr. Co., 1 N.C. App. 300, 161 S.E.2d 200 (1968); Gaines v. L.D. Swain & Son, 33 N.C. App. 575, 235 S.E.2d 856 (1977); King v. Exxon

Co., 46 N.C. App. 750, 266 S.E.2d 37 (1980); Peeler v. State Hwy. Comm'n, 48 N.C. App. 1, 269 S.E.2d 153 (1980), aff'd, 302 N.C. 183, 273 S.E.2d 705 (1981); McLean v. Roadway Express, Inc., 307 N.C. 99, 296 S.E.2d 456 (1982); Keller v. City of Wilmington Police Dep't, 65 N.C. App. 675, 309 S.E.2d 543 (1983).

When called upon to review the findings of fact, conclusions of law, and awards of the Industrial Commission in compensation cases, the courts determine as a matter of law whether the facts found support the Commission's conclusions, and whether they justify the awards. McRae v. Wall, 260 N.C. 576, 133 S.E.2d 220 (1963).

If the findings of fact of the Industrial Commission are supported by competent evidence and are determinative of all of the questions at issue in the proceeding, the court must accept such findings as final truth and merely determine whether they justify the legal conclusions and decision of the Commission. Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963); Morgan v. Thomasville Furn. Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968); Byers v. North Carolina State Hwy. Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968), aff'd, 275 N.C. 229, 166 S.E.2d 649 (1969); Hollar v. Montclair Furn. Co., 48 N.C. App. 489, 269 S.E.2d 667 (1980).

While findings of fact of the Industrial Commission are conclusive on appeal when supported by evidence, the courts must review the reasonableness of the inferences of fact deduced from the basic facts found, and the conclusions of law predicated upon them. Evans v. Tabor City Lumber Co., 232 N.C. 111, 59 S.E.2d 612 (1950); Crawley v. Southern Devices, Inc., 31 N.C. App. 284, 229 S.E.2d 325 (1976), cert. denied, 292 N.C. 467, 234 S.E.2d 2 (1977).

On appeal from an award of the Industrial Commission, the appellate court's review is limited to the questions of whether the findings made by the Commission are supported by competent evidence in the record and whether these findings support the conclusions of law drawn by the Commission. Little v. Penn Ventilator Co., 75 N.C. App. 92, 330 S.E.2d 276, aff'd in part and rev'd in part, 317 N.C. 206, 345 S.E.2d 204 (1986).

While the Commission's findings of fact are conclusive, the reviewing court's function is to determine whether the Commission's findings of fact are supported by competent evidence and whether the conclusions of law are correct. Lucas v. Thomas Built Buses, Inc., 88 N.C. App. 587, 364 S.E.2d 147 (1988).

In making its determinations, the North Carolina Industrial Commission is not required to find facts as to all credible evidence, but must find those facts which are necessary to support its conclusions of law; the evidence supported findings that a worker had not reached maximum medical improvement, and that he had not refused suitable employment. Walker v. Lake Rim Lawn & Garden, 155 N.C. App. 709, 575 S.E.2d 764, 2003 N.C. App. LEXIS 384 (2003), cert. denied, 357 N.C. 67, 579 S.E.2d 577 (2003).

Court May Not Find Facts Itself. — In no event may the superior court (now the Court of Appeals) or the Supreme Court consider the evidence in a proceeding involving an appeal from the Industrial Commission for the purpose of finding the facts for itself. Reed v. Lavender Bros., 206 N.C. 898, 172 S.E. 877 (1934); Walker v. J.D. Wilkins, Inc., 212 N.C. 627, 194 S.E. 89 (1937); Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952); Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963); Byers v. North Carolina State Hwy. Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968), aff'd, 275 N.C. 229, 166 S.E.2d 649 (1969).

The court cannot consider the evidence in the proceeding in any event for the purpose of finding the facts for itself. If the findings of fact of the Industrial Commission are supported by competent evidence and are determinative of all the questions at issue in the proceeding, the court must accept such findings as final truth and merely determine whether or not they justify the legal conclusions and decision of the Commission. But if the findings of fact of the Industrial Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the Commission for proper findings. Brice v. Robertson House Moving, Wrecking & Salvage Co., 249 N.C. 74, 105 S.E.2d 439 (1958); Gamble v. Borden, Inc., 45 N.C. App. 506, 263 S.E.2d 280, cert. denied, 300 N.C. 372, 267 S.E.2d 675 (1980).

The Court of Appeals may neither find facts nor adjudicate matters within the jurisdiction of the Industrial Commission. Byers v. North Carolina State Hwy. Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

When reviewing an appeal from an award of the full Commission, the appellate court does not retry the facts, but instead, determines whether there was any competent evidence before the Commission to support its findings of fact. Bailey v. Smoky Mt. Enters., Inc., 65 N.C. App. 134, 308 S.E.2d 489 (1983), cert. denied, 311 N.C. 303, 317 S.E.2d 678 (1984).

Or Receive Evidence Not Considered Below. — Neither the superior court (now the Court of Appeals) nor the Supreme Court may receive or consider any evidence not introduced in the hearings before the hearing commissioner or the full Commission. Huffman v. Douglass Aircraft Co., 260 N.C. 308, 132 S.E.2d 614 (1963), cert. denied, 379 U.S. 850, 85 S. Ct. 93, 13 L. Ed. 2d 53, rehearing denied, 379 U.S. 925, 85 S. Ct. 279, 13 L. Ed. 2d 338 (1964).

The appellate court may not receive or consider new evidence not introduced in the hearing before the Commission. Byers v. North Carolina State Hwy. Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968), aff'd, 275 N.C. 229, 166 S.E.2d 649 (1969).

The scope of review is limited to the record as certified by the Commission and to the questions of law therein presented. Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957); Byers v. North Carolina State Hwy. Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968), aff'd, 275 N.C. 229, 166 S.E.2d 649 (1969).

On appeal from a judgment of the superior court (now the Court of Appeals) affirming or reversing an award of the Industrial Commission, the Supreme Court acts upon the record that was before the court and upon that alone; if the record was defective, it should have been amended in the superior court. Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

Matters which were not in the record before the superior court (now the Court of Appeals), but which were sent up with the transcript to the Supreme Court, are no more a part of the record in the Supreme Court than they were in the superior court (now the Court of Appeals), and may not be made so by certificate of the court below. Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

Under G.S. 97-86, an appeal from an opinion and award of the North Carolina Industrial Commission is taken under the same terms and conditions as govern appeals from the superior court to the Court of Appeals of North Carolina in ordinary civil actions, and the procedure for the appeal shall be as provided by the rules of appellate procedure, N.C. R. App. P. 10(a) which provides that the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal. McGrady v. Olsten Corp., 159 N.C. App. 643, 583 S.E.2d 371, 2003 N.C. App. LEXIS 1520 (2003).

The court does not have the right to weigh the evidence in a workers' compensation case and decide the issue on the basis of its weight. Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968); Inscoe v. DeRose Indus., Inc., 292 N.C. 210, 232 S.E.2d 449 (1977).

Upon review of an order of the Industrial Commission, the Supreme Court does not weigh the evidence but may only determine whether there is evidence in the record to support the finding made by the Commission. Russell v. Pharr Yarns, Inc., 18 N.C. App. 249, 196 S.E.2d 571 (1973); Willis v. Reidsville Drapery Plant, 29 N.C. App. 386, 224 S.E.2d 287 (1976).

Upon review of the opinion and award of the full Commission, the Court of Appeals does not weigh the evidence, but may only determine whether there is evidence in the record to support the findings made by the Commission. If there is any evidence of substance which directly or by reasonable inference tends to support the findings, this court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary. Porterfield v. RPC Corp., 47 N.C. App. 140, 266 S.E.2d 760 (1980).

It is not for a reviewing court to weigh the evidence before the Industrial Commission in a workers' compensation case. Mayo v. City of Washington, 51 N.C. App. 402, 276 S.E.2d 747 (1981).

It is not the function of any appellate court to retry the facts found by the Commission or weigh the evidence received by it and decide anew the issue of compensability of an employee's claim. Buck v. Procter & Gamble Mfg. Co., 52 N.C. App. 88, 278 S.E.2d 268 (1981).

Commission Is Sole Judge of Weight and Credibility of Testimony. — The Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968); Inscoe v. DeRose Indus., Inc., 292 N.C. 210, 232 S.E.2d 449 (1977); McNinch v. Henredon Indus., Inc., 51 N.C. App. 250, 276 S.E.2d 756 (1981); Yelverton v. Kemp Furn. Co., 51 N.C. App. 675, 277 S.E.2d 441 (1981); Woodell v. Starr Davis Co., 77 N.C. App. 352, 335 S.E.2d 48 (1985); Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

By authority of this section the Commission is the sole judge of the credibility and weight to be accorded to the evidence and testimony before it. Its findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them. Mayo v. City of Washington, 51 N.C. App. 402, 276 S.E.2d 747 (1981).

The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Thus, the Commission may assign more weight and credibility to certain testimony than to other testimony. Moreover, if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commission is conclusive on appeal. Dolbow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983), cert. denied, 310 N.C. 308, 312 S.E.2d 651 (1984).

Argument that finding was contrary to the greater weight of the evidence was irrelevant; determining the weight and credibility of evidence was the province of the commission, the fact finder, which could accept or reject different parts of a witness' testimony as it saw fit. Fowler v. B.E. & K. Constr., Inc., 92 N.C. App. 237, 373 S.E.2d 878 (1988).

Authority to Find Facts Is Vested Exclusively in Industrial Commission. — The authority to find facts necessary for an award pursuant to the provisions of the act is vested exclusively in the Industrial Commission. Moore v. Adams Elec. Co., 259 N.C. 735, 131 S.E.2d 356 (1963); Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965).

The Industrial Commission is the sole trier of the facts. Hall v. W.A. Davis Milling Co., 1 N.C. App. 380, 161 S.E.2d 780 (1968).

This section vests the Industrial Commission with full authority to find essential facts. Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968); Inscoe v. DeRose Indus., Inc., 292 N.C. 210, 232 S.E.2d 449 (1977).

The Industrial Commission is vested with the judicial function and the authority and duty to determine whether, under the established facts and applicable law, the plaintiff has a compensable claim. Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

The Commission is the sole fact-finding agency in cases in which it has jurisdiction. Yelverton v. Kemp Furn. Co., 51 N.C. App. 675, 277 S.E.2d 441 (1981).

The factual determinations of the Industrial Commission are conclusive on appeal to the superior court (now the Court of Appeals) and in the Supreme Court. Brown v. Carolina Aluminum Co., 224 N.C. 766, 32 S.E.2d 320 (1944).

Under the Workers' Compensation Act the Industrial Commission is made the fact-finding body, and the findings of fact made by the Commission are conclusive on appeal. McMahan v. Hickey's Supermarket, 24 N.C. App. 113, 210 S.E.2d 214 (1974); Inscoe v. DeRose Indus., Inc., 292 N.C. 210, 232 S.E.2d 449 (1977).

When Supported by Competent Evidence. — The findings of fact of the Industrial Commission are conclusive and binding upon appeal when supported by competent evidence. Fox v. Mills, Inc., 225 N.C. 580, 35 S.E.2d 869 (1945); Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950); Williams v. Ornamental Stone Co., 232 N.C. 88, 59 S.E.2d 193 (1950); Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951); Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951); McCraw v. Calvine Mills, Inc., 233 N.C. 524, 64 S.E.2d 658 (1951); Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952); Rice v. Thomasville Chair Co., 238 N.C. 121, 76 S.E.2d 311 (1953); Moses v. Bartholomew, 238 N.C. 714, 78 S.E.2d 923 (1953); Hinkle v. City of Lexington, 239 N.C. 105, 79 S.E.2d 220 (1953); Osborne v. Colonial Ice Co., 249 N.C. 387, 106 S.E.2d 573 (1959); McGinnis v. Old Fort Finishing Plant, 253 N.C. 493, 117 S.E.2d 490 (1960); Byrd v. Farmers Fed'n Coop., 260 N.C. 215, 132 S.E.2d 348 (1963); Huffman v. Douglass Aircraft Co., 260 N.C. 308, 132 S.E.2d 614 (1963), cert. denied, 379 U.S. 850, 85 S. Ct. 93, 13 L. Ed. 2d 53, rehearing denied, 379 U.S. 925, 85 S. Ct. 279, 13 L. Ed. 2d 338 (1964); McRae v. Wall, 260 N.C. 576, 133 S.E.2d 220 (1963); Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964); Evans v. Topstyle, Inc., 270 N.C. 134, 153 S.E.2d 851 (1967); Jackson v. North Carolina State Hwy. Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968); Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968); Green v. Eastern Constr. Co., 1 N.C. App. 300, 161 S.E.2d 200 (1968); Stewart v. North Carolina Dep't of Cors., 29 N.C. App. 735, 225 S.E.2d 336 (1976); Gallimore v. Marilyn's Shoes, 292 N.C. 399, 233 S.E.2d 529 (1977); Long v. Asphalt Paving Co., 47 N.C. App. 564, 268 S.E.2d 1 (1980); Walston v. Burlington Indus., 49 N.C. App. 301, 271 S.E.2d 516 (1980), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982); McNinch v. Henredon Indus., Inc., 51 N.C. App. 250, 276 S.E.2d 756 (1981); McLean v. Roadway Express, Inc., 307 N.C. 99, 296 S.E.2d 456 (1982); Robinson v. J.P. Stevens & Co., 57 N.C. App. 619, 292 S.E.2d 144 (1982); Sanderson v. Northeast Constr. Co., 77 N.C. App. 117, 334 S.E.2d 392 (1985).

The Industrial Commission's findings of fact, except jurisdictional findings, are conclusive on appeal if supported by competent evidence. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965); Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965); Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968); Thompson v. Burlington Indus., 59 N.C. App. 539, 297 S.E.2d 122 (1982), cert. denied, 307 N.C. 582, 299 S.E.2d 650 (1983).

If the evidence and the stipulations, viewed in the light most favorable to claimant, support the findings of the Industrial Commission, the courts are bound by them. Maurer v. Salem Co., 266 N.C. 381, 146 S.E.2d 432 (1966).

The Commission occupies a position analogous to that of a referee, the difference being that the findings of fact by the Commission are binding, if there is any evidence to support them, while those of a referee are not. Singleton v. Durham Laundry Co., 213 N.C. 32, 195 S.E. 34 (1937). See also, Maley v. Thomasville Furn. Co., 214 N.C. 589, 200 S.E. 438 (1948), as to the hearing commissioner.

The court was required to affirm the finding of the North Carolina Industrial Commission where competent evidence supported it pursuant to G.S. 97-86. Harrison v. Lucent Techs., 156 N.C. App. 147, 575 S.E.2d 825, 2003 N.C. App. LEXIS 80 (2003), cert. denied, 357 N.C.

164, 580 S.E.2d 365 (2003).

Even If Evidence Would Also Have Supported Contrary Findings. — If there is any competent evidence to support a finding of fact of the Industrial Commission, such finding is conclusive on appeal, even though there is evidence that would have supported a finding to the contrary. Riddick v. Richmond Cedar Works, 227 N.C. 647, 43 S.E.2d 850 (1947); Johnson v. Erwin Cotton Mills Co., 232 N.C. 321, 59 S.E.2d 828 (1950); Tucker v. Lowdermilk, 233 N.C. 185, 63 S.E.2d 109 (1951); Hawes v. Mutual Benefit Health & Accident Ass'n, 243 N.C. 62, 89 S.E.2d 739 (1955); Champion v. Hardin-Dixon Tractor Co., 246 N.C. 691, 99 S.E.2d 917 (1957); Osborne v. Colonial Ice Co., 249 N.C. 387, 106 S.E.2d 573 (1959); Humphrey v. Quality Cleaners & Laundry, 251 N.C. 47, 110 S.E.2d 467 (1959); Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962); Keller v. Electric Wiring Co., 259 N.C. 222, 130 S.E.2d 342 (1963); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Crawford v. Central Bonded Whse., 263 N.C. 826, 140 S.E.2d 548 (1965); Jones v. Myrtle Desk Co., 264 N.C. 401, 141 S.E.2d 632 (1965); Eaton v. Klopman Mills, Inc., 2 N.C. App. 363, 163 S.E.2d 17 (1968); Hales v. North Hills Constr. Co., 5 N.C. App. 564, 169 S.E.2d 24 (1969); Benfield v. Troutman, 17 N.C. App. 572, 195 S.E.2d 75, cert. denied, 283 N.C. 392, 196 S.E.2d 274 (1973); Hardin v. A.D. Swann Trucking Co., 29 N.C. App. 216, 223 S.E.2d 840 (1976); Schofield v. Great Atl. & Pac. Tea Co., 32 N.C. App. 508, 232 S.E.2d 874, cert. denied, 292 N.C. 641, 235 S.E.2d 62 (1977); Gaines v. L.D. Swain & Son, 33 N.C. App. 575, 235 S.E.2d 856 (1977); Hansel v. Sherman Textiles, 49 N.C. App. 1, 270 S.E.2d 585 (1980), rev'd on other grounds, 304 N.C. 44, 283 S.E.2d 101 (1981); Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981); Yelverton v. Kemp Furn. Co., 51 N.C. App. 675, 277 S.E.2d 441 (1981); Fann v. Burlington Indus., 59 N.C. App. 512, 296 S.E.2d 819 (1982); Carter v. Frank Shelton, Inc., 62 N.C. App. 378, 303 S.E.2d 184 (1983), cert. denied, 310 N.C. 476, 312 S.E.2d 883 (1984); Pollard v. Krispy Waffle #1, 63 N.C. App. 354, 304 S.E.2d 762 (1983); Bailey v. Smoky Mt. Enters., Inc., 65 N.C. App. 134, 308 S.E.2d 489 (1983), cert. denied, 311 N.C. 303, 317 S.E.2d 678 (1984); Sanderson v. Northeast Constr. Co., 77 N.C. App. 117, 334 S.E.2d 392 (1985); Woodell v. Starr Davis Co., 77 N.C. App. 352, 335 S.E.2d 48 (1985).

The findings of fact of the Industrial Commission are conclusive on the courts when the findings are supported by any competent evidence, notwithstanding the fact that the court, if it had been the fact-finding body, might have reached a different conclusion, the finding of facts from the evidence being the exclusive function of the Industrial Commission. McGill v. Lumberton, 218 N.C. 586, 11 S.E.2d 873 (1940). See Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

If there is any evidence of substance which directly or by reasonable inference tends to support the findings, the court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary. Russell v. Pharr Yarns, Inc., 18 N.C. App. 249, 196 S.E.2d 571 (1973); Willis v. Reidsville Drapery Plant, 29 N.C. App. 386, 224 S.E.2d 287 (1976).

If the totality of the evidence, viewed in the light most favorable to the complainant, tends directly or by reasonable inference to support the Commission's findings, these findings are conclusive on appeal even though there may be plenary evidence to support findings to the contrary. Mayo v. City of Washington, 51 N.C. App. 402, 276 S.E.2d 747 (1981).

For other examples of the application of the rule that when supported by competent legal evidence, the findings of fact of the Commission are conclusive even though they may be contrary to the opinion of the appellate court, see Williams v. Thompson, 200 N.C. 463, 157 S.E. 430 (1931); Wimbish v. Home Detective Co., 202 N.C. 800, 164 S.E. 344 (1932); Moore v. Summers Drug Co., 206 N.C. 711, 175 S.E. 96 (1934); Johnson v. Foreman-Blades Lumber Co., 216 N.C. 123, 4 S.E.2d 334 (1939); Blythe v. Welborn, 223 N.C. 857, 25 S.E.2d 555 (1940).

But facts found by the Commission under a misapprehension of law are not binding on appeal. Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948); Cooper v. Colonial Ice Co., 230 N.C. 43, 51 S.E.2d 889 (1949); Hawes v. Mutual Benefit Health & Accident Ass'n, 243 N.C. 62, 89 S.E.2d 739 (1955).

Findings May Be Set Aside Only for Complete Lack of Competent Evidence. — Industrial Commission's findings of fact are binding on a reviewing court if supported by competent evidence, and may be set aside on appeal only when there is a complete lack of competent evidence to support them. Carrington v. Housing Auth., 54 N.C. App. 158, 282 S.E.2d 541 (1981).

The findings of the Commission are conclusive only if there is evidence to show that the facts are as found. Hildebrand v. McDowell Furn. Co., 212 N.C. 100, 193 S.E. 294 (1937).

The court may set aside a finding of fact of the Industrial Commission only upon the ground that it lacks evidentiary support. McRae v. Wall, 260 N.C. 576, 133 S.E.2d 220 (1963); Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Inscoe v. DeRose Indus., Inc., 292 N.C. 210, 232 S.E.2d 449 (1977).

As an Award Not Supported by Evidence Cannot Be Upheld. — The rule that the findings of fact made by the Industrial Commission, when supported by any competent evidence, are conclusive on appeal, does not mean that the conclusions of the Commission from the evidence are in all respects unexceptionable. If those findings, involving mixed questions of law and fact, are not supported by evidence, the award cannot be upheld. Perley v. Ballenger Paving Co., 228 N.C. 479, 46 S.E.2d 298 (1948).

The findings of fact of the Industrial Commission, when supported by competent evidence, are binding upon the courts upon appeal, but findings not supported by competent evidence are not conclusive and must be set aside. Logan v. Johnson, 218 N.C. 200, 10 S.E.2d 653 (1940); Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

But if the findings of fact are supported by the evidence, the decision of the full Commission must be affirmed. Brown v. J.P. Stevens & Co., 49 N.C. App. 118, 270 S.E.2d 602 (1980), cert. denied, 304 N.C. 192, 285 S.E.2d 96 (1981).

As a general rule, an opinion and award of the Industrial Commission is conclusive on appeal if its findings of fact are supported by any competent evidence and the conclusions of law are supported by the findings. Priddy v. Cone Mills Corp., 58 N.C. App. 720, 294 S.E.2d 743 (1982).

Conclusions of the Commission will not be disturbed if justified by findings of fact. Robinson v. J.P. Stevens & Co., 57 N.C. App. 619, 292 S.E.2d 144 (1982).

Ruling Undisturbed Even Though Facts Justified Setting Aside Dismissal. — Commission's refusal to set aside dismissal was not an abuse of discretion. While there was much in the case which would have justified its setting aside dismissal, Commission's decision was supported by reason. Hogan v. Cone Mills Corp., 326 N.C. 476, 390 S.E.2d 136 (1990).

An opinion and award entered by the Commission may not be disturbed on appeal unless a patent error of law exists therein. Hoffman v. Ryder Truck Lines, 306 N.C. 502, 293 S.E.2d 807 (1982); Carter v. Frank Shelton, Inc., 62 N.C. App. 378, 303 S.E.2d 184 (1983), cert. denied, 310 N.C. 476, 312 S.E.2d 883 (1984).

Commission's legal interpretation of a particular provision is persuasive, although not binding, and should be accorded some weight on appeal and not idly cast aside, since that administrative body hears and decides all questions arising under the Workers' Compensation Act in the first instance. Deese v. Southern Lawn & Tree Expert Co., 306 N.C. 275, 293 S.E.2d 140, cert. denied, 306 N.C. 753, 303 S.E.2d 83 (1982).

A finding based on incompetent testimony is not conclusive. Plyler v. Charlotte Country Club, 214 N.C. 453, 199 S.E. 622 (1938); Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

Where the record specifically discloses that the Commission's findings of fact are based upon incompetent testimony, such as the direct testimony of a witness who refused to be cross-examined or the transcript of previous testimony given in a criminal action, the findings are not only not conclusive, but there is error and the cause will be remanded. Citizens Bank & Trust Co. v. Reid Motor Co., 216 N.C. 432, 5 S.E.2d 318 (1939).

Effect of Admission of Incompetent Evidence Where Competent Evidence Supports Findings. — Where each of the essential facts found by the Industrial Commission is supported by competent evidence, the findings are conclusive on appeal, even though some incompetent evidence was also admitted upon the hearing. Carlton v. Bernhardt-Seagle Co., 210 N.C. 655, 188 S.E. 77 (1936). See Tomlinson v. Town of Norwood, 208 N.C. 716, 182 S.E. 659 (1935); Swink v. Carolina Asbestos Co., 210 N.C. 303, 186 S.E. 258 (1936); Porter v. Noland Co., 215 N.C. 724, 2 S.E.2d 853 (1939); Baxter v. W.H. Arthur Co., 216 N.C. 276, 4 S.E.2d 621 (1939); Tindall v. American Furn. Co., 216 N.C. 306, 4 S.E.2d 894 (1939); Stallcup v. Carolina Wood Turning Co., 217 N.C. 302, 7 S.E.2d 550 (1940); MacRae v. Unemployment Comp. Comm'n, 217 N.C. 769, 9 S.E.2d 595 (1940); Blevins v. Teer, 220 N.C. 135, 16 S.E.2d 659 (1941); Miller v. Caudle, 220 N.C. 308, 17 S.E.2d 487 (1941); Haynes v. Feldspar Producing Co., 222 N.C. 163, 22 S.E.2d 275 (1942); Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942); Kearns v. Biltwell Chair & Furn. Co., 222 N.C. 438, 23 S.E.2d 310 (1942); Archie v. Greene Bros. Lumber Co., 222 N.C. 477, 23 S.E.2d 834 (1943); Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

The introduction of incompetent evidence cannot be held prejudicial where the record contains sufficient competent evidence to support the findings. Eaton v. Klopman Mills, Inc., 2 N.C. App. 363, 163 S.E.2d 17 (1968).

Adoption of Findings by Reference. — If the court's findings are in agreement with those of the Commission, it may by reference in the judgment adopt the latter as its own. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965); Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968).

VI. REVIEW OF PARTICULAR FINDINGS.

The relationship of employer and employee created by the facts found by the Commission is a question of law and the conclusion of the Commission based on those facts is reviewable. Hawes v. Mutual Benefit Health &

Accident Ass'n, 243 N.C. 62, 89 S.E.2d 739 (1955).

The finding of the Industrial Commission that deceased was an employee of defendant at the time of his fatal injury is conclusive on the courts if supported by competent evidence, notwithstanding that the court might have reached a different conclusion if it had been the fact-finding body. Cloinger v. Ambrosia Cake Bakery Co., 218 N.C. 26, 9 S.E.2d 615 (1940). But see, Francis v. Carolina Wood Turning Co., 204 N.C. 701, 169 S.E. 654 (1933), wherein it was held that the finding by the Commission on the question of whether the claimant was an employee was one of jurisdiction and was not conclusive on appeal.

The question of whether claimant was employed by defendant or by an independent subcontractor, as contended, was one of law, and reviewable, once the facts to the arrangements between the parties and their actions with reference to it had been determined by the Commission. Farmer v. Bemis Lumber Co., 217 N.C. 158, 7 S.E.2d 376 (1940).

Finding of fact that the superior of an injured worker was a supervisory employee and not an independent contractor is conclusive on appeal when supported by competent evidence. Scott v. Waccamaw Lumber Co., 232 N.C. 162, 59 S.E.2d 425 (1950).

Whether an accident arises out of and in the course of employment is a mixed question of law and fact, and the appellate court may review the record to determine if the findings and conclusions are supported by sufficient evidence. Gallimore v. Marilyn's Shoes, 292 N.C. 399, 233 S.E.2d 529 (1977); Williams v. Hydro Print, Inc., 65 N.C. App. 1, 308 S.E.2d 478 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 297 (1984); Spratt v. Duke Power Co., 65 N.C. App. 457, 310 S.E.2d 38 (1983).

On Which the Commission's Finding Is Conclusive If Supported by Evidence. — Whether an accident arises out of the employment is a mixed question of fact and law, and the finding of the Commission is conclusive if supported by any competent evidence. Chambers v. Union Oil Co., 199 N.C. 28, 153 S.E. 594 (1930); Perdue v. State Bd. of Equalization, 205 N.C. 730, 172 S.E. 396 (1934); Marsh v. Bennett College for Women, 212 N.C. 662, 194 S.E. 303 (1937); Lockey v. Cohen, Goldman & Co., 213 N.C. 356, 196 S.E. 342 (1938); McNeill v. C.A. Ragland Constr. Co., 216 N.C. 744, 6 S.E.2d 491 (1940); Ashley v. F-W Chevrolet Co., 222 N.C. 25, 21 S.E.2d 834 (1942); Hegler v. Cannon Mills Co., 224 N.C. 669, 31 S.E.2d 918 (1944); Fox v. Cramerton Mills, 225 N.C. 580, 35 S.E.2d 869 (1945); DeVine v. Dave Steel Co., 227 N.C. 684, 44 S.E.2d 77 (1947); Stubblefield v. Watson Elec. Constr. Co., 277 N.C. 444, 177 S.E.2d 882 (1970); Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976).

Commission Made Findings on All Ultimate Facts. — As competent evidence supported the Industrial Commission's finding that a carrier failed to prove a mutual mistake by the carrier and the employer, its refusal to reform the workers' compensation policy to exclude the employee and its award of benefits to the employee were affirmed; as the Commission made findings on all ultimate facts, no additional findings of fact were required Smith v. First Choice Servs., 158 N.C. App. 244, 580 S.E.2d 743, 2003 N.C. App. LEXIS 1039 (2003), cert. denied, 357 N.C. 461, 586 S.E.2d 99 (2003).

Where the evidence is conflicting, the Commission's finding of causal connection is conclusive. Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965).

Reversal Where Findings of Fact Lead to Opposite Conclusion. — Whether an accident grew out of the employment within the purview of the act is a mixed question of law and fact, which the court has the right to review on appeal, and when the detailed findings of fact force a conclusion opposite that reached by the Commission, it is the duty of the court to reverse the Commission. Alford v. Quality Chevrolet Co., 246 N.C. 214, 97 S.E.2d 869 (1957).

Whether an accident was proximately caused by the violation of a safety statute is a question for the fact-finding body. Osborne v. Colonial Ice Co., 249 N.C. 387, 106 S.E.2d 573 (1959).

Finding as to Cause of Death. — Determination of the Industrial Commission that the additional hazard created by artificial heat was the direct and superinducing cause of plaintiff's intestate's death was conclusive on appeal. Fields v. Tompkins-Johnston Plumbing Co., 224 N.C. 841, 32 S.E.2d 623 (1945).

Whether an accident was proximately caused by the violation of a safety statute is a question for the fact-finding body. Osborne v. Colonial Ice Co., 249 N.C. 387, 106 S.E.2d 573 (1959).

A finding by the Commission that the claimant sustained a compensable injury is conclusive upon an appeal to the courts if, but only if, the Commission had before it competent evidence sufficient to support such a finding. Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967).

Marriage of Deceased Employee. — Findings by the Commission upon competent evidence that the deceased employee and the femme claimant were married and lived together as husband and wife until the husband's death, thereby entitling the wife to an award of compensation, was binding upon the reviewing court, even though there was evidence that the wife's first marriage had not been dissolved.

Green v. Eastern Constr. Co., 1 N.C. App. 300, 161 S.E.2d 200 (1968).

Whether evidence shows a "reasonable ground" to defend is a matter reviewable by Court of Appeals. Robinson v. J.P. Stevens & Co., 57 N.C. App. 619, 292 S.E.2d 144 (1982).

VII. REMAND AND REHEARING.

As to the jurisdiction of the court to reverse and remand, see Perkins v. Sprott, 207 N.C. 462, 177 S.E. 404 (1934).

Remand Where Findings Insufficient. — When the findings of the Industrial Commission are insufficient for a proper determination of the question involved, the proceeding will be remanded to the Industrial Commission for additional findings. Farmer v. Bemis Lumber Co., 217 N.C. 158, 7 S.E.2d 376 (1940); Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952); Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963).

In case the findings are insufficient upon which to determine the rights of the parties, the Court of Appeals may remand the proceeding to the Industrial Commission for additional findings. Byers v. North Carolina State Hwy. Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969); Hales v. North Hills Constr. Co., 5 N.C. App. 564, 169 S.E.2d 24 (1969); Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969); Hundley v. Fieldcrest Mills, 58 N.C. App. 184, 292 S.E.2d 766 (1982); Priddy v. Cone Mills Corp., 58 N.C. App. 720, 294 S.E.2d 743 (1982).

If the findings of fact of the Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the end that the Commission may make proper findings. Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963); Byers v. North Carolina State Hwy. Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968), aff'd, 275 N.C. 229, 166 S.E.2d 649 (1969); Morgan v. Thomasville Furn. Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968); Gaines v. L.D. Swain & Son, 33 N.C. App. 575, 235 S.E.2d 856 (1977); Walston v. Burlington Indus., 49 N.C. App. 301, 271 S.E.2d 516 (1980), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982); Grant v. Burlington Indus., Inc., 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Remand Where Commission Fails to Find Facts. — Where the Commission fails to find facts, and justice so demands, the cause will be remanded. Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942).

Where the Industrial Commission failed to find the facts necessary for a determination of the rights of the parties, the judgment of the superior court (now the Court of Appeals) was reversed in order that it could remand to the Industrial Commission with directions to make necessary findings of fact on which the rights of the parties could be determined. Moore v. Adams Elec. Co., 259 N.C. 735, 131 S.E.2d 356 (1963).

Remand for Specific Findings. — Stipulations to the effect that plaintiff employee became disabled while at work are insufficient alone to support an award of compensation, and a case is properly remanded to the Industrial Commission for specific findings from the evidence and stipulations as to whether claimant was injured by accident. Hargus v. Select Foods, Inc., 271 N.C. 369, 156 S.E.2d 737 (1967).

Remand for More Complete Findings. — Where the Commission's findings of fact are supported by competent evidence, the superior court (now the Court of Appeals) has no power to remand for more complete findings. Blevins v. Teer, 220 N.C. 135, 16 S.E.2d 659 (1941).

Remand Where Facts Found Under Misapprehension of Law. — Where it appears that the Industrial Commission has found the facts under a misapprehension of the law, the cause will be remanded for findings by the Commission upon consideration of the evidence in its true legal light. McGill v. Town of Lumberton, 215 N.C. 752, 3 S.E.2d 324 (1939); Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965); Cauble v. Macke Co., 78 N.C. App. 793, 338 S.E.2d 320 (1986).

When facts are found or the Industrial Commission fails to find facts under a misapprehension of the law, a remand may be necessary so that the evidence may be considered in its true legal light; the proper procedure on appeal is to remand a case when the Commission's findings of fact are insufficient to determine the rights of parties upon a claim for compensation. Mills v. Mills, 68 N.C. App. 151, 314 S.E.2d 833 (1984).

Remand for Taking of Additional Evidence. — Ordinarily the limited authority of the reviewing court does not permit it to order remand of the case for the taking of additional evidence. Byers v. North Carolina State Hwy. Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968), aff'd, 275 N.C. 229, 166 S.E.2d 649 (1969).

As to the power of the court to remand on ground of newly discovered evidence, see Byrd v. Gloucester Lumber Co., 207 N.C. 253, 176 S.E. 572 (1934); McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966); Hall v. W.A. Davis Milling Co., 1 N.C. App. 380, 161 S.E.2d 780 (1968).

The burden is upon the applicant for a rehearing to rebut the presumption that the award is correct and that there has been a lack of due diligence. McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966); Hall v.

W.A. Davis Milling Co., 1 N.C. App. 380, 161 S.E.2d 780 (1968).

Applicant makes out "a proper case" for granting a new hearing for newly discovered evidence only when it appears by affidavit: (1) That the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is competent, material, and relevant; (4) that due diligence has been used, or that there have been no laches, in procuring the testimony at the trial; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966); Hall v. W.A. Davis Milling Co., 1 N.C. App. 380, 161 S.E.2d 780 (1968).

The appellate court may remand a cause to the Industrial Commission on the ground of newly discovered evidence only when a proper case is made to appear by affidavit meeting the seven requirements set out in Johnson v. Seaboard Air Line Ry., 163 N.C. 431, 79 S.E. 690, 1915B Ann. Cas. 598 (1913); Byers v. North Carolina State Hwy. Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968), aff'd, 275 N.C. 229, 166 S.E.2d 649 (1969).

It is error for the court to direct an award for compensation. The correct procedure is to remand the case to the Industrial Commission. Francis v. Wood Turning Co., 204 N.C. 701, 169 S.E. 654 (1933), decided prior to the 1967 amendment.

Surrender of Jurisdiction by Court upon Remand. — When a proceeding is remanded to the Commission for a specific purpose, the superior court (now the Court of Appeals) surrenders jurisdiction and the Commission acquires it for all purposes. Butts v. Montague Bros., 208 N.C. 186, 179 S.E. 799 (1935).

§ 97-86.1. Payment of award pending appeal in certain cases.

(a) When any appeal or certification to the Court of Appeals is pending, and it appears to the Commission that any part of the award appealed from is not appealed by the issues raised by such appeal, the Commission may, on action or of its own motion, render a judgment directing compliance with any portion of such award not affected by such appeal; or, if the only issue raised by such appeal is the amount of the average weekly wage, the Commission shall, on motion of the claimant, direct the payment of such portion of the compensation payable under its award as is not in dispute, if any, pending final adjudication of the undisputed portion thereof.

(b) In any claim under the provisions of this Chapter where it is conceded by all parties that the employee's claim is a compensable one and the amount is not disputed and where the only issue is which employer or employers, carrier or carriers are liable, the Commission may, where an appeal from a hearing commissioner or the full Commission is taken by one or more parties, order payment made to the employee pending outcome of the case on appeal. The order of payment shall contain the provision that if the employer or carrier ordered to pay is not ultimately liable for the amount paid, the employer or carrier will be reimbursed by the employer or carrier ultimately held liable.

(c) No payment made pursuant to the provisions of this section shall in any manner operate as an admission of liability or estoppel to deny liability by an employer or carrier.

(d) In any claim under the provisions of this Chapter wherein one employer or carrier has made payments to the employee or his dependents pending a final disposition of the claim and it is determined that different or additional employers or carriers are liable, the Commission may order any employers or carriers determined liable to make repayment in full or in part to any employer or carrier which has made payments to the employee or his dependents. (1977, c. 521, s. 2.)

Legal Periodicals. — For survey of 1977 worker's compensation law, see 56 N.C.L. Rev. 1166 (1978).

CASE NOTES

Credit for Overpayment. — There was no basis, under G.S. 97-86.1(d), for denying a first employer a credit for benefits overpaid to an employee where the employee's disability was attributable to the exacerbation of his occupational disease, first contracted while working for the first employer, while working for a second employer. Shockley v. Cairn Studios Ltd., 149 N.C. App. 961, 563 S.E.2d 207, 2002 N.C. App. LEXIS 363 (2002), cert. dismissed, 356 N.C. 678, 577 S.E.2d 887 (2003), cert. denied, 356 N.C. 678, 577 S.E.2d 888 (2003).

Applied in Goodson v. P.H. Glatfelter Co., 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

Cited in Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982); West v. Bladenboro Cotton Mills, Inc., 62 N.C. App. 267, 302 S.E.2d 645 (1983); Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

§ 97-86.2. Interest on awards after hearing.

In any workers' compensation case in which an order is issued either granting or denying an award to the employee and where there is an appeal resulting in an ultimate award to the employee, the insurance carrier or employer shall pay interest on the final award or unpaid portion thereof from the date of the initial hearing on the claim, until paid at the legal rate of interest provided in G.S. 24-1. If interest is paid it shall not be a part of, or in any way increase attorneys' fees, but shall be paid in full to the claimant. (1981, c. 242, s. 1; 1985, c. 598; 1987, c. 729, s. 16.)

Legal Periodicals. — For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

CASE NOTES

Legislative Intent. — An order directing defendants to forthwith comply with the opinion and award has the import of an affirmance under this section. A contrary holding would permit circumvention of the compensation statutes by appeals taken but subsequently abandoned upon calendaring for review; carriers, through frivolous appeals, could temporarily deprive injured employees of awards while retaining the earnings thereon. The General Assembly, in the enactment of this section, did not intend to permit such a result. Suggs v. Kelly Springfield Tire Co., 71 N.C. App. 428, 322 S.E.2d 441 (1984), decided prior to 1985 amendment.

Award Entered Prior to Effective Date of Section. — The initial award of permanent partial disability entered on January 14, 1980 by the deputy commissioner, and not the award of total permanent disability made by the full Industrial Commission on October 28, 1982, was controlling in the application of this section; as such award was entered prior to the effective date of this section, the plaintiff was not entitled to interest on the award. Peoples v. Cone Mills Corp., 86 N.C. App. 227, 356 S.E.2d 801 (1987).

Standing. — Under G.S. 97-86.2, a claimant is entitled to interest on medical compensation only where there is an appeal resulting in an ultimate award to the employee, and the possibility of a favorable decision on appeal is not an invasion of a legally protected interest that is either concrete and particularized, or actual or imminent; an estate and a widow had no standing to bring a claim against an employer and its carrier for full payment of their decedent's medical expenses where the healthcare provider had accepted a reduced amount as payment in full, and there was no debt left to be collected. Estate of Apple v. Commer. Courier Express, Inc., 168 N.C. App. 175, 607 S.E.2d 14, 2005 N.C. App. LEXIS 173 (2005), cert. denied, — N.C. —, 613 S.E.2d 688 (2005), cert. dismissed, — N.C. —, 613 S.E.2d 689 (2005).

Interest Properly Awarded. — Industrial Commission did not err in awarding interest on plaintiff's outstanding medical expenses pursuant to this section. Childress v. Trion, Inc., 125 N.C. App. 588, 481 S.E.2d 697 (1997), cert. denied, 346 N.C. 276, 487 S.E.2d 541 (1997).

Industrial commission properly awarded interest on retroactive attendant care for a comatose worker pursuant to G.S. 97-86.2, as that statute allowed for an award of interest pursuant to G.S. 24-1 on outstanding medical expenses, and the fact that the money was going directly to two relatives who were taking care of a worker in a vegetative state, rather than the worker himself, did not preclude the commission from awarding interest. Palmer v. Jackson, 161 N.C. App. 642, 590 S.E.2d 275, 2003 N.C. App. LEXIS 2266 (2003).

Payment of Interest. — Interest awarded must be paid in full to plaintiffs and cannot be used to calculate the attorney's fees. Strickland v. Carolina Classics Catfish, Inc., 127 N.C. App. 615, 492 S.E.2d 362 (1997), cert. denied, 347 N.C. 585, 502 S.E.2d 617 (1998).

Plaintiffs were not entitled to receive interest on entire award (commuted and uncommuted portions) from the date of the initial hearing because the plaintiffs were not entitled to the full uncommuted award at the time of the initial hearing. Strickland v. Carolina Classics Catfish, Inc., 127 N.C. App. 615, 492 S.E.2d 362 (1997), cert. denied, 347 N.C. 585, 502 S.E.2d 617 (1998).

Applied in Hicks v. Brown Shoe Co., 64 N.C. App. 144, 306 S.E.2d 543 (1983); Mullinax v. Fieldcrest Cannon, Inc., 100 N.C. App. 248, 395 S.E.2d 160 (1990).

Cited in Myers v. Department of Crime Control & Pub. Safety, 67 N.C. App. 553, 313 S.E.2d 276 (1984); Henke v. First Colony Bldrs., Inc., 126 N.C. App. 703, 486 S.E.2d 431 (1997); Faulkenbury v. Teachers' & State Employees' Ret. Sys., 132 N.C. App. 137, 510 S.E.2d 675, 1999 N.C. App. LEXIS 89 (1999), cert. denied, 350 N.C. 379, 536 S.E.2d 620 (1999); Davis v. Weyerhaeuser Co., 132 N.C. App. 771, 514 S.E.2d 91 (1999).

§ 97-87. Judgments on awards.

(a) As used in this section, "award" includes the following:

(1) A form filed, or an award arising, under G.S. 97-18(b), 97-18(d), or 97-82(b).
(2) A memorandum of agreement approved by the Commission.
(3) An order or decision of the Commission.
(4) An award of the Commission from which there has been no appeal.
(5) An award of the Commission affirmed on appeal.

(b) When an award or portion of an award provides for a sum certain or for a sum that can by computation be made certain, and that sum is due and payable as of the date of the award, a judgment may be docketed as provided in subsection (d) of this section, in an amount equal to that sum.

(c) When an award or portion of an award provides for periodic payments to be made on or after the date of the award, a judgment may be docketed as provided in subsection (d) of this section, in an amount equal to the sum stated in any Certificate of Accrued Arrearages that is issued by the Commission under this subsection. If any payment that has accrued after the date of the award, or after the date specified in the most recent Certificate of Accrued Arrearages issued under this subsection, is not received by the claimant when due, the following procedure is available for obtaining a Certificate of Accrued Arrearages:

(1) The claimant may file with the Commission a Statement of Accrued Arrearages, on a form approved by the Commission, and shall serve a copy on all parties against whom judgment is sought and their attorney of record.
(2) Any party against whom judgment is sought may, within 15 days of the date of service of a Statement of Accrued Arrearages, file with the Commission proof of any payments that have been made or other responsive pleadings.
(3) If no proof or other responsive pleading is filed within 15 days of the date of service of the Statement, the Commission shall immediately issue a Certificate of Accrued Arrearages.
(4) If proof of payment or other responsive pleading is filed, the Commission shall, within seven days, either issue a Certificate of Accrued Arrearages that shall state the sum of payments due or decline to issue a Certificate of Accrued Arrearages. The Commission shall notify the claimant, the party against whom judgment is sought, and their attorney of record of the Commission's decision.
(5) If any party disputes the decision of the Commission entered under subdivision (c)(4) of this section, the party may appeal to the full

Commission within 10 days of the entry of the decision of the Commission. The nonappealing party may file a response within 10 days of receiving notice of appeal. The notice of appeal shall request one of the following:

a. The Commission reconsider the decision entered based on the record and any additional evidence that parties submit with the notice and response.

b. A de novo evidentiary hearing before the full Commission.

(6) The Commission shall grant the request for an evidentiary hearing under sub-subdivision (c)(5)b. of this section if a material issue of fact exists whose resolution is necessary to determine the appeal.

(7) If a notice of appeal is given under sub-subdivision (c)(5)a. of this section, the Commission shall issue its decision within 10 days of the filing of the response under subdivision (c)(5)b. of this section. If a notice of appeal is given under sub-subdivision (c)(5) of this section, the Commission shall either conduct an evidentiary hearing and issue its decision on the appeal within 90 days of the filing of the response under subdivision (c)(5) of this section or deny the request for the evidentiary hearing and issue its decision within 10 days of the filing of the response under subdivision (c)(5) of this section. Further appeals are governed by G.S. 97-86.

(8) Each award and each Certificate of Accrued Arrearages shall include the following information:

a. The names and addresses of the parties.

b. The sum of all principal amounts that have accrued and remain unpaid since the date of the award or since the date of the most recent prior Certificate of Accrued Arrearages.

c. The total of any interest that has accrued on the award, as of the date of the Certificate of Accrued Arrearages, since the date of the award or since the date of the most recent prior Certificate of Accrued Arrearages.

d. Any costs, penalties, or monetary sanctions included in the award.

(d) Any party in interest may file a certified copy of an award described in subsection (b) of this section, or of a Certificate of Accrued Arrearages, in the office of the clerk of superior court of the county in which the defendant has a place of business or has property, or in which an injury occurred, or in Wake County. An award shall be accompanied by the party's affidavit stating that the award has become final and the time for making the first payment under the award has expired.

(e) Promptly after a certified copy of an award or of a Certificate of Accrued Arrearages is filed, the clerk shall docket and index a judgment as provided in Chapter 1 of the General Statutes. The principal amount in the award or in the Certificate of Accrued Arrearages shall bear interest at the judgment rate from the date the judgment is docketed. The judgment may be enforced in the same manner as a judgment docketed under Chapter 1 of the General Statutes.

(f) The filing of an award, or of a Certificate of Accrued Arrearages, for docketing as a judgment under this section shall be treated as a civil action for record-keeping purposes. The amount in which the judgment is docketed shall determine the amount of the costs to be collected at the time of filing and assessed pursuant to G.S. 7A-305.

(g) Nothing in this section shall be construed to limit the Commission's authority to impose any other remedy provided by law. (1929, c. 120, s. 61; 2001-477, s. 1.)

Editor's Note. — Session Laws 2001-477, s. 1, which amended G.S. 1-209 and 97-87 to provide for agreements, orders and final awards under the Workers' Compensation Act to be entered as judgments by the clerk of the superior court, provides in s. 3: "This act becomes effective June 1, 2002, and applies to all forms filed and awards arising under G.S. 97-18(b), 97-18(d), or 97-82(b) that are filed or that arise before, on, or after that date; all agreements approved by the North Carolina Industrial Commission under the Workers' Compensation Act, Article 1 of Chapter 97 of the General Statutes, that are approved before, on, or after that date; all orders or decisions of the North Carolina Industrial Commission under the Workers' Compensation Act that are entered before, on, or after that date; and all awards of the North Carolina Industrial Commission unappealed from or affirmed upon appeal under the Workers' Compensation Act that are awarded before, on, or after that date, and to all Certificates of Accrued Arrearages that are issued on and after that date."

CASE NOTES

***Editor's Note.** — The cases below were decided prior to the 2001 amendment of this section, providing for agreements, orders and final awards under the Workers' Compensation Act to be entered as judgments by the clerk of the superior court.*

Remedy Exclusive. — The Act does not provide for the enforcement of an award of the Industrial Commission by execution or otherwise. Nor does it authorize or contemplate the institution and maintenance of a civil action based on such award. The exclusive remedy of claimant in a proceeding under the Act is that provided by this section. Bryant v. Poole, 261 N.C. 553, 135 S.E.2d 629 (1964).

Pleading. — A worker's complaint demanding entry of judgment against his employer for the sums due under an Industrial Commission Form 60 was an acceptable method for asserting a claim, where the complaint failed to state that the claimant was seeking judgment under this section, but he pled facts sufficient to alert the employer that relief was being sought under this section. Calhoun v. Wayne Dennis Heating & Air Conditioning, 129 N.C. App. 794, 501 S.E.2d 346 (1998).

Procedure Where No Appeal Is Taken. — The procedure for the enforcement of an award of the Industrial Commission when no appeal is taken therefrom is by filing a certified copy of the award in the superior court, whereupon said court shall render judgment in accordance therewith and notify the parties. Champion v. Vance County Bd. of Health, 221 N.C. 96, 19 S.E.2d 239 (1942).

Section Refers to Judgment of Superior Court. — The text of this section is clear. The judgment referred to is a judgment of the superior court, not an award of the Industrial Commission. Bryant v. Poole, 261 N.C. 553, 135 S.E.2d 629 (1964).

Mandamus to Compel County Board of Health to Pay Award. — Mandamus to compel a municipal corporation, governmental agency or public officer to pay a claim is equivalent to execution, and therefore a suit to compel a county board of health to pay an award rendered against it by the Industrial Commission from which no appeal was taken will not lie until judgment on the award has been rendered by the superior court in accordance with the procedure outlined by this section. Champion v. Vance County Bd. of Health, 221 N.C. 96, 19 S.E.2d 239 (1942).

An agreement for the payment of compensation, when approved by the Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal. Tucker v. Lowdermilk, 233 N.C. 185, 63 S.E.2d 109 (1951); Tabron v. Gold Leaf Farms, Inc., 269 N.C. 393, 152 S.E.2d 533 (1967); Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968).

The employer's execution of Industrial Commission Form 60 constitutes an award of the Commission and thus entitles the employee to seek the imposition of a judgment, which in turn entitles him to seek execution for past due installments and future installments as they become due. Calhoun v. Wayne Dennis Heating & Air Conditioning, 129 N.C. App. 794, 501 S.E.2d 346 (1998).

Applied in Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960).

Cited in Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953); Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971); Travelers Ins. Co. v. Rushing, 36 N.C. App. 226, 243 S.E.2d 420 (1978); Weydener v. Carolina Village, 45 N.C. App. 549, 263 S.E.2d 329 (1980); Watts v. Hemlock Homes of the Highlands, Inc., 141 N.C. App. 725, 544 S.E.2d 1, 2001 N.C. App. LEXIS 22 (2001), cert. denied, 353 N.C. 398, 547 S.E.2d 431 (2001).

§ 97-88. Expenses of appeals brought by insurers.

If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs. (1929, c. 120, s. 62; 1931, c. 274, s. 11; 1971, c. 500.)

Cross References. — As to the assessment of costs incurred in hearings brought without reasonable grounds, see G.S. 97-88.1.

CASE NOTES

Construction with Other Sections. — This section and G.S. 97-88.1 are supplementary in nature. This section allows an injured employee to move that its attorney's fees be paid whenever an insurer appeals to the Full Commission, or to a court of the appellate division, and the insurer is required to make payments to the injured employee. By contrast, an award of attorney's fees under G.S. 97-88.1 requires that the litigation be brought, prosecuted, or defended without reasonable ground. Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

The statutory requirements for awarding attorney's fees to plaintiff under G.S. 97-88 are met when defendant appeals the Industrial Commission's order directing that defendant pay additional benefits to plaintiff, and that order is affirmed; there is no proviso that "reasonable ground" be found lacking, which applies to fees sought under G.S. 97.88.1, at the original hearing before the commission. Brown v. Public Works Comm'n, 122 N.C. App. 473, 470 S.E.2d 352 (1996).

Validity. — This section is valid. Russell v. Western Oil Co., 206 N.C. 341, 174 S.E. 101 (1934).

And Constitutes Only Statutory Authority to Award Fees. — Although the Commission is authorized to approve fees received by attorneys for services rendered in workers' compensation matters (G.S. 97-90), the only statutory authority to award fees as a part of the costs is contained in this section. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

Fees Only for Portion of Case Attributable to Appeal. — Under this section, the Commission is empowered to award to the injured employee attorney's fees only for the portion of the case attributable to the insurer's appeal(s). Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

The statutory requirements for awarding attorney's fees to plaintiff under this section are met when defendant appeals the Industrial Commission's order directing that defendant pay additional benefits to plaintiff and that order is affirmed; there is no proviso that "reasonable ground" be found lacking, which applies to fees sought under GS 97.88.1, at the original hearing before the Commission. Brown v. Public Works Comm'n, 122 N.C. App. 473, 470 S.E.2d 352 (1996).

This section includes carriers, self insurers, and noninsurers. Morris v. Laughlin Chevrolet Co., 217 N.C. 428, 8 S.E.2d 484 (1940).

Standing. — Under G.S. 97-88 and G.S. 97-88.1, an award of attorney's fees is a discretionary decision made by the North Carolina Industrial Commission, and the possibility of an attorney's fees award is not an invasion of a legally protected interest that is concrete and particularized, or actual or imminent; an estate and a widow had no standing to bring a claim against an employer and its carrier for full payment of their decedent's medical expenses where the healthcare provider had accepted a reduced amount as payment in full, and there was no debt left to be collected. Estate of Apple v. Commer. Courier Express, Inc., 168 N.C. App. 175, 607 S.E.2d 14, 2005 N.C. App. LEXIS 173 (2005), cert. denied, — N.C. —, 613 S.E.2d 688 (2005), cert. dismissed, — N.C. —, 613 S.E.2d 689 (2005).

When Section Is Applicable. — The better interpretation of this statute is that the Commission, in its discretion, can award attorneys' fees only when an appeal is before it to review a hearing commissioner's decision. Suggs v. Kelly Springfield Tire Co., 71 N.C. App. 428, 322 S.E.2d 441 (1984).

This section is applicable only when proceedings are brought by the insurer and the court orders the insurer to make or to continue payments of compensation to the injured employee. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

This section authorizes reasonable attorneys' fees as a part of the bill of costs only when the decision orders the insurer to make, or to continue, payments of compensation to the injured employee. Ashley v. Rent-A-Car Co., 1 N.C. App. 171, 160 S.E.2d 521 (1968).

This section requires that there be a hearing or proceeding brought by the insurer from which the insurer is ordered to pay an award. Taylor v. J.P. Stevens Co., 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified and aff'd, 307 N.C. 392, 298 S.E.2d 681 (1983).

Requirements of G.S. 97-88 were satisfied, and a worker's request for an award of costs on appeal was granted where the employer and the carrier appealed a deputy commissioner's decision that temporary total disability compensation be paid to the worker; the North Carolina Industrial Commission had affirmed the award of temporary total disability compensation — which decision the employer and the carrier had appealed to the appellate court, and the appellate court affirmed the decision that the worker's disability compensation be reinstated. Brooks v. Capstar Corp., 168 N.C. App. 23, 606 S.E.2d 696, 2005 N.C. App. LEXIS 175 (2005), appeal dismissed, 360 N.C. 60, 621 S.E.2d 170 (2005).

When Section Is Inapplicable. — The portion of this section requiring defendant carrier to pay plaintiff's costs, including attorneys' fees, incident to the appeal by defendants from the Commission to the superior court does not apply when the Supreme Court finds error in the Commission's decision in respect to the sole controversy presented by the appeal. Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 94 S.E.2d 790 (1956); Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Intervenor was not entitled to attorneys' fees under this section, where intervenor had accepted Medicaid as payment for injured employee's medical care under Medicaid, Title XIX of the Social Security Act, 42 U.S.C. § 1396-1396v, and in conjunction with North Carolina's Medicaid program as set out in G.S. 108A-54 thru 108A-70.5, and, thereby, gave up its right to hold injured employee liable for any costs associated with that care aside from the standard deductible, coinsurance or copayment required. Pearson v. C.P. Buckner Steel Erection, 139 N.C. App. 394, 533 S.E.2d 532, 2000 N.C. App. LEXIS 912 (2000), cert denied, 353 N.C. 379, 547 S.E.2d 434 (2001).

Payments in Addition to Medicaid Prohibited. — the prerequisites for an award pursuant to this section were fulfilled. Robinson v. J.P. Stevens & Co., 57 N.C. App. 619, 292 S.E.2d 144 (1982).

"Commission" and "Court" Not Used Interchangeably. — Use of the wording "Commission or court" on three separate occasions does not mean that the Commission and the court are interchangeable, nor that the Commission can award attorneys' fees for services rendered before the Court of Appeals, while the Court of Appeals can award such fees for services rendered before the Industrial Commission. Buck v. Procter & Gamble Mfg. Co., 58 N.C. App. 804, 295 S.E.2d 243 (1982), cert. denied, 308 N.C. 543, 304 S.E.2d 236 (1983). But see Taylor v. J.P. Stevens Co., 307 N.C. 392, 298 S.E.2d 681 (1983).

The costs may be assessed either by the Commission or by the court. Morris v. Laughlin Chevrolet Co., 217 N.C. 428, 8 S.E.2d 484 (1940).

Award of Attorneys' Fees Is Within Discretion of Commission. — The language of both this section and G.S. 97-88.1 clearly indicates that an award of attorneys' fees is not required to be granted. Such language places the decision of whether to award attorneys' fees within the sound discretion of the Industrial Commission. Taylor v. J.P. Stevens Co., 307 N.C. 392, 298 S.E.2d 681 (1983).

In a workers' compensation case involving a Department of Corrections officer's claim for salary continuation, the Industrial Commission could in its discretion award reasonable attorney's fees under G.S. 143-166.19. Ruggery v. North Carolina Dep't of Cors., 135 N.C. App. 270, 520 S.E.2d 77 (1999).

Where the Industrial Commission had failed to determine whether an employee was entitled to her attorney's fees, pursuant to G.S. 97-88.1, as a result of an appeal taken by the employer and insurer from the Commission's award of additional benefits to her due to her back injury as a result of a slip and fall, the matter was remanded to the Commission for proper findings on the issue of the appropriateness of the employer's grounds; however, the court awarded the employee her attorney's fees as costs of the appeal, pursuant to G.S. 97-88, because much of the disability benefits that had been awarded were affirmed. Whitfield v. Lab. Corp., 158 N.C. App. 341, 581 S.E.2d 778, 2003 N.C. App. LEXIS 1192 (2003).

North Carolina Industrial Commission did not abuse its discretion in denying an injured city employee attorney's fees where the Commission on remand reversed its decision to credit a city, which was self-insured, for disability retirement benefits paid to the employee because the decision to award attorneys fees was consigned to the discretion of the Commission. Cox v. City of Winston-Salem, 171 N.C. App. 112, 613 S.E.2d 746, 2005 N.C. App. LEXIS 1161 (2005).

And the Commission's decision must be upheld unless there is an abuse of discretion. Taylor v. J.P. Stevens Co., 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified and aff'd, 307 N.C. 392, 298 S.E.2d 681 (1983).

The power given the court under this section to order that the costs to the injured employee of such proceedings, including a reasonable attorneys' fee to be determined by the Commission, shall be paid by the insurer as part of the bill of costs is within the discretion of the court, and an order appearing in the judgment will not be reviewed by the Supreme Court. Perdue

v. State Bd. of Equalization, 205 N.C. 730, 172 S.E. 396 (1934).

The Commission, in its discretion, can award attorneys' fees only when an appeal is before it to review a hearing commissioner's decision. In such a situation, the amount of the award for attorney fees is limited to the value of those services rendered on the appeal taken to the Industrial Commission. Buck v. Procter & Gamble Mfg. Co., 58 N.C. App. 804, 295 S.E.2d 243 (1982), cert. denied, 308 N.C. 543, 304 S.E.2d 236 (1983). But see Taylor v. J.P. Stevens Co., 307 N.C. 392, 298 S.E.2d 681 (1983).

Fees Not Awarded Where Only Claimant Appeals. — In its sound discretion, the Industrial Commission may award claimant attorneys' fees in cases in which defendant insurer appealed. However, the Industrial Commission may not award attorneys' fees pursuant to this section in cases in which only the claimant appealed. Harwell v. Thread, 78 N.C. App. 437, 337 S.E.2d 112 (1985).

Industrial Commission did not abuse its discretion when it refused to assess attorney's fees against defendants in appeal brought by plaintiff. Valles de Portillo v. D.H. Griffin Wrecking Co., 134 N.C. App. 714, 518 S.E.2d 555, 1999 N.C. App. LEXIS 904 (1999), cert. denied, 351 N.C. 186, 541 S.E.2d 727 (1999).

Expenses and Fees Incurred at Appellate Court Level. — Where defendant/insurer appealed deputy commissioner's decision, and then appealed the full Commission's decision, and the court affirmed the prior decisions, the requirements of this section were satisfied and the court granted the plaintiff's request for expenses incurred on appeal, including attorney's fees. Flores v. Stacy Penny Masonry Co., 134 N.C. App. 452, 518 S.E.2d 200 (1999).

Employee's motion for fees and expenses on appeal was not properly raised as a cross-assignment of error; moreover, even if it had been properly raised, an appellate court declined in its discretion to issue such an order. Guerrero v. Brodie Contrs., Inc., 158 N.C. App. 678, 582 S.E.2d 346, 2003 N.C. App. LEXIS 1226 (2003).

Where the city appealed the deputy commissioner's decision that temporary total disability compensation be paid to the police officer, on appeal the North Carolina Industrial Commission unanimously affirmed the award of temporary total disability compensation, and the city unsuccessfully appealed to the court, the statutory requirements were satisfied and the court, in its discretion, granted the officer's request for expenses incurred in the appeal; the matter was remanded for the commission to determine the proper fees. Rose v. City of Rocky Mount, — N.C. App. —, 637 S.E.2d 251, 2006 N.C. App. LEXIS 2413 (2006).

This section provides the commission with authority to allow attorneys' fees for work done in furtherance of an appeal before an appellate court; however, the decision to grant or deny a request for such an award will not be disturbed in the absence of an abuse of discretion. Taylor v. J.P. Stevens Co., 307 N.C. 392, 298 S.E.2d 681 (1983).

The Commission may exercise limited discretion when the Court of Appeals approves an award of attorneys' fees but certifies its decision to the Commission with instructions to decide the exact amount to be awarded. In such a case, the Commission may determine only the amount of the award and not whether the award should be made at all. It follows that the Court of Appeals is the only body which can decide whether to allow attorneys' fees for services rendered on an appeal taken to the Court of Appeals. Buck v. Procter & Gamble Mfg. Co., 58 N.C. App. 804, 295 S.E.2d 243 (1982), cert. denied, 308 N.C. 543, 304 S.E.2d 236 (1983). But see Taylor v. J.P. Stevens Co., 307 N.C. 392, 298 S.E.2d 681 (1983).

Awards Upheld. — The allowance of attorneys' fees to claimant's attorneys' in a proceeding under the act was held authorized by this section. Brooks v. Carolina Rim & Wheel Co., 213 N.C. 518, 196 S.E. 835 (1938); Gant v. Crouch, 243 N.C. 604, 91 S.E.2d 705 (1956).

Affirmance by the full Commission of the hearing commissioner's findings of fact, conclusions, and award, and approval of a fee of $150.00 for claimant's counsel, in addition to the fee for claimant's counsel approved by the hearing commissioner, and an order that such fee be assessed against defendant as a part of the costs of the appeal in accordance with the provisions of this section was not error. Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962).

Industrial Commission properly awarded attorney's fees upon finding defendants in violation of rules by terminating compensation without the Commission's approval, and by refusing to resume immediate payments following the deputy commissioner's order. Hieb v. Howell's Child Care Ctr., Inc., 123 N.C. App. 61, 472 S.E.2d 208 (1996).

Industrial Commission did not abuse its discretion in awarding plaintiff attorney fees for successfully defending his appeal. Childress v. Trion, Inc., 125 N.C. App. 588, 481 S.E.2d 697 (1997), cert. denied, 346 N.C. 276, 487 S.E.2d 541 (1997).

Fee Upheld Even Where Appeal Was Made on Reasonable Grounds. — An award of fees under this section is permitted even if the insurer who institutes the proceeding has reasonable grounds, provided the insurer is ordered as a result of the proceeding to make or continue making benefit payments to the injured worker. Lewis v. Sonoco Prods. Co., 137 N.C. App. 61, 526 S.E.2d 671, 2000 N.C. App. LEXIS 257 (2000).

Award Modified on Appeal to Require Defendant to Pay Costs. — Where plaintiff ultimately prevailed against the defendants, and since costs follow the final judgment, the opinion and award of the Commission in which it was provided that "Each side shall pay its own costs as the same relate to the appeal" was modified so as to require the defendants to pay the costs of the appeal. Grigg v. Pharr Yarns, Inc., 15 N.C. App. 497, 190 S.E.2d 285 (1972).

Remand for Determination of Attorneys' Fees. — Where the language in the Commission's order regarding this section was so ambiguous as to preclude review as to whether the Commission believed it lacked authority to award attorneys' fees where both the insurer and the claimant appealed, the case could be remanded to the Commission for a discretionary determination as to an award of attorneys' fees to claimant. Harwell v. Thread, 78 N.C. App. 437, 337 S.E.2d 112 (1985).

Although evidence in the record supported the North Carolina Industrial Commission's judgment that an employee's cancer was accelerated by injuries the employee sustained in a work-related accident, and the appellate court affirmed the Commission's decision to award temporary total disability benefits to the employee, the court remanded the case to the Commission for further proceedings because the record did not explain how the Commission determined the employee's average weekly wage, a determination that was central to its award of benefits, and because there was conflicting evidence in the record which raised questions about the Commission's findings that a city which employed the employee was entitled to a credit for long-term disability benefits it paid the employee, and that the employee was not entitled to an award of attorney's fees. Cox v. City of Winston-Salem, 157 N.C. App. 228, 578 S.E.2d 669, 2003 N.C. App. LEXIS 535 (2003).

Employee Was Entitled to Have Employer Pay Attorney's Fees. — Where an employer had no reasonable basis for appealing the decision of the Deputy Commissioner to the Full Commission and requiring employee to appeal to the court of appeals to obtain the benefits under settlement agreement approved by the Industrial Commission, the employee was entitled to have his attorneys' fees paid by the employer. Mullinax v. Fieldcrest Cannon, Inc., 100 N.C. App. 248, 395 S.E.2d 160 (1990).

Where defendant appealed the initial award of benefits from the deputy commissioner to the full Commission and then to the Court of Appeals, and both affirmed the award of benefits, the requirements of this section were satisfied, and the Commission could award plaintiff the costs, including attorney's fees, of defending those appeals to the full Commission and to the Court of Appeals. Estes v. North Carolina State Univ., 117 N.C. App. 126, 449 S.E.2d 762 (1994).

Failure to Address Fee Request. — North Carolina Industrial Commission awarded a claimant the ordinary contingent fee under G.S. 97-90, and erred by not addressing the claimant's motion seeking additional attorney's fees pursuant G.S. 97-88 or G.S. 97-88.1. Clawson v. Phil Cline Trucking, Inc., 168 N.C. App. 108, 606 S.E.2d 715, 2005 N.C. App. LEXIS 152 (2005).

Applied in Williams v. Thompson, 203 N.C. 717, 166 S.E. 906 (1932); Brooks v. Carolina Rim & Wheel Co., 213 N.C. 518, 196 S.E. 835 (1939); Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969); Poplin v. PPG Indus., 108 N.C. App. 55, 422 S.E.2d 353 (1992); Matthews v. Petroleum Tank Serv., Inc., 108 N.C. App. 259, 423 S.E.2d 532 (1992); Brown v. Family Dollar Distribution Ctr., 129 N.C. App. 361, 499 S.E.2d 197 (1998); Rackley v. Coastal Painting, 153 N.C. App. 469, 570 S.E.2d 121, 2002 N.C. App. LEXIS 1186 (2002); Bryson v. Phil Cline Trucking, 150 N.C. App. 653, 564 S.E.2d 585, 2002 N.C. App. LEXIS 675 (2002).

Cited in Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970); Peoples v. Cone Mills Corp., 86 N.C. App. 227, 356 S.E.2d 801 (1987); Andrews v. Fulcher Tire Sales & Serv., 120 N.C. App. 602, 463 S.E.2d 425 (1995); Cooke v. P.H. Glatfelter/Ecusta, 130 N.C. App. 220, 502 S.E.2d 419 (1998); Matthews v. Charlotte-Mecklenburg Hosp. Auth., 132 N.C. App. 11, 510 S.E.2d 388 (1999); Chavis v. Thetford Prop. Mgmt., Inc., 155 N.C. App. 769, 573 S.E.2d 920, 2003 N.C. App. LEXIS 3 (2003).

§ 97-88.1. Attorney's fees at original hearing.

If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them. (1979, c. 268, s. 1.)

Legal Periodicals. — For survey of 1982 law on workers' compensation, see 61 N.C.L. Rev. 1243 (1983).

CASE NOTES

Legislative Intent. — The General Assembly did not intend to deter an employer with legitimate doubt regarding the employee's credibility, based on substantial evidence of conduct by the employee inconsistent with his alleged claim, from compelling the employee to sustain his burden of proof. Sparks v. Mountain Breeze Restaurant & Fish House, Inc., 55 N.C. App. 663, 286 S.E.2d 575 (1982).

The language of this section clearly shows the legislature did not intend to require that attorneys' fees be awarded. Instead the statute was written to enable the Industrial Commission to award attorneys' fees in those cases it deems proper. Taylor v. J.P. Stevens Co., 307 N.C. 392, 298 S.E.2d 681 (1983).

Purpose. — The evident purpose of this section is to deter stubborn, unfounded litigiousness, which is inharmonious with the primary consideration of the Workers' Compensation Act, namely, compensation for injured employees. Sparks v. Mountain Breeze Restaurant & Fish House, Inc., 55 N.C. App. 663, 286 S.E.2d 575 (1982).

The purpose of this section is to prevent stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees. Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

Construction with Other Sections. — Section G.S. 97-88 and this section are supplementary in nature. Section 97-88 allows an injured employee to move that its attorney's fees be paid whenever an insurer appeals to the Full Commission, or to a court of the appellate division, and the insurer is required to make payments to the injured employee. By contrast, an award of attorney's fees under this section requires that the litigation be brought, prosecuted, or defended without reasonable grounds. Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

The statutory requirements for awarding attorney's fees to plaintiff under G.S. 97-88 are met when defendant appeals the Industrial Commission's order directing that defendant pay additional benefits to plaintiff, and that order is affirmed; there is no proviso that "reasonable ground" be found lacking, which applies to fees sought under G.S. 97.88.1, at the original hearing before the commission. Brown v. Public Works Comm'n, 122 N.C. App. 473, 470 S.E.2d 352 (1996).

Discretion of Industrial Commission. — The language of both G.S. 97-88 and this section clearly indicates that an award of attorneys' fees is not required to be granted. Such language places the decision of whether to award attorneys' fees within the sound discretion of the Industrial Commission. Taylor v. J.P. Stevens Co., 307 N.C. 392, 298 S.E.2d 681 (1983).

Although the court of appeals held that the full commission did not abuse its discretion in awarding costs and attorney's fees as its findings were not manifestly unsupported by reason, the Supreme Court held that based upon the specific facts of this case, defendant's defense of plaintiff's claims was not without reasonable ground. Presbyterian Hosp. v. N.C. HHS, 177 N.C. App. 780, 630 S.E.2d 213, 2006 N.C. App. LEXIS 1184 (2006), appeal dismissed, cert denied, 361 N.C. 221, 642 S.E.2d 446 (2007).

Decision whether to award or deny attorney's fees rests within the sound discretion of the North Carolina Industrial Commission and will not be overturned absent a showing that the decision was manifestly unsupported by reason; the commission did not abuse its discretion in refusing to award attorney's fees to an employee based on her claim seeking payment for the treatment rendered to her by an unauthorized physician. Thompson v. Fed. Express Ground, 175 N.C. App. 564, 623 S.E.2d 811, 2006 N.C. App. LEXIS 184 (2006).

Necessity of Findings of Fact and Conclusions of Law. — Award of attorney fees was error where the workers' compensation award and opinion did not contain findings of fact or conclusions of law pertaining to attorney fees; the Commission was instructed to specifically state the statute it relied upon in making the award and to make the necessary findings of fact and conclusions of law supporting the award. Swift v. Richardson Sports, Ltd., 173 N.C. App. 134, 620 S.E.2d 533, 2005 N.C. App. LEXIS 1898 (2005).

Authority of Commission. — The Commission is authorized under this section to assess attorney's fees, and other costs, for the entire case, against a party prosecuting or defending a hearing without reasonable grounds. Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

Standing. — Under G.S. 97-88 and G.S. 97-88.1, an award of attorney's fees is a discretionary decision made by the North Carolina Industrial Commission, and the possibility of an attorney's fees award is not an invasion of a legally protected interest that is concrete and particularized, or actual or imminent; an estate and a widow had no standing to bring a claim against an employer and its carrier for full payment of their decedent's medical expenses where the healthcare provider had accepted a reduced amount as payment in full, and there was no debt left to be collected. Estate of Apple v. Commer. Courier Express, Inc., 168 N.C. App. 175, 607 S.E.2d 14, 2005 N.C. App. LEXIS 173 (2005), cert. denied, — N.C. —, 613 S.E.2d 688 (2005), cert. dismissed, — N.C. —, 613 S.E.2d 689 (2005).

Test. — The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness. Sparks v. Mountain Breeze Restaurant & Fish House, Inc., 55 N.C. App. 663, 286 S.E.2d 575 (1982); Donnell v. Cone Mills Corp., 60 N.C. App. 338, 299 S.E.2d 436, cert. denied, 308 N.C. 190, 302 S.E.2d 243 (1983).

Defendants did not have reasonable grounds to appeal opinion and award of the deputy commissioner, and the full Commission did not abuse its discretion in awarding costs to plaintiff under this section; no evidence indicated that defendants were informed by an employer that plaintiff had returned to work, consistent with plaintiff's claim that she had not returned to work. Lewis v. Sonoco Prods. Co., 137 N.C. App. 61, 526 S.E.2d 671, 2000 N.C. App. LEXIS 257 (2000).

Finding of lack of reasonable grounds upheld. — Finding that an employer's application to suspend or terminate benefits, based on a worker's refusal to accept suitable employment after being released to full-duty work status was brought and prosecuted without reasonable grounds, was correct; the employer terminated the worker's offer of employment before the worker could receive a functional capacity evaluation, and subsequently filed a form to suspend or terminate payment based on the worker's failure to accept employment. Byrd v. Ecofibers, Inc., — N.C. App. —, 645 S.E.2d 80, 2007 N.C. App. LEXIS 784 (2007).

Funding of Fees. — Although a trial court had authority under G.S. 97-88.1, 97-90(c), 97-91, and Workers' Comp. R. N.C. Indus. Comm'n 407(1), 2003 Ann. R. N.C. 829 to award attorneys' fees based on the amount of a worker's medical compensation, the trial court could not reduce the amount of compensation paid to the medical providers in order to fund the fee award. Palmer v. Jackson, 157 N.C. App. 625, 579 S.E.2d 901, 2003 N.C. App. LEXIS 930 (2003).

Payment of Fees By Counsel. — The Industrial Commission erred in ordering that defendant's costs and attorney's fees be paid by plaintiff's counsel. Evans v. Young-Hinkle Corp., 123 N.C. App. 693, 474 S.E.2d 152 (1996), cert. denied, 346 N.C. 177, 486 S.E.2d 203 (1997).

The statutory language of this section does not expressly provide the Industrial Commission with the authority to assess costs and fees against a party's counsel. Evans v. Young-Hinkle Corp., 123 N.C. App. 693, 474 S.E.2d 152 (1996), cert. denied, 346 N.C. 177, 486 S.E.2d 203 (1997).

Whether the evidence shows a "reasonable ground" to defend is a matter reviewable by the Court of Appeals. Robinson v. J.P. Stevens & Co., 57 N.C. App. 619, 292 S.E.2d 144 (1982).

North Carolina Industrial Commission erred in failing to determine whether a worker was entitled to sanctions against a self-insured employer and an administering agency under G.S. 97-88.1, because once the issue was properly raised before the Commission, it was error for the Commission to fail to rule on whether sanctions should be awarded. Moore v. Fed. Express, 162 N.C. App. 292, 590 S.E.2d 461, 2004 N.C. App. LEXIS 127 (2004).

Failure to Address Fee Request. — In reviewing an award by the Industrial Commission, a deputy commission of the Industrial Commission found that the full commission erred in failing to address the employee's request for attorney's fees for the employer's denial of her claim without reasonable investigation and its failure to accept the claim when liability became reasonably clear. Cialino v. Wal-Mart Stores, 156 N.C. App. 463, 577 S.E.2d 345, 2003 N.C. App. LEXIS 203 (2003).

North Carolina Industrial Commission awarded a claimant the ordinary contingent fee under G.S. 97-90, and erred by not addressing the claimant's motion seeking additional attorney's fees pursuant G.S. 97-88 or G.S. 97-88.1. Clawson v. Phil Cline Trucking, Inc., 168 N.C. App. 108, 606 S.E.2d 715, 2005 N.C. App. LEXIS 152 (2005).

Failure to Make Findings of Fact to Support Award. — Decision by the North Carolina Industrial Commission to award attorney fees was error where the Commission failed to specifically state the statute it relied upon in making the award and failed to make the necessary findings of fact and conclusions of law to support the award; the Commission's opinion contained no findings of fact or conclusions of law pertaining to attorney fees. Swift v. Richardson Sports, Inc., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 725 (Apr. 5, 2005).

Fees Upheld. — Industrial Commission properly awarded attorney's fees upon finding defendants in violation of rules by terminating compensation without the Commission's approval, and by refusing to resume immediate payments following the deputy commissioner's order. Hieb v. Howell's Child Care Ctr., Inc., 123

N.C. App. 61, 472 S.E.2d 208 (1996).

Competent evidence supported the Industrial Commission's conclusion that the employer was responsible for the employee's costs and attorney fees, where the employer refused to comply with the Workers' Compensation Act and the Commission's rules and regulations, the claimant was required to incur substantial travel and housing expenses to attend a hearing, and his counsel was forced to expend extra time in handling the matter. Tucker v. Workable Co., 129 N.C. App. 695, 501 S.E.2d 360 (1998).

An attorney's fee award of 25% of awarded benefits was warranted based on the failure of the employer of an employee who was murdered by a former co-employee to disclose during discovery that the employee had gone to a restaurant to take work-related information on unemployment benefits to the former co-employee. Hauser v. Advanced Plastiform, Inc., 133 N.C. App. 378, 514 S.E.2d 545 (1999).

Where employee sought treatment from other physicians for a legitimate injury because the employer-approved physician refused to see him, and where the Industrial Commission subsequently approved this medical treatment within a reasonable time, the Court of Appeals upheld the Commission's finding that the employer unreasonably defended the case and, therefore, should pay an attorney's fee of five hundred dollars. Ruggery v. North Carolina Dep't of Cors., 135 N.C. App. 270, 520 S.E.2d 77 (1999).

The Commission's award of attorney's fees was neither arbitrary nor unreasoned, where it was undisputed that plaintiff suffered a compensable injury in 1994, compensation for which defendant employer was ultimately responsible, and defendant's refusal to compensate plaintiff pending the outcome of its litigation with defendant insurer with respect to coverage prevented plaintiff for approximately six years from receiving the full amount of compensation to which he was entitled. Harrison v. Tobacco Transp., Inc., 139 N.C. App. 561, 533 S.E.2d 871, 2000 N.C. App. LEXIS 996 (2000), cert. denied, 353 N.C. 263, 546 S.E.2d 96 (2000).

The Industrial Commission did not abuse its discretion in awarding defendants attorney's fees "incurred as a result of plaintiff's unfounded litigiousness," pursuant to this section, where the plaintiff argued that the defendant failed to rebut the presumption of continuing disability in his favor but the defendant presented witness testimony, videotaped surveillance of plaintiff, as well as medical evidence and strong evidence of fraud in rebuttal. Johnson v. Lowe's Cos., 143 N.C. App. 348, 546 S.E.2d 616, 2001 N.C. App. LEXIS 296 (2001), aff'd, 354 N.C. 358, 554 S.E.2d 336 (2001).

The North Carolina Industrial Commission properly awarded employee attorneys' fees under G.S. 97-88.1 where there was no indication that the Commission relied upon unsupported findings of fact or improperly relied on its conclusions of law in an earlier award of attorneys' fees. Bryson v. Phil Cline Trucking, 151 N.C. App. 130, 564 S.E.2d 591, 2002 N.C. App. LEXIS 675 (2002).

Where the Industrial Commission had failed to determine whether an employee was entitled to her attorney's fees, pursuant to G.S. 97-88.1, as a result of an appeal taken by the employer and insurer from the Commission's award of additional benefits to her due to her back injury as a result of a slip and fall, the matter was remanded to the Commission for proper findings on the issue of the appropriateness of the employer's grounds; however, the court awarded the employee her attorney's fees as costs of the appeal, pursuant to G.S. 97-88, because much of the disability benefits that had been awarded were affirmed. Whitfield v. Lab. Corp., 158 N.C. App. 341, 581 S.E.2d 778, 2003 N.C. App. LEXIS 1192 (2003).

North Carolina Industrial Commission did not abuse its discretion under G.S. 97-88.1 by ordering an employer who filed a frivolous appeal from a deputy commissioner's decision awarding an employee temporary total disability benefits to pay the employee's attorney an amount equal to 25 percent of all compensation paid to the employee as reasonable attorney fees. Chavis v. Thetford Prop. Mgmt., Inc., 155 N.C. App. 769, 573 S.E.2d 920, 2003 N.C. App. LEXIS 3 (2003).

Finding that an employer unreasonably denied and defended a workers' compensation claim and an award of attorneys' fees to the worker were proper where the record reflected that (1) the employer objected to the worker receiving additional medical examinations and treatment, (2) the employer denied that his injury arose in and out of the course of his employment, (3) the worker testified that he never received a copy of Form 19, which the law required employers to provide to injured employees, (4) after the injury, the worker had to take frequent breaks at work, had to leave work regularly for doctors' appointments, and had, according to doctors' reports, an extreme limp and abnormal gait, and (3) although the employer must have been aware of the worker's disability, it failed to pay even temporary or partial compensation until ordered to do so almost four years later. Allen v. SouthAg Mfg., 167 N.C. App. 331, 605 S.E.2d 209, 2004 N.C. App. LEXIS 2187 (2004).

Where the Full Commission concluded that an employer's refusal to comply with its order to reinstate temporary partial disability compensation to the employee and the employer's denial of psychological treatment were made without any reasonable basis, Commission's conclusion that the employer's refusals were based on unfounded litigiousness was based on sufficient evidence such that its decision to award reasonable attorney's fees was appropriate. Haley v. ABB, Inc., 174 N.C. App. 469, 621 S.E.2d 180, 2005 N.C. App. LEXIS 2496 (2005).

Fees Denied. — Because the parties brought, prosecuted, or defended this matter with reasonable grounds, the Commission properly declined to award attorney's fees in this matter. Shaw v. UPS, 116 N.C. App. 598, 449 S.E.2d 50 (1994), aff'd per curiam, 342 N.C. 189, 463 S.E.2d 78 (1995).

The statutory requirements for awarding attorney's fees to plaintiff under G.S. 97-88 are met when defendant appeals the Industrial Commission's order directing that defendant pay additional benefits to plaintiff and that order is affirmed; there is no proviso that "reasonable ground" be found lacking, which applies to fees sought under this section, at the original hearing before the Commission. Brown v. Public Works Comm'n, 122 N.C. App. 473, 470 S.E.2d 352 (1996).

The employer had reasonable ground to defend against a claim for permanent partial disability benefits, and thus attorneys' fees should have been denied, where there was some evidence that the clawed position in which the defendant held her hand was not a result of her arm injury and could not be explained physiologically, and the claimant presented no evidence that she obtained work at a lesser wage or that a search for work would have been futile. Cooke v. P.H. Glatfelter/Ecusta, 130 N.C. App. 220, 502 S.E.2d 419 (1998).

Award of travel expenses for employee was erroneous where the evidence showed that the employer had reasonable grounds for its motion to suspend compensation. Matthews v. Charlotte-Mecklenburg Hosp. Auth., 132 N.C. App. 11, 510 S.E.2d 388 (1999).

North Carolina Industrial Commission properly refused to award a workers' compensation claimant attorney's fees where: (1) although an employer was obligated to modify the claimant's house, the claimant lived out of state and was trying to sell the house and did not return to the house and contact the employer about the modifications until about one month before she filed a Form 33, (2) the claimant had not been billed for some unpaid medical expenses, and (3) the claimant advised the provider that other visits were unrelated to workers' compensation, and they, in fact, were for degenerative arthritis, which was not a compensable injury. Clark v. Sanger Clinic, P.A., 175 N.C. App. 76, 623 S.E.2d 293, 2005 N.C. App. LEXIS 2742 (2005).

Where the record showed that an employer challenged an employee's credibility and the cause of her fibromyalgia, sanctions were properly denied since there was sufficient reason for a defense of the claim. Singletary v. N.C. Baptist Hosp., 174 N.C. App. 147, 619 S.E.2d 888, 2005 N.C. App. LEXIS 2303 (2005).

Denial of Fees Reversed. — Workers' compensation claimant was entitled to attorney fees under G.S. 97-88.1 for the time spent responding to an employer's Forms 61 and 63, but not for the time spent responding to the claims that her subsequent surgeries were due to pre-existing conditions, as when the employer filed a Form 63 under G.S. 97-18(d), it was still gathering information and had no evidence contradicting the claimant's application. Bradley v. Mission St. Joseph's Health Sys., — N.C. App. —, 638 S.E.2d 254, 2006 N.C. App. LEXIS 2501 (2006).

Applied in Beam v. Floyd's Creek Baptist Church, 99 N.C. App. 767, 394 S.E.2d 191 (1990); Poplin v. PPG Indus., 108 N.C. App. 55, 422 S.E.2d 353 (1992); Matthews v. Petroleum Tank Serv., Inc., 108 N.C. App. 259, 423 S.E.2d 532 (1992); Rackley v. Coastal Painting, 153 N.C. App. 469, 570 S.E.2d 121, 2002 N.C. App. LEXIS 1186 (2002); Hunt v. N.C. State Univ., 159 N.C. App. 111, 582 S.E.2d 380, 2003 N.C. App. LEXIS 1425 (2003); Goforth v. K-Mart Corp., 167 N.C. App. 618, 605 S.E.2d 709, 2004 N.C. App. LEXIS 2378 (2004).

Cited in Taylor v. J.P. Stevens Co., 57 N.C. App. 643, 292 S.E.2d 277 (1982); West v. Bladenboro Cotton Mills, Inc., 62 N.C. App. 267, 302 S.E.2d 645 (1983); Tharp v. Southern Gables, Inc., 125 N.C. App. 364, 481 S.E.2d 339 (1997), cert. denied, 346 N.C. 184, 486 S.E.2d 219 (1997); London v. Snak Time Catering, Inc., 136 N.C. App. 473, 525 S.E.2d 203, 2000 N.C. App. LEXIS 102 (2000); Pearson v. C.P. Buckner Steel Erection, 139 N.C. App. 394, 533 S.E.2d 532, 2000 N.C. App. LEXIS 912 (2000), cert denied, 353 N.C. 379, 547 S.E.2d 434 (2001); Bostick v. Kinston-Neuse Corp., 145 N.C. App. 102, 549 S.E.2d 558, 2001 N.C. App. LEXIS 545 (2001); Pomeroy v. Tanner Masonry, 151 N.C. App. 171, 565 S.E.2d 209, 2002 N.C. App. LEXIS 709 (2002); Cox v. City of Winston-Salem, 157 N.C. App. 228, 578 S.E.2d 669, 2003 N.C. App. LEXIS 535 (2003); Lee v. Roses, 162 N.C. App. 129, 590 S.E.2d 404, 2004 N.C. App. LEXIS 14 (2004).

§ 97-88.2. Penalty for fraud.

(a) Any person who willfully makes a false statement or representation of a material fact for the purpose of obtaining or denying any benefit or payment, or assisting another to obtain or deny any benefit or payment under this

Article, shall be guilty of a Class 1 misdemeanor if the amount at issue is less than one thousand dollars ($1,000). Violation of this section is a Class H felony if the amount at issue is one thousand dollars ($1,000) or more. The court may order restitution.

(a1) When a person is convicted under subsection (a) of this section, the Commission may enter such orders as necessary to ensure that the person convicted does not benefit from the unlawful conduct.

(b) The Commission shall:

(1) Perform investigations regarding all cases of suspected fraud and all violations related to workers' compensation claims, by or against insurers or self-funded employers, and refer possible criminal violations to the appropriate prosecutorial authorities;
(2) Conduct administrative violation proceedings; and
(3) Assess and collect civil penalties and restitution.

The Commission may employ sworn law enforcement officers duly appointed and certified through the North Carolina Criminal Justice Education and Training Standards Commission to conduct the investigations mandated by this subsection.

(c) Any person who threatens an employee with criminal prosecution under the provisions of subsection (a) of this section for the purpose of coercing or attempting to coerce the employee into agreeing to compensation or agreeing to forgo compensation under this Article shall be guilty of a Class H felony.

(d) The Commission shall not be liable in a civil action for any action made in good faith under this section, including the identification and referral of a person for investigation and prosecution for an alleged administrative violation or criminal offense. Any person, including, but not limited to, an attorney, an employee, an employer, an insurer, and an employee of an insurer, who in good faith comes forward with information under this section, shall not be liable in a civil action.

(e) The Commission shall report annually to the General Assembly on the number and disposition of investigations involving claimants, employers, insurance company officials, officials of third-party administrators, insurance agents, attorneys, health care providers, and vocational rehabilitation providers. (1993 (Reg. Sess., 1994), c. 679, s. 7.1; 1995, c. 507, s. 25(a); 1997-353, s. 1; 2005-448, s. 8; 2007-358, s. 1.)

Effect of Amendments. — Session Laws 2007-358, s. 1, effective September 1, 2007, added the last paragraph of subsection (b).

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 487.

CASE NOTES

Cited in Johnson v. First Union Corp., 128 N.C. App. 450, 496 S.E.2d 1 (1998).

§ 97-88.3. Penalty for health care providers.

(a) In addition to any liability under G.S. 97-88.2, any health care provider who willfully or intentionally undertakes the following acts is subject to an administrative penalty, assessed by the Commission, not to exceed ten thousand dollars ($10,000):

(1) Submitting charges for health care that was not furnished;
(2) Fraudulently administering, providing, and attempting to collect for inappropriate or unnecessary treatment or services; or
(3) Violating the provisions of Article 28 of Chapter 90 of the General Statutes.

A penalty assessed by the Commission for a violation of subdivision (3) of this subsection is in addition to penalties assessed under G.S. 90-407.

(b) In addition to any liability under G.S. 97-88.2, any health care provider who willfully or intentionally undertakes the following acts is subject to an administrative penalty, assessed by the Commission, not to exceed one thousand dollars ($1,000):

(1) Failing or refusing to timely file required reports or records;
(2) Making unnecessary referrals; and
(3) Knowingly violating this Article or rules promulgated hereunder, including treatment guidelines, with intention to deceive or to gain improper advantage of a patient, employee, insurer, or the Commission.

(c) A health care provider who knowingly charges or otherwise holds an employee financially responsible for the cost of any services provided for a compensable injury under this Article is guilty of a Class 1 misdemeanor.

(d) Any person, including, but not limited to, an employer, an insurer, and an employee of an insurer, who in good faith comes forward with information under this section, shall not be liable in a civil action.

(e) Information relating to possible violations under this section shall be reported to the Commission which shall refer the same to the appropriate licensing or regulatory board or authority for the health care provider involved.

(f) A hospital that relies in good faith on a written order of a physician in performing health care services shall not be subject to an administrative penalty in violation of this section. (1993 (Reg. Sess., 1994), c. 679, s. 7.2.)

CASE NOTES

Estate and Widow Lacked Standing to Bring Claim. — Under G.S. 97-88.3(c), it is a class 1 misdemeanor for a healthcare provider to knowingly hold an employee responsible for medical expenses incurred as a result of a compensable injury; thus an estate and a widow had no standing to bring a claim against an employer and its carrier for full payment of their decedent's medical expenses where the healthcare provider had accepted reduced amount as payment in full, and there was no debt left to be collected. Estate of Apple v. Commer. Courier Express, Inc., 168 N.C. App. 175, 607 S.E.2d 14, 2005 N.C. App. LEXIS 173 (2005), cert. denied, — N.C. —, 613 S.E.2d 688 (2005), cert. dismissed, — N.C. —, 613 S.E.2d 689 (2005).

§ 97-89. Commission may appoint qualified physician to make necessary examinations; expenses; fees.

The Commission or any member thereof may, upon the application of either party, or upon its own motion, appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination of the employee, and to testify in respect thereto. Said physician or surgeon shall be allowed traveling expenses and a reasonable fee to be fixed by the Commission. The fees and expenses of such physician or surgeon shall be paid by the employer. (1929, c. 120, s. 63; 1931, c. 274, s. 12; 1973, c. 520, s. 3.)

CASE NOTES

This section does not provide for examination by an additional physician. Clark v. Burlington Indus., 49 N.C. App. 269, 271 S.E.2d 101 (1980), cert. denied, 301 N.C. 719, 276 S.E.2d 283 (1981).

§ 97-90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims; agreement for fee or compensation.

(a) Fees for attorneys and charges of health care providers for medical compensation under this Article shall be subject to the approval of the Commission; but no physician or hospital or other medical facilities shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Commission in connection with the case. Except as provided in G.S. 97-26(g), a request for a specific prior approval to charge shall be submitted to the Commission for each such fee or charge.

(b) Any person (i) who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the Commission or the court, as provided in subsection (c), or (ii) who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, shall be guilty of a Class 1 misdemeanor.

(c) If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed. If within five days after receipt of notice of such fee allowance, the attorney shall file notice of appeal to the full Commission, the full Commission shall hear the matter and determine whether or not the attorney's agreement as to a fee or the fee allowed is unreasonable. If the full Commission is of the opinion that such agreement or fee allowance is unreasonable and so finds, then the attorney may, by filing written notice of appeal within 10 days after receipt of such action by the full Commission, appeal to the senior resident judge of the superior court in the county in which the cause of action arose or in which the claimant resides; and upon such appeal said judge shall consider the matter and determine in his discretion the reasonableness of said agreement or fix the fee and direct an order to the Commission following his determination therein. The Commission shall, within 20 days after receipt of notice of appeal from its action concerning said agreement or allowance, transmit its findings and reasons as to its action concerning such agreement or allowance to the judge of the superior court designated in the notice of appeal. In all other cases where there is no agreement for fee or compensation, the attorney or claimant may, by filing written notice of appeal within five days after receipt of notice of action of the full Commission with respect to attorneys' fees, appeal to the senior resident judge of the superior court of the district of the county in which the cause arose or in which the claimant resides; and upon such appeal said judge shall consider the matter of such fee and determine in his discretion the attorneys' fees to be allowed in the cause. The Commission shall, within 20 days after notice of appeal has been filed, transmit its findings and reasons as to its action concerning such fee or compensation to the judge of the superior court designated in the notice of appeal; provided that the Commission shall in no event have any jurisdiction over any attorneys' fees in any third-party action. In any case in which an attorney appeals to the superior court on the question of attorneys' fees, the appealing attorney shall notify the Commission and the employee of any and all proceedings before the superior court on the appeal, and either or both may appear and be represented at such proceedings.

The Commission, in determining an allowance of attorneys' fees, shall examine the record to determine the services rendered. The factors which may be considered by the Commission in allowing a reasonable fee include, but are not limited to, the time invested, the amount involved, the results achieved, whether the fee is fixed or contingent, the customary fee for similar services, the experience and skill level of the attorney, and the nature of the attorney's services.

In making the allowance of attorneys' fees, the Commission shall, upon its own motion or that of an interested party, set forth findings sufficient to support the amount approved.

The Commission may deny or reduce an attorney's fees upon proof of solicitation of employment in violation of the Rules of Professional Conduct of the North Carolina State Bar.

(d) Provided, that nothing contained in this section shall prevent the collection of such reasonable fees of physicians and charges for hospitalization as may be recovered in an action, or embraced in settlement of a claim, against a third-party tort-feasor as described in G.S. 97-10.2.

(e) A health care provider shall not pursue a private claim against an employee for all or part of the costs of medical treatment provided to the employee by the provider unless the employee's claim or the treatment is finally adjudicated not to be compensable or the employee fails to request a hearing after denial of liability by the employer. Notwithstanding subsequent denial of liability or adjudication that the condition treated was not compensable, the insurer shall be liable as provided in G.S. 97-26 to providers whose services have been authorized by the insurer or employer. The statute of limitations applicable to a provider's claim for payment shall be tolled during the period the compensability of a claim or liability for particular treatment remains an issue in a compensation case. (1929, c. 120, s. 64; 1955, c. 1026, s. 4; 1959, cc. 1268, 1307; 1973, c. 520, s. 4; 1981, c. 521, s. 4; 1991, c. 703, s. 6; 1993, c. 539, s. 680; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 679, s. 9.1.)

Cross References. — For related subject in reference to fees of physicians and hospital charges, see G.S. 97-26. As to attorneys' fees as costs in certain appeals, see G.S. 97-88. As to the assessment of attorneys' fees incurred in hearings brought without reasonable ground, see G.S. 97-88.1.

Legal Periodicals. — For article, "Primary Issues in Compensation Litigation," see 17 Campbell L. Rev. 443 (1995).

CASE NOTES

The clear intent of this section and judicial opinions is to assure that medical and related expenses incurred by an injured employee for which the employer or his insurance carrier is to be liable shall be kept within reasonable and appropriate limits, and the responsibility for the enforcement of these limits rests upon the Industrial Commission. Morse v. Curtis, 20 N.C. App. 96, 200 S.E.2d 832 (1973), cert. denied, 285 N.C. 86, 203 S.E.2d 58 (1974).

The authority to approve hospital charges under subsection (a) is provided to ensure that hospitals do not provide services not reasonably required to effect a cure or give relief or tend to lessen the period of disability, and that hospital charges therefor do not exceed the prevailing community charge described therein. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

Employer's Liability for Medical Expense Not Preempted by Federal Law. — The obligation of an employer to pay claimant's reasonable and necessary medical expenses, and the ability of health-care providers to accept such payment, was not controlled or preempted by federal Medicaid statutes or regulations. Pearson v. C.P. Buckner Steel Erection Co., 348 N.C. 239, 498 S.E.2d 818 (1998).

An employer who denied liability but was ordered to pay medical expenses under the Workers' Compensation Act was required to pay health-care providers the difference between the amount covered by Medicaid and the full amount authorized by the Commission's fee schedule. Pearson v. C.P. Buckner Steel Erection Co., 348 N.C. 239, 498 S.E.2d 818 (1998).

Appropriate Treatment Is Within Exclu-

sive Jurisdiction of Commission. — What treatment is appropriate for a particular employee is a matter within the exclusive jurisdiction of the Industrial Commission. North Carolina Chiropractic Ass'n v. Aetna Cas. & Sur. Co., 89 N.C. App. 1, 365 S.E.2d 312 (1988).

No Jurisdiction Over Dispute Between Attorney's Over Division of Fees. — There is no statutory authority that would extend commission's jurisdiction to cover dispute between plaintiff's attorneys over division of attorneys' fees. Eller v. J & S Truck Servs., Inc., 100 N.C. App. 545, 397 S.E.2d 242 (1990), cert. denied, 328 N.C. 271, 400 S.E.2d 451 (1991).

Attorney did not claim that Industrial Commission failed to compensate him for his efforts on behalf of employee, or that the Commission found a reasonable fee to be unreasonable, but that the Commission refused to divide fee award between attorneys with competing claims to it. Commission had no statutory authority to resolve this dispute. Eller v. J & S Truck Servs., Inc., 100 N.C. App. 545, 397 S.E.2d 242 (1990), cert. denied, 328 N.C. 271, 400 S.E.2d 451 (1991).

Compensation of Medical Providers Cannot Be Reduced to Pay Attorney's Fees. — Although a trial court had authority under G.S. 97-88.1, 97-90(c), 97-91, and Workers' Comp. R. N.C. Indus. Comm'n 407(1), 2003 Ann. R. N.C. 829 to award attorneys' fees based on the amount of a worker's medical compensation, the trial court could not reduce the amount of compensation paid to the medical providers in order to fund the fee award. Palmer v. Jackson, 157 N.C. App. 625, 579 S.E.2d 901, 2003 N.C. App. LEXIS 930 (2003).

Jurisdiction of Industrial Commission. — Where plaintiff sought enforcement of Industrial Commission's previous order awarding him reasonable and necessary medical expenses after a dispute arose over what expenses defendants must pay the Commission was acting within its statutory mandate and had subject matter jurisdiction to hear and decide these issues. Pearson v. C.P. Buckner Steel Erection Co., 126 N.C. App. 745, 486 S.E.2d 723 (1997), rev'd on other grounds, 348 N.C. 239, 498 S.E.2d 818 (1998).

All Bills Must Be Submitted to and Approved by Commission. — The superior court had no authority to order defendants to pay medical bills incurred by plaintiff for treatment of her work-related injury, though the Industrial Commission had ordered that defendants pay all such bills, where the bills in question had not been submitted to or approved by the Industrial Commission. Weydener v. Carolina Village, 45 N.C. App. 549, 263 S.E.2d 329 (1980).

It would be a misdemeanor for any person to receive fees which were not approved by the Commission. Morse v. Curtis, 20 N.C. App. 96, 200 S.E.2d 832 (1973), cert. denied, 285 N.C. 86, 203 S.E.2d 58 (1974).

Process of filing for approval does not result in notice to the claimant; the statute provides a penalty for noncompliance, and its purpose (to ensure that medical service providers are not overcharging for services and products) is unrelated to the employee's claim. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Failure to obtain approval for payments of medical expenses does not raise an estoppel claim. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Agreement by Employee to Pay Balance to Physician Held Void. — An agreement by an injured employee to pay the physician engaged by him any balance due on his account after application of the amount approved by the Industrial Commission for the services was unenforceable and void, since this section made the receipt of any fee for such services not approved by the Commission a misdemeanor. Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

Approval of Rehabilitation Services Not Required. — Subsection (a) does not require approval of the Commission for rehabilitation services. Roberts v. ABR Assocs., 101 N.C. App. 135, 398 S.E.2d 917 (1990).

Pre-approval of Attendant Care Services by Employee's Brother Not Required. — Injured employee who was provided attendant care benefits by his brother was entitled to an award for the benefits in spite of the fact the employee did not seek pre-approval of the care by the North Carolina Industrial Commission before it was performed. Ruiz v. Belk Masonry Co., 148 N.C. App. 675, 559 S.E.2d 249, 2002 N.C. App. LEXIS 50 (2002), appeal dismissed, cert. denied, 356 N.C. 166, 568 S.E.2d 610 (2002).

Remedy Where Physician's Bill Approved for Less than Full Amount. — Where a physician has submitted his bill to the Industrial Commission for its approval, and received approval for less than the full amount, his remedy is to request a hearing before the Commission with the right of appeal to the courts under G.S. 97-83 through 97-86, and this remedy is exclusive. Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948). See Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1949).

Independent Action by Physician Against Employee. — Where a physician has submitted his bill to the Industrial Commission for its approval and received approval for less than the full amount, and has failed to pursue his exclusive statutory remedy of a hearing before the Industrial Commission with the right of appeal to the courts under G.S. 97-83 through 97-86, he has no standing to attack the constitutionality of this section in an independent suit against the employee to recover for the medical services. Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948). See Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1949).

Refusal of Insurers to Provide Chiropractic Treatment as Workers' Compensation Coverage. — Plaintiff chiropractors alleging that defendant insurance companies had interfered with their contractual rights by refusing to honor employers' choices of chiropractors as providers of health care treatment to employees under the Workers' Compensation Act, that defendants had misrepresented to employer insureds that their workers' compensation policies did not provide coverage for chiropractic treatment, that said misrepresentations were unfair and deceptive trade practices in violation of G.S. 75-1.1, and that defendants had conspired among themselves and with members of the medical profession to deprive plaintiffs of business opportunities by refusing to pay for chiropractic services provided in compliance with the act, an illegal restraint of trade in violation of G.S. 75-1 and 15 U.S.C. § 1, could not maintain their action in superior court without first seeking relief from the Industrial Commission. North Carolina Chiropractic Ass'n v. Aetna Cas. & Sur. Co., 89 N.C. App. 1, 365 S.E.2d 312 (1988), remanding case to the trial court for entry of an order staying plaintiffs' action pending a determination of the underlying workers' compensation issues by the Commission.

Less Than 100% Credit Was Within Commission's Authority. — Where the Commission's award allowed the defendant credit for payments that they had already made through their private insurer less only the plaintiff's reasonable attorney's fees calculated and based upon the amount of the entire worker's compensation award, the award was authorized by the statute since all credit given by the Commission in these circumstances is "subject to the approval" of the Industrial Commission. Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

The Industrial Commission acted within its discretion, pursuant to G.S. 97-42, in reducing defendants' credit for payments made under a disability insurance policy fully funded by defendants by 25% to provide plaintiff's counsel additional fees, although the record on appeal contained no copy of a fee award filed with the Commission as required by this section. Cole v. Triangle Brick, 136 N.C. App. 401, 524 S.E.2d 79, 2000 N.C. App. LEXIS 11 (2000).

Fees in Special Hardship Cases. — The fees prescribed by the Commission shall govern, except that in special hardship cases where sufficient reason therefor is demonstrated to the Commission, fees in excess of those published may be allowed. Wake County Hosp. Sys. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970), overruled on other grounds, Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

Failure to Address Other Statutory Grounds for Awarding Attorneys' Fees. — North Carolina Industrial Commission awarded a claimant the ordinary contingent fee under G.S. 97-90, and erred by not addressing the claimant's motion seeking additional attorney's fees pursuant G.S. 97-88 or G.S. 97-88.1. Clawson v. Phil Cline Trucking, Inc., 168 N.C. App. 108, 606 S.E.2d 715, 2005 N.C. App. LEXIS 152 (2005).

Authority to Review Attorneys' Fees. — The authority of the Industrial Commission and its hearing officers to review fees for attorneys is found in this section. Hardy v. Brantley Constr. Co., 87 N.C. App. 562, 361 S.E.2d 748 (1987).

Any disputes as to attorney's fees had to be appealed according to the procedures set out in this section. Davis v. Trus Joist MacMillan, 148 N.C. App. 248, 558 S.E.2d 210, 2002 N.C. App. LEXIS 3 (2002), cert. denied, 355 N.C. 490, 563 S.E.2d 564 (2002).

Attorney's failure to follow the procedures prescribed in G.S. 97-90(c) to seek review of the Industrial Commission's award of attorney's fees deprived the appellate court of jurisdiction to consider the issue. Russell v. Lab. Corp. of Am., 151 N.C. App. 63, 564 S.E.2d 634, 2002 N.C. App. LEXIS 644 (2002), cert. denied, 356 N.C. 304, 570 S.E.2d 111 (2002).

Applicability of Reasonableness Requirement. — Under G.S. 97-10.2(f)(1)b, the attorneys' fee taken from the employee's share may not exceed one-third of the amount recovered, but it is not otherwise subject to the reasonableness requirement of subsection (c) of this section; the attorneys' fee on the subrogation interest of the employer (or its carrier) is subject to the reasonableness requirement of subsection (c) of this section and may not exceed one-third of the amount recovered from the third party. Hardy v. Brantley Constr. Co., 87 N.C. App. 562, 361 S.E.2d 748 (1987), rev'd on other grounds, 322 N.C. 106, 366 S.E.2d 485 (1988).

Award of Attorneys' Fees Proper. — Finding that an employer unreasonably denied and defended a workers' compensation claim and an award of attorneys' fees to the worker were proper where the record reflected that (1) the employer objected to the worker receiving additional medical examinations and treatment, (2) the employer denied that his injury arose in and out of the course of his employment, (3) the worker testified that he never received a copy of Form 19, which the law required employers to provide to injured employees, (4) after the injury, the worker had to take frequent breaks at work, had to leave work regularly for doctors' appointments, and had, according to doctors' reports, an extreme limp and abnormal gait, and (3) although the employer must have been aware of the worker's disability, it failed to pay even temporary or partial compensation until ordered to do so almost four years later. Allen v. SouthAg Mfg., 167 N.C. App. 331, 605 S.E.2d 209, 2004 N.C. App. LEXIS 2187 (2004).

Applied in Salmons v. E.L. Trogden Lumber Co., 1 N.C. App. 390, 161 S.E.2d 632 (1968); Priddy v. Blue Bird Cab Co., 2 N.C. App. 331, 163 S.E.2d 20 (1968); Cloutier v. State, 57 N.C. App. 239, 291 S.E.2d 362 (1982).

Cited in Hatchett v. Hitchcock Corp., 240 N.C. 591, 83 S.E.2d 539 (1954); Donnell v. Cone Mills Corp., 60 N.C. App. 338, 299 S.E.2d 436 (1983); Hieb v. Lowery, 134 N.C. App. 1, 516 S.E.2d 621 (1999); Hansen v. Crystal Ford-Mercury, Inc., 138 N.C. App. 369, 531 S.E.2d 867, 2000 N.C. App. LEXIS 628 (2000).

§ 97-90.1. Insurers that provide employee's health benefit plans, disability income plans, or any other health insurance plans as real parties in interest; reimbursement.

An insurer that covers an employee under a health benefit plan as defined in G.S. 58-3-167, a disability income plan, or any other health insurance plan is not a real party in interest and shall not intervene or participate in any proceeding or settlement agreement under this Article to determine whether a claim is compensable under this Article or to seek reimbursement for medical payments under its plan. The insurer that covers an employee under a health benefit plan as defined in G.S. 58-3-167 or any other health insurance plan may seek reimbursement from the employee, employer, or carrier that is liable or responsible for the specific medical charge according to a final adjudication of the claim under this Article or an order of the Commission approving a settlement agreement entered into under this Article for health plan payments for that specific medical charge. Upon the admission or adjudication that a claim is compensable, the party or parties liable shall notify in writing any known health benefit plan covering the employee of the admission or adjudication. (2001-216, s. 1; 2001-487, s. 102(b).)

§ 97-91. Commission to determine all questions.

All questions arising under this Article if not settled by agreements of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided. (1929, c. 120, s. 65.)

Legal Periodicals. — For article, "Primary Issues in Compensation Litigation," see 17 Campbell L. Rev. 443 (1995).

CASE NOTES

This section is not limited in its application solely to questions arising out of an employer-employee relationship or in the determination of rights asserted by or on behalf of an injured employee. Wake County Hosp. Sys. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970), overruled on other grounds, Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994); Spivey v. Oakley's Gen. Contractors, 32 N.C. App. 488, 232 S.E.2d 454 (1977).

The Act does not take away common law rights that are unrelated to the employer-employee relationship. North Carolina Chiropractic Ass'n v. Aetna Cas. & Sur. Co., 89 N.C. App. 1, 365 S.E.2d 312 (1988).

"Questions arising under this Article" would seem to consist primarily, if not exclusively, of questions for decision in the determination of rights asserted by or on behalf of an injured employee or his dependents. Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

The phrase in G.S. 97-91, "questions arising under this Article," refers primarily to questions relating to the rights asserted by or on behalf of an injured employee or the employee's dependents. N.C. State Bar v. Gilbert, 151 N.C. App. 299, 566 S.E.2d 685, 2002 N.C. App. LEXIS 782 (2002), aff'd, 357 N.C. 502, 586 S.E.2d 89 (2003).

Jurisdiction of Commission Exclusive. — In an action instituted in the superior court under the Declaratory Judgment Act or otherwise, when the pleadings disclose that an employee-employer relationship exists so as to make the parties subject to the provisions of the Workers' Compensation Act, dismissal is proper, for the Industrial Commission has exclusive jurisdiction in such cases. Cox v. Pitt County Transp. Co., 259 N.C. 38, 129 S.E.2d 589 (1963).

The Declaratory Judgment Act may not be used to determine whether or not the employer's insurance carrier is entitled to the right of subrogation against the funds received from the third-party tortfeasor under the provisions of G.S. 97-10.2, since the Industrial Commission has exclusive original jurisdiction to determine the question. Cox v. Pitt County Transp. Co., 259 N.C. 38, 129 S.E.2d 589 (1963).

By statute, the superior court is divested of original jurisdiction of all actions which come within the provisions of the Workers' Compensation Act. Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

The amount, or rate, of compensation to which plaintiff is entitled, depending on a determination of his average weekly wage, is a question within the exclusive jurisdiction of the Industrial Commission; while the court has jurisdiction to enforce an award made pursuant to the execution of a Form 60, it cannot review the amount of compensation unless the Commission has first made that determination. Watts v. Hemlock Homes of the Highlands, Inc., 141 N.C. App. 725, 544 S.E.2d 1, 2001 N.C. App. LEXIS 22 (2001), cert. denied, 353 N.C. 398, 547 S.E.2d 431 (2001).

Jurisdiction Over Employee's Claim. — North Carolina Industrial Commission, pursuant to G.S. 97-91, had jurisdiction over an employee's claim after the employer sold the division for which the employee worked to a buyer that went bankrupt, and the sales agreement between the employer and the buyer, pursuant to G.S. 97-6, did not invalidate this jurisdiction by its terms for the transfer of liabilities; however, the method of handling the certificate of deposit belonging to the buyer that was deposited with the North Carolina Department of Insurance (DOI) fell within the ambit of the DOI's jurisdiction. Goodson v. P.H. Glatfelter Co., 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

Jurisdiction Over Declaratory Judgment. — Although the industrial commission had exclusive jurisdiction over matters arising under the Workers' Compensation Act pursuant to G.S. 97-91, where an injured passenger's declaratory judgment claim under G.S. 1-253 and G.S. 1-254 was based on his standing as a third-party intended beneficiary of a contract between his employer, a subcontractor, and a contractor, wherein the contractor was to provide workers' compensation coverage to the subcontractor's employees, the claim was within the jurisdiction of the trial court. Lowery v. Campbell, — N.C. App. —, 649 S.E.2d 453, 2007 N.C. App. LEXIS 1948 (2007).

Jurisdiction of Dispute as to Payment of Medical Expenses. — Having determined that the employer was liable for claimant's disability compensation and medical expenses, the Commission had jurisdiction to determine whether a health-care provider could receive payment pursuant to workers' compensation laws after accepting payment from Medicaid. Pearson v. C.P. Buckner Steel Erection Co., 348 N.C. 239, 498 S.E.2d 818 (1998).

A dispute pertaining to the payment of medical expenses and case management hours that arose from a "custodial agreement" made after and in furtherance of a settlement agreement that was approved by the Industrial Commission fell within the exclusive jurisdiction of that administrative body. Coleman v. Medi-Bill, Inc., — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 15285 (W.D.N.C. Sept. 21, 2001).

No Jurisdiction over Dispute Between Attorneys over Division of Legal Fees. — There is no statutory authority that would extend commission's jurisdiction to cover dispute between plaintiff's attorneys over division of attorneys' fees. Eller v. J & S Truck Servs., Inc., 100 N.C. App. 545, 397 S.E.2d 242 (1990), cert. denied, 328 N.C. 271, 400 S.E.2d 451 (1991).

Funding of Attorney's Fees. — Although a trial court had authority under G.S. 97-88.1, 97-90(c), 97-91, and Workers' Comp. R. N.C. Indus. Comm'n 407(1), 2003 Ann. R. N.C. 829 to award attorneys' fees based on the amount of a worker's medical compensation, the trial court could not reduce the amount of compensation paid to the medical providers in order to fund the fee award. Palmer v. Jackson, 157 N.C. App. 625, 579 S.E.2d 901, 2003 N.C. App. LEXIS 930 (2003).

Appropriate Treatment Within Exclusive Jurisdiction of Commission. — What treatment is appropriate for a particular employee is a matter within the exclusive jurisdiction of the Industrial Commission. North Carolina Chiropractic Ass'n v. Aetna Cas. & Sur. Co., 89 N.C. App. 1, 365 S.E.2d 312 (1988).

The Commission has the duty to make specific findings of fact necessary to determine all questions relevant to the issues raised in a proceeding before it. Buchanan v. Mitchell County, 38 N.C. App. 596, 248 S.E.2d 399 (1978), cert. denied, 296 N.C. 583, 254 S.E.2d 35 (1979).

Prerogative of Commission to Determine Credibility and Weigh Evidence. — The full Commission has the authority to make additional findings of fact, and where it found that plaintiff failed to prove that he was injured while making an arrest was supported by competent evidence, plaintiff's case was left without a foundation. In not accepting plaintiff's contrary version of the event involved, the Commission exercised its prerogative under the law to determine the credibility and weight of the evidence presented. Griffey v. Town of Hot Springs, 87 N.C. App. 290, 360 S.E.2d 457 (1987).

The Industrial Commission is not required to find in accordance with plaintiff's expert medical testimony if the defendant does not offer expert medical testimony to the contrary. Harvey v. Raleigh Police Dep't, 96 N.C. App. 28, 384 S.E.2d 549, cert. denied, 326 N.C. 706, 388 S.E.2d 454 (1989).

On appeal, the Commission's findings of fact are conclusive and the role of the reviewing court is limited to ascertaining whether there was any competent evidence before the Commission to support its findings of fact and whether the findings of fact justify its legal conclusions and decision. Buchanan v. Mitchell County, 38 N.C. App. 596, 248 S.E.2d 399 (1978), cert. denied, 296 N.C. 583, 254 S.E.2d 35 (1979).

A health insurer may intervene as a real party in interest in a workers' compensation proceeding when it alleges that it has paid medical expenses due to an employee's compensable injury and is entitled to reimbursement, and liability is disputed by the employer. Hansen v. Crystal Ford-Mercury, Inc., 138 N.C. App. 369, 531 S.E.2d 867, 2000 N.C. App. LEXIS 628 (2000).

Questions Respecting Existence of Insurance and Liability of Insurance Carrier. — The Commission is specifically vested by statute with jurisdiction to hear "all questions arising under" the act. This jurisdiction under the statute ordinarily includes the right and duty to hear and determine questions of fact and law respecting the existence of insurance coverage and the liability of the insurance carrier. Greene v. Spivey, 236 N.C. 435, 73 S.E.2d 488 (1952); Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964); Spivey v. Oakley's Gen. Contractors, 32 N.C. App. 488, 232 S.E.2d 454 (1977).

The act does not confer upon the Commission, expressly or by implication, jurisdiction to determine, in a proceeding in which plaintiff asserts no claim against insurer, employer's asserted right to reform the policy and to recover from insurer the amount of plaintiff's award. Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

Greene v. Spivey, 236 N.C. 435, 73 S.E.2d 488 (1952) may not be considered authority for the proposition that the Commission has equitable jurisdiction to determine whether a compensation insurance policy should be reformed. Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

After the employer had settled with the employee, the Commission had jurisdiction to determine whether policy of compensation insurance had been properly cancelled, or whether insurer was on the risk. Spivey v. Oakley's Gen. Contractors, 32 N.C. App. 488, 232 S.E.2d 454 (1977).

Trial court lacked subject matter jurisdiction under N.C. R. Civ. P. 12(b)(1) over whether the insurance guaranty association was required by amendments to the Insurance Guaranty Association Act, G.S. 58-48-1 et seq., and the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., to defend and indemnify the workers' compensation claims against the insolvent insurers, as the industrial commission had jurisdiction over the matter; not only was the association an insurer under G.S. 58-48-35(a)(2) over which the industrial commission had jurisdiction, but also, under G.S. 97-91, the industrial commission had jurisdiction to hear all questions arising under the Workers' Compensation Act. N.C. Ins. Guar. Ass'n v. Int'l Paper Co., 152 N.C. App. 224, 569 S.E.2d 285, 2002 N.C. App. LEXIS 1092 (2002).

Refusal of Insurers to Provide Chiropractic Treatment as Workers' Compensation Coverage. — Plaintiff chiropractors alleging that defendant insurance companies had interfered with their contractual rights by refusing to honor employers' choices of chiropractors as providers of health care treatment to employees under the Workers' Compensation Act, that defendants had misrepresented to employer insureds that their workers' compensation policies did not provide coverage for chiropractic treatment, that said misrepresentations were unfair and deceptive trade practices in violation of G.S. 75-1.1, and that defendants had conspired among themselves and with members of the medical profession to deprive plaintiffs of business opportunities by refusing to pay for chiropractic services provided in compliance with the act, an illegal restraint of trade in violation of G.S. 75-1 and 15 U.S.C. § 1, could not maintain their action in superior court without first seeking relief from the Industrial Commission. North Carolina Chiropractic Ass'n v. Aetna Cas. & Sur. Co., 89 N.C. App. 1, 365 S.E.2d 312 (1988), remanding case to the trial court for entry of an order staying plaintiffs' action pending a determination of the underlying workers' compensation issues by the Commission.

Where the North Carolina Industrial Commission invalidated a Form 26 agreement because no medical documentation was submitted, it was not obliged under G.S. 97-91 to determine whether the claimant had undergone a G.S. 97-47 change of condition. Clawson v. Phil Cline Trucking, Inc., 168 N.C. App. 108, 606 S.E.2d 715, 2005 N.C. App. LEXIS 152 (2005).

Applied in Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); Forrest v. Pitt County Bd. of Educ., 100 N.C. App. 119, 394 S.E.2d 659 (1990).

Cited in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992); Abels v. Renfro Corp., 108 N.C. App. 135, 423 S.E.2d 479 (1992).

§ 97-92. Employer's record and report of accidents; records of Commission not open to public; supplementary report upon termination of disability; penalty for refusal to make report; when insurance carrier liable.

(a) Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment on blanks approved by the Commission. Within five days after the occurrence and knowledge thereof as provided in G.S. 97-22 of an injury to an employee, causing his absence from work for more than one day or charges for medical compensation exceeding the amount set by the Commission, a report thereof shall be made in writing and mailed or transmitted to the Commission in the form approved by the Commission for this purpose.

(b) The records of the Commission that are not awards under G.S. 97-84 and that are not reviews of awards under G.S. 97-85, insofar as they refer to accidents, injuries, and settlements are not public records under G.S. 132-1 and shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the right to inspect them, and to State and federal agencies pursuant to G.S. 97-81.

(c) Upon the termination of the disability of the injured employee, or if the disability extends beyond a period of 60 days, then, also, at the expiration of such period the employer shall make a supplementary report to the Commission on blanks to be procured from the Commission for the purpose.

(d) The said report shall contain the name, nature, and location of the business of the employer and name, age, sex, and wages and occupation of the injured employee, and shall state the date and hour of the accident causing injury, the nature and cause of the injury, and such other information as may be required by the Commission.

(e) Any employer who refuses or neglects to make the report required by this section shall be liable for a penalty of not less than five dollars ($5.00) and not more than twenty-five dollars ($25.00) for each refusal or neglect. The fine herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases. In the event the employer has transmitted the report to the insurance carrier for transmission by such insurance carrier to the Industrial Commission, the insurance carrier willfully neglecting or failing to transmit the report shall be liable for the said penalty.

(f) Any bill, report, application, and document of every nature and kind, which is required or permitted by Commission rules to be transmitted to the Commission by electronic media or is recorded among the Commission records on computer disk, optical disk, microfilm, or similar media and which is produced or reproduced in written form in the normal course of business or is certified as a true and accurate copy of the data recorded at the Commission in the normal course of its business shall be treated as a signed original in all uses before the Commission and as a duplicate within the meaning of Rule

1003 of the North Carolina Rules of Evidence. (1929, c. 120, s. 66; 1945, c. 766; 1991, c. 703, s. 9; 1991 (Reg. Sess., 1992), c. 894, s. 3; 1993 (Reg. Sess., 1994), c. 679, s. 10.8; 2001-216, s. 3; 2001-487, s. 102(b).)

Cross References. — As to tabulation and publication of employers' reports in annual report of Commission, see G.S. 97-81(b).

CASE NOTES

Report of Occupational Disease. — Subsection (a) of this section requires an employer to report any injury by accident if it keeps the employee from work for more than one day. Presumably this would include notice of an occupational disease which is considered an injury by accident. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Filing of employer's report (Form 19) is insufficient to invoke the jurisdiction of the Commission where the employee has not filed the claim required under G.S. 97-24. Perdue v. Daniel Int'l, Inc., 59 N.C. App. 517, 296 S.E.2d 845 (1982), cert. denied, 307 N.C. 577, 299 S.E.2d 647 (1983).

The notice requirement of subsection (a) of this section does not invoke the jurisdiction of the Commission without the employee filing a claim. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

For case in which report filed by employer upon verbal information elicited from the illiterate representative of the employee by its claim agent was treated as a claim, see Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936).

Report as Evidence. — The report signed by the manager of an incorporated employer and filed with the Industrial Commission, as required by this section, is competent upon the hearing, and statements contained therein not within the personal knowledge of the manager are competent as an admission against interest. Carlton v. Bernhardt-Seagle Co., 210 N.C. 655, 188 S.E. 77 (1936).

Employer's failure to notify the Commission pursuant to subsection (a) of this section does not raise an estoppel claim. Knight v. Cannon Mills Co., 82 N.C. App. 453, 347 S.E.2d 832, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Applied in Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948).

Cited in Poythress v. J.P. Stevens & Co., 54 N.C. App. 376, 283 S.E.2d 573 (1981); Clary v. A.M. Smyre Mfg. Co., 61 N.C. App. 254, 300 S.E.2d 704 (1983); Smallwood v. Eason, 123 N.C. App. 661, 474 S.E.2d 411 (1996), rev'd on other grounds, 346 N.C. 171, 484 S.E.2d 526 (1997); Vereen v. N.C. Dep't of Corr., 168 N.C. App. 588, 608 S.E.2d 412, 2005 N.C. App. LEXIS 333 (2005).

§ 97-93. Employers required to carry insurance or prove financial ability to pay for benefits; employers required to post notice; self-insured employers regulated by Commissioner of Insurance.

(a) Every employer subject to the provisions of this Article relative to the payment of compensation shall either:

(1) Insure and keep insured his liability under this Article in any authorized corporation, association, organization, or in any mutual insurance association formed by a group of employers so authorized; or

(2) Repealed by Session Laws 1997-362, s. 5.

(3) Obtain a license from the Commissioner of Insurance under Article 5 of this Chapter or under Article 47 of Chapter 58 of the General Statutes.

(b) through (d) Repealed by Session Laws 1997-362, s. 5.

(e) Every employer who is in compliance with the provisions of subsection (a) of this section shall post in a conspicuous place in places of employment a notice stating that employment by this employer is subject to the North Carolina Workers' Compensation Act and stating whether the employer has a policy of insurance against liability or qualifies as a self-insured employer. In the event the employer allows its insurance to lapse or ceases to qualify as a self-insured employer, the employer shall, within five working days of this occurrence, remove any notices indicating otherwise. (1929, c. 120, s. 67; 1943, c. 543; 1973, c. 1291, s. 12; 1979, c. 345; 1983, c. 728; 1985, c. 119, s. 1; 1993, c. 120, ss. 1, 2; 1993 (Reg. Sess., 1994), c. 679, s. 8.2; 1995, c. 193, s. 64; c. 471, s. 1; 1997-362, s. 5.)

Legal Periodicals. — For comment on the provisions of this and other sections in relation to the law of contracts, see 13 N.C.L. Rev. 102 (1935).

CASE NOTES

The manifest legislative intent is that the employer's liability should be insured at all times. Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965), decided under prior version of section.

Employer Primarily Liable. — An award was entered in favor of the dependents of a deceased employee for payment of compensation in weekly installments for the death of the employee. After the insurance carrier had paid several installments, it defaulted in the payment of the balance because of insolvency. Under the provisions of the act, the employer is primarily liable to the employee, which obligation is unimpaired by its contract with an insurer for insurance protection, or by the insurer's subrogation to the rights of the employer upon paying or assuming the payment of an award, and the employer is not relieved of its liability to the dependents of the deceased employee for the balance of the weekly payments because of the insolvency of the insurer. Roberts v. City Ice & Coal Co., 210 N.C. 17, 185 S.E. 438 (1936), decided under prior version of section.

The employer, held liable for the balance of an award after the insolvency of the insurer, is not entitled to a credit for the amount paid the dependents out of the judgment against the third-person tortfeasor or for the amount paid plaintiff's attorneys in that action, the amount paid the dependents out of the judgment being an amount in addition to the award, and the award not being subject to reduction by such amount. Roberts v. City Ice & Coal Co., 210 N.C. 17, 185 S.E. 438 (1936), decided under prior version of section.

General Contractor Liable for Subcontractor's Injuries. — Where, prior to the time of subcontracting the performance of roofing work, the general contractor did not require from the subcontractor, plaintiff, a certificate of insurance, and general contractor did not obtain from the Industrial Commission a certificate stating that plaintiff had complied with this section, the general contractor was liable for plaintiff's injuries pursuant to G.S. 97-19 as it existed at the time of plaintiff's accident. Southerland v. B.V. Hedrick Gravel & Sand Co., 345 N.C. 739, 483 S.E.2d 150 (1997).

General Contractor Liable for Failure to Bring SubContractor into Compliance. — Where defendant/contractor presented conflicting testimony regarding his knowledge of subcontractor's lack of workers' compensation insurance, the Industrial Commission's findings and conclusions that he willfully neglected to bring the subcontractor into compliance with the requirements of this section would be upheld. Rivera v. Trapp, 135 N.C. App. 296, 519 S.E.2d 777 (1999).

Imposition of Fine Not Mandatory Against Corporate Officer of Employer. — Imposition of administrative penalty against employer that failed to obtain workers' compensation insurance or self-insurance was mandatory under G.S. 97-94(b), and the term "neglect to" secure insurance was construed to mean the same thing as "fails to secure" the necessary workers' compensation insurance; imposition of a penalty against a corporate officer of the employer who could have obtained the compliance for the employer pursuant to G.S. 97-93 was not mandatory but the penalty was affirmed. Johnson v. Herbie's Place, 157 N.C. App. 168, 579 S.E.2d 110, 2003 N.C. App. LEXIS 640 (2003), cert. denied, 357 N.C. 460, 585 S.E.2d 760 (2003).

Self-insured Former Employer Required to Secure Its Obligation. — North Carolina Industrial Commission properly exercised its authority in determining that the former employer of the employee was the employee's employer, subject to the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., after the employer sold the division for which the employee worked to a buyer that later went bankrupt, and that the employer had to secure its obligation to the employee by one of the permitted statutory methods in order to accomplish the Commission's opinion and disability award to the employee. Goodson v. P.H. Glatfelter Co., 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

Cancellation of Policy. — Employer's insurance policy was cancellable on 10 days' written notice. Notice was held effective from the time of receipt by insured, even though he mislaid it and never read it or knew its purport. Nor was the policy kept in force as to a later injured employee by failure of the carrier to give notice to the Industrial Commission or to the North Carolina Rating Bureau in accordance with their rules, even though the policy was made expressly subject to the law concerning cancellation notices. The rules of these bodies do not have the force of law as to such matters. Motsinger v. Perryman, 218 N.C. 15, 9 S.E.2d 511 (1940), decided under prior version of section.

Applied in Carroll v. Daniels & Daniels Constr. Co., 327 N.C. 616, 398 S.E.2d 325 (1990).

Cited in Thompson's Dependents v. Johnson Funeral Home, 205 N.C. 801, 172 S.E. 500 (1934); Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1948); Evans v. Tabor City Lumber Co., 232 N.C. 111, 59 S.E.2d 612 (1950); Ashe v. Barnes, 255 N.C. 310, 121 S.E.2d 549 (1961); Smith v. Liberty Mut. Ins. Co., 409 F. Supp. 1211 (M.D.N.C. 1976); Dockery v. McMillan, 85 N.C. App. 469, 355 S.E.2d 153 (1987); Harrelson v. Soles, 94 N.C. App. 557, 380 S.E.2d 528 (1989); Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991); Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992); Christian v. Riddle & Mendenhall Logging, 117 N.C. App. 261, 450 S.E.2d 510 (1994); Nicholson v. Adkins, 183 Bankr. 702 (Bankr. M.D.N.C. 1995); North Carolina Steel, Inc. v. National Council on Comp. Ins., 123 N.C. App. 163, 472 S.E.2d 578 (1996), aff'd in part and rev'd in part, 347 N.C. 627, 496 S.E.2d 369 (1998); Patterson v. Markham & Assocs., 123 N.C. App. 448, 474 S.E.2d 400 (1996); Boone v. Vinson, 127 N.C. App. 604, 492 S.E.2d 356 (1997), cert. denied, 347 N.C. 573, 498 S.E.2d 377 (1998); Poe v. Atlas-Soundelier/American Trading & Prod. Corp., 132 N.C. App. 472, 512 S.E.2d 760 (1999); Seigel v. Patel, 132 N.C. App. 783, 513 S.E.2d 602 (1999); Reece v. Forga, 138 N.C. App. 703, 531 S.E.2d 881, 2000 N.C. App. LEXIS 790 (2000).

§ 97-94. Employers required to give proof that they have complied with preceding section; penalty for not keeping liability insured; review; liability for compensation; criminal penalties for failure to secure payment of compensation.

(a) Every employer subject to the compensation provisions of this Article shall file with the Commission, in form prescribed by it, as often as the Commission determines to be necessary, evidence of its compliance with the provisions of G.S. 97-93 and all other provisions relating thereto.

(b) Any employer required to secure the payment of compensation under this Article who refuses or neglects to secure such compensation shall be punished by a penalty of one dollar ($1.00) for each employee, but not less than fifty dollars ($50.00) nor more than one hundred dollars ($100.00) for each day of such refusal or neglect, and until the same ceases; and the employer shall be liable during continuance of such refusal or neglect to an employee either for compensation under this Article or at law at the election of the injured employee.

The penalty herein provided may be assessed by the Industrial Commission administratively, with the right to a hearing if requested within 30 days after notice of the assessment of the penalty and the right of review and appeal as in other cases. Enforcement of the penalty shall be made by the Office of the Attorney General. The clear proceeds of penalties provided for in this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(c) Any employer required to secure the payment of compensation under this Article who willfully fails to secure such compensation shall be guilty of a Class H felony. Any employer required to secure the payment of compensation under this Article who neglects to secure the payment of compensation shall be guilty of a Class 1 misdemeanor.

(d) Any person who, with the ability and authority to bring an employer in compliance with G.S. 97-93, willfully fails to bring the employer in compliance, shall be guilty of a Class H felony. Any person who, with the ability and authority to bring an employer in compliance with G.S. 97-93, neglects to bring the employer in compliance, shall be guilty of a Class 1 misdemeanor. Any person who violates this subsection may be assessed a civil penalty by the Commission in an amount up to one hundred percent (100%) of the amount of any compensation due the employer's employees injured during the time the employer failed to comply with G.S. 97-93.

(e) Notwithstanding the provisions of G.S. 97-101, the Commission may suspend collection or remit all or part of any civil penalty imposed under this section on condition that the employer or person pays the compensation due and complies with G.S. 97-93. (1929, c. 120, s. 68; 1945, c. 766; 1963, c. 499; 1973, c. 1291, s. 13; 1985, c. 119, s. 4; 1985 (Reg. Sess., 1986), c. 1027, s. 54; 1987, c. 729, s. 17; 1993, c. 539, s. 681; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 679, s. 8.1; 1997-353, s. 2; 1998-215, s. 115.)

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For 1997 legislative survey, see 20 Campbell L. Rev. 487.

CASE NOTES

This Section Does Not Grant the Court Jurisdiction Absent Proof of Noncompliance. — A claim in which the plaintiff/employee alleges only that he sustained injuries due to defendant employer's negligence while he was performing duties within the course and scope of his employment is within the exclusive jurisdiction of the Industrial Commission and cannot be heard by the court without further evidence that the employer refuses to accept the provisions of this Act. Reece v. Forga, 138 N.C. App. 703, 531 S.E.2d 881, 2000 N.C. App. LEXIS 790 (2000).

Claims Against Noncompliant Employers. — While this section arguably permits a plaintiff to bring a claim at law, the Industrial Commission is not precluded from hearing claims against noncompliant employers. Seigel v. Patel, 132 N.C. App. 783, 513 S.E.2d 602 (1999).

Authority of Industrial Commission. — North Carolina Industrial Commission properly exercised its authority in determining that the former employer of the employee was the employee's employer, subject to the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., after the employer sold the division for which the employee worked to a buyer that later went bankrupt, and that the employer had to secure its obligation to the employee by one of the permitted statutory methods in order to accomplish the Commission's opinion and disability award to the employee. Goodson v. P.H. Glatfelter Co., 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

The Industrial Commission properly assessed a fine of $50.00 per day where it determined that defendant employer had failed to procure necessary insurance for its North Carolina operations, and thus was in violation of this section. Harrison v. Tobacco Transp., Inc., 139 N.C. App. 561, 533 S.E.2d 871, 2000 N.C. App. LEXIS 996 (2000), cert. denied, 353 N.C. 263, 546 S.E.2d 96 (2000).

Imposition of Fine Mandatory. — Imposition of administrative penalty against employer that failed to obtain workers' compensation insurance or self-insurance was mandatory under G.S. 97-94(b), and the term "neglect to" secure insurance was construed to mean the same thing as "fails to secure" the necessary workers' compensation insurance; imposition of a penalty against a corporate officer of the employer who could have obtained the compliance for the employer pursuant to G.S. 97-93 was not mandatory but the penalty was affirmed. Johnson v. Herbie's Place, 157 N.C. App. 168, 579 S.E.2d 110, 2003 N.C. App. LEXIS 640 (2003), cert. denied, 357 N.C. 460, 585 S.E.2d 760 (2003).

Applied in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992); Rivera v. Trapp, 135 N.C. App. 296, 519 S.E.2d 777 (1999).

Cited in Roberts v. City Ice & Coal Co., 210 N.C. 17, 185 S.E. 438 (1936); Smith v. Liberty Mut. Ins. Co., 409 F. Supp. 1211 (M.D.N.C. 1976); Poe v. Atlas-Soundelier/American Trading & Prod. Corp., 132 N.C. App. 472, 512 S.E.2d 760 (1999).

§ 97-95. Actions against employers failing to effect insurance or qualify as self-insurer.

As to every employer subject to the provisions of this Article who shall fail or neglect to keep in effect a policy of insurance against compensation liability arising hereunder with some insurance carrier as provided in G.S. 97-93, or who shall fail to qualify as a self-insurer as provided in the Article, in addition to other penalties provided by this Article, such employer shall be liable in a civil action which may be instituted by the claimant for all such compensation as may be awarded by the Industrial Commission in a proceeding properly instituted before said Commission, and such action may be brought by the claimant in the county of his residence or in any county in which the defendant has any property in this State; and in said civil action, ancillary remedies provided by law in civil actions of attachment, receivership, and other appropriate ancillary remedies shall be available to plaintiff therein. Said action may be instituted before the award shall be made by the Industrial Commission in such case for the purpose of preventing the defendant from disposing of or removing from the State of North Carolina for the purpose of defeating the payment of compensation any property which the defendant may own in this State. In said action, after being instituted, the court may, after proper amendment to the pleadings therein, permit the recovery of a judgment against the defendant for the amount of compensation duly awarded by the North Carolina Industrial Commission and subject any property seized in said action for payment of the judgment so awarded. The institution of said action shall in no wise interfere with the jurisdiction of said Industrial Commission in hearing and determining the claim for compensation in full accord with the provisions of this Article. Nothing in this section shall be construed to limit or abridge the rights of an employee as provided in subsection (b) of G.S. 97-94. (1941, c. 352.)

CASE NOTES

Section Held Valid. — This section was held valid as applied to a claim arising and an award made before its passage. Byrd v. Johnson, 220 N.C. 184, 16 S.E.2d 843 (1941).

Construction with § 1-440.2. — This section provides a further action in which attachment may be had, and which must be read in pari materia with G.S. 1-440.2. Nelson v. Hayes, 116 N.C. App. 632, 448 S.E.2d 848, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

An employer must pay benefits to its employees, whether the employer has the necessary insurance, is self-insured, or has no insurance at all. Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487, cert. denied, 333 N.C. 169, 424 S.E.2d 406 (1992).

Employer's lack of workers' compensation insurance does not bar an employee's remedy through workers' compensation. Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487, cert. denied, 333 N.C. 169, 424 S.E.2d 406 (1992).

This section affects procedure only and does not disturb any vested rights. It must be construed prospectively and not retrospectively. Byrd v. Johnson, 220 N.C. 184, 16 S.E.2d 843 (1941).

Attachment. — The provisions of this section, in force from its ratification on March 15, 1941, were available to claimants who instituted a civil action alleging that the Industrial Commission had awarded them compensation in a stipulated sum on March 24, 1941, that defendant employer had failed and neglected to keep in effect a policy of compensation insurance and had failed to qualify as a self-insurer, and that defendant was disposing of and removing all his property from the State, and praying that a warrant of attachment issue against defendant's property. The warrant of attachment was issued, and defendant's exception to the refusal of the court to vacate it was held without merit. Byrd v. Johnson, 220 N.C. 184, 16 S.E.2d 843 (1941).

This section merely provides an avenue to allow for attachment where an employer (1) is uninsured or fails to qualify as a self-insurer, and (2) owns property in the State susceptible to disposal or removal; as such, plaintiff's affidavit must meet one of the grounds for attachment listed in G.S. 1-440.2 and 1-440.11. Nelson v. Hayes, 116 N.C. App. 632, 448 S.E.2d 848, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

The rights of a plaintiff in an action under this section are the same as those of any other plaintiff in a civil action. Nelson v. Hayes, 116 N.C. App. 632, 448 S.E.2d 848, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

The opinion and award issued by the Industrial Commission did not violate a stay order issued by a federal court, where the stay order was issued with regard to the employer's insolvent workers' compensation insurance carrier, but the only issues determined by the Commission related to the employee's claim for benefits from his employer, which is required to pay benefits when so ordered whether or not it has insurance. Tucker v. Workable Co., 129 N.C. App. 695, 501 S.E.2d 360 (1998).

Cited in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

§ 97-96: Repealed by Session Laws 1997-362, s. 7.

§ 97-97. Insurance policies must contain clause that notice to employer is notice to insurer, etc.

All policies insuring the payment of compensation under this Article must contain a clause to the effect that, as between the employer and the insurer the notice to or acknowledgment of the occurrence of the injury on the part of the insured employer shall be deemed notice or knowledge as the case may be, on the part of the insurer; that jurisdiction of the insured for the purposes of this Article shall be jurisdiction of the insurer, that the insurer shall in all things be bound by and subject to the awards, judgments, or decrees rendered against such insured employer, and that insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the insurer from the payment of compensation for disability or death sustained by an employee during the life of such policy or contract. (1929, c. 120, s. 70.)

Legal Periodicals. — For article, "North Carolina Construction Law Survey II," see 22 Wake Forest L. Rev. 481 (1987).

CASE NOTES

Applied in Collins v. Garber, 72 N.C. App. 652, 325 S.E.2d 21 (1985).

§ 97-98. Policy must contain agreement promptly to pay benefits; continuance of obligation of insurer in event of default.

No policy of insurance against liability arising under this Article shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to same all benefits conferred by this Article, and all installments of the compensation that may be awarded or agreed upon, and that the obligation shall not be affected by any default of the insured after the injury or by any default in giving notice required by such policy or otherwise. Such agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name. (1929, c. 120, s. 71.)

Cross References. — As to cancellation of policies, see note to G.S. 97-93. As to The Stock Workers' Compensation Security Fund, see G.S. 97-107.

CASE NOTES

Under this section, an employee has the right to enforce the insurance contract made for his benefit. Hartsell v. Thermoid Co., 249 N.C. 527, 107 S.E.2d 115 (1959).

Ambiguous provisions must be resolved against the carrier. Kenan v. Duplin Motor Co., 203 N.C. 108, 164 S.E. 729 (1932). See Williams v. Ornamental Stone Co., 232 N.C. 88, 59 S.E.2d 193 (1950).

Carrier Held Estopped to Deny Existence of Employment Relationship. — Where defendant carrier, at the request of employer, attached a rider to its policy covering "S, logging contractor," it was estopped to deny that plaintiff, who was working for S, was an employee of defendant. Greenway v. Riverside Mfg. Co., 206 N.C. 599, 175 S.E. 112 (1934).

Employee Paid in Part by State. — Claimant was paid for janitorial work partly by the local board of education and partly by the State School Commission. He was injured while doing extra, after-hours work solely for and at the expense of the board. A stipulation in the insurance contract with the board reduced the carrier's liability where part of the employee's wage was paid by the State. This clause was held inapplicable to the instant case, since pay for the job in which he was injured was not shared by the State, even though the award was figured on the basis of his regular weekly wage which the State did share. Casey v. Board of Educ., 219 N.C. 739, 14 S.E.2d 853 (1941). See also, Callihan v. Board of Educ., 222 N.C. 381, 23 S.E.2d 297 (1942), in which a somewhat similar liability-limiting indorsement on an insurance policy was held not applicable to relieve the carrier where a teacher of vocational education was paid in part with funds supplied by the State.

Policy Covering "Operations Conducted from" Main Place of Business. — Where a policy covered a Charlotte employer, inter alia, on "operations . . . conducted . . . from" its main place of business, it was proper for the Commission to find that an employee going daily to lay tile nearby in South Carolina, who was expected to report back at headquarters each evening and was killed in North Carolina on such return journey, was within the policy, even though the tile company had a policy in another company covering its operations in South Carolina and the North Carolina carrier did not receive any premium for the South Carolina job. Mion v. Atlantic Marble & Tile Co., 217 N.C. 743, 9 S.E.2d 501 (1940).

Injury at Quarry 40 Miles from Employer's Main Plant. — A policy designated the operations of the insured as "concrete products mfg. — shop or yard work only," and gave as the location the address of the main plant of the insured. The policy covered injuries sustained by reason of the business operations, which were stated to include "all operations necessary, incident or appurtenant thereto . . . whether such operations are conducted at the work places defined . . . or elsewhere." The policy further provided that no other business operations were covered. An injury received at defendant's quarry, 40 miles from the main plant, was held to be covered by this policy; it was "one of the work places of the company." Williams v. Ornamental Stone Co., 232 N.C. 88, 59 S.E.2d 193 (1950).

Quarrying Operations Carried on in Connection with Trucking Business. — Defendant carrier's policy covered defendant trucker's employees, including specifically blacksmiths, and service away from the business headquarters. The employer not only hauled stone for others but, without disclosure to the carrier, operated a quarry from which he sold and delivered stone. Deceased employee, a blacksmith, worked at the quarry only, but repaired some shovels and other tools used in connection with the trucking as well as the quarry machinery. He was on the general payroll. The policy provided for adjustment of the premiums on a payroll check-over made at the end of the policy period. It was held that the Commission's findings that the quarrying operations were carried on in connection with the trucking business and that the employee was covered by the policy were supported by competent evidence and were binding on the court. An award against the carrier was upheld. Miller v. Caudle, 220 N.C. 308, 17 S.E.2d 487 (1941).

Truck Driver Engaged in Unloading Logs. — It was found that defendant motor company did log hauling as an incident to its regular business. A policy in terms covering injuries to drivers was held to cover plaintiff, a regularly employed truck driver, who was engaged in unloading logs for the motor company. The carrier had contended that injuries in this type of work were outside the policy. Kenan v. Duplin Motor Co., 203 N.C. 108, 164 S.E. 729 (1932).

Notice of Cancellation of Policy. — Where policy provided for 10 days' notice of cancellation, and plaintiff was injured within 10 days from the day the employer received notice of cancellation but more than 10 days after such notice was mailed, the carrier was liable, as the 10 days date from the time of receipt of the notice. Pettit v. Wood-Owen Trailer Co., 214 N.C. 335, 199 S.E. 279 (1938).

Applied in Smith v. Richardson Sports Ltd., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 908 (May 3, 2005); Vogler v. Branch

Erections Co., — N.C. App. —, 640 S.E.2d 419, 2007 N.C. App. LEXIS 365 (2007).

Cited in North Carolina Chiropractic Ass'n v. Aetna Cas. & Sur. Co., 89 N.C. App. 1, 365 S.E.2d 312 (1988); Smith v. Richardson Sports Ltd. Partners, 168 N.C. App. 410, 608 S.E.2d 342, 2005 N.C. App. LEXIS 348 (2005); Smith v. Richardson Sports Ltd. Partners, 172 N.C. App. 200, 616 S.E.2d 245, 2005 N.C. App. LEXIS 1440 (2005), cert. denied, 360 N.C. 536, 633 S.E.2d 824 (2006), cert. dismissed, 360 N.C. 536, 633 S.E.2d 824 (2006).

§ 97-99. Law written into each insurance policy; form of policy to be approved by Commissioner of Insurance; single catastrophe hazards.

(a) Every policy for the insurance of the compensation in this Article, or against liability therefor, shall be deemed to be made subject to the provisions of this Article. No corporation, association or organization shall enter into any such policy of insurance unless its form has been approved by the Commissioner of Insurance.

(b) This Article shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar single catastrophe hazards: Provided, that nothing in this Article relieves an employer from liability for injury or death of an employee as a result of such an explosion or catastrophe. (1929, c. 120, s. 72; 1943, c. 170; 1945, c. 381, s. 1; 1959, c. 863, s. 5; 1967, c. 1218; 1993, c. 504, s. 31; 2001-241, s. 1.)

Cross References. — As to prohibition against certain workers' compensation insurance policy cancellations, see G.S. 58-36-105. As to notice of nonrenewal, premium rate increase, or change in workers' compensation insurance coverage, see G.S. 58-36-110.

CASE NOTES

Editor's Note. — *The cases below were decided prior to the 2001 amendment to this section, which deleted language relating to cancellation and notice thereof. See now G.S. 58-36-105, 58-36-110.*

Purpose of Notice. — The statutory requirement of 30 days' notice of intent to cancel was intended to assure an employer sufficient opportunity to procure other insurance. Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965).

This section applies to all workers' compensation insurance. Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965).

There is no requirement that the notice of intent to cancel due to nonpayment of premium be sent by registered or certified mail. Wilson v. Claude J. Welch Bldrs. Corp., 115 N.C. App. 384, 444 S.E.2d 628 (1994).

Evidence of Receipt of Notice. — In dispute between insurance companies where there was evidence that one insurer sent employer, by certified mail, a properly addressed, postage pre-paid notice of its intent to cancel the workers' compensation insurance policy, however, there was no evidence that employer's agent, his secretary whose duties included handling the mail, did not receive the letter, the inference created by the establishment of the prima facie case, that the letter was received, was not rebutted. Wilson v. Claude J. Welch Bldrs. Corp., 115 N.C. App. 384, 444 S.E.2d 628 (1994).

All relevant provisions of the Workers' Compensation Act become a part of each policy of insurance procured pursuant to the act. Hartsell v. Thermoid Co., 249 N.C. 527, 107 S.E.2d 115 (1959).

Whether such insurance is evidenced by binder or by policy. See Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965).

A valid binder for workers' compensation insurance cannot be terminated except by giving 30 days' notice to the insured as required by this section for cancellation of a formal policy. Wiles v. Mullinax, 270 N.C. 661, 155 S.E.2d 246 (1967).

Insurer is not obligated to notify insured of date specified in contract for termination. But where termination results from insurer's affirmative action, he must give notice of the date when cancellation will become effective. Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965).

Applied in Moore v. Adams Elec. Co., 259 N.C. 735, 131 S.E.2d 356 (1963).

Cited in Wiles v. Mullinax, 275 N.C. 473, 168 S.E.2d 366 (1969); Spivey v. Oakley's Gen. Contractors, 32 N.C. App. 488, 232 S.E.2d 454 (1977); Graves v. ABC Roofing Co., 55 N.C. App.

252, 284 S.E.2d 718 (1981); North Carolina Chiropractic Ass'n v. Aetna Cas. & Sur. Co., 89 N.C. App. 1, 365 S.E.2d 312 (1988); Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992).

§ 97-100. Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices.

(a) The rates charged by all carriers of insurance, including the parties to any mutual insurance association writing insurance against the liability for compensation under this Article, shall be fair, reasonable, and adequate.

(b) Each insurance carrier shall report to the Commissioner of Insurance, in accordance with rules adopted by the Commissioner of Insurance, for the purpose of determining the solvency of the carrier and the adequacy of its rates; for this purpose the Commissioner of Insurance may inspect the books and records of any insurance carrier, and examine its agents, officers, and directors under oath.

(c) Every insurer under this Article, every employer carrying its own risk under G.S. 97-93, and every group of employers that has pooled the employers' liabilities under G.S. 97-93 is subject to the premiums tax levied in Article 8B of Chapter 105 of the General Statutes.

(d) through (f). Repealed by Session Laws 1995, c. 360, s. 1.

(g) Any person who acts or assumes to act as agent for any insurance carrier whose authority to do business in this State has been suspended, while the suspension remains in force, who neglects or refuses to comply with any of the provisions of this section, or who willfully makes a false or fraudulent statement of the business or condition of any insurance carrier, is guilty of a Class 2 misdemeanor.

(h) Whenever by this Article, or the terms of any policy contract, any officer is required to give any notice to an insurance carrier, the notice may be given by delivery, or by mailing by registered letter properly addressed and stamped, to the principal office or general agent of the insurance carrier within this State, or to its home office, or to the secretary, general agent, or chief officer of the carrier in the United States, or to the Commissioner of Insurance.

(i) through (k). Repealed by Session Laws 1995, c. 360, s. 1. (1929, c. 120, s. 73; 1931, c. 274, s. 13; 1947, c. 574; 1961, c. 833, s. 13; 1977, c. 828, s. 7; 1985, c. 119, s. 2; 1985 (Reg. Sess., 1986), c. 928, s. 13; 1989, c. 647, s. 1; 1993, c. 539, s. 682; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 360, s. 1(h).)

Cross References. — As to the North Carolina Rate Bureau, see G.S. 58-36-1 et seq. As to the regulation of insurance rates, see G.S. 58-40-1 et seq.

CASE NOTES

Clause Stating That Policy Is Subject to Rates Promulgated by Insurance Commissioner. — Where a clause in an insurance policy stated that the policy was subject to the rates promulgated by the Insurance Commissioner, such clause would be enforced. Travelers' Ins. Co. v. Murdock, 208 N.C. 223, 179 S.E. 886 (1935).

Money Received Under Subsection (j). — For case decided prior to the 1961 amendment, which added the last sentence to subsection (j), see North Carolina Indus. Comm'n v. O'Berry, 197 N.C. 595, 150 S.E. 44 (1929).

Applied in State ex rel. Commissioner of Ins. v. Compensation Rating & Inspection Bureau, 30 N.C. App. 332, 226 S.E.2d 822 (1976).

Cited in State ex rel. Comm'r of Ins. v. State ex rel. Attorney Gen., 19 N.C. App. 263, 198 S.E.2d 575 (1973); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 40 N.C. App. 85, 252 S.E.2d 811 (1979).

§ 97-101. Collection of fines and penalties.

The Industrial Commission shall have the power by civil action brought in its own name to enforce the collection of any fines or penalties provided by this Article, and fines or penalties collected by the Commission shall become a part of the maintenance fund referred to in subsection (j) of G.S. 97-100. (1931, c. 274, s. 14.)

Editor's Note. — Section 97-100(j), referred to in this section, was repealed by Session Laws 1995, c. 360, s. 1.

CASE NOTES

Cited in McCorkle v. Aeroglide Corp., 115 N.C. App. 651, 446 S.E.2d 145 (1994); Canady v. McLeod, 116 N.C. App. 82, 446 S.E.2d 879 (1994).

§ 97-101.1. Commission may issue writs of habeas corpus.

The Industrial Commission may issue a writ of habeas corpus ad testificandum under Article 8 of Chapter 17 of the General Statutes although it is not a court of record. (1998-217, s. 31.1(a).)

CASE NOTES

Cited in Jane Doe 1 v. Swannanoa Valley Youth Dev. Ctr., 163 N.C. App. 136, 592 S.E.2d 715, 2004 N.C. App. LEXIS 299 (2004).

Article 2.

Compensation Rating and Inspection Bureau.

§§ 97-102 through 97-104.6: Repealed by Session Laws 1977, c. 828, s. 8, as amended by Session Laws 1979, c. 824, s. 8.

Cross References. — As to the North Carolina Rate Bureau, see G.S. 58-36-1 et seq. As to the regulation of insurance rates, see G.S. 58-40-1 et seq.

Article 3.

Security Funds.

§§ 97-105 through 97-122: Repealed by Session Laws 1991 (Regular Session, 1992), c. 802, s. 12, as amended by Session Laws 1991 (Regular Session, 1992), c. 1030, s. 51.3.

Cross References. — As to disposition of funds in the Stock Workers' Compensation Security Fund and the Mutual Workers' Compensation Security Fund, see G.S. 58-48-105 through 58-48-130.

§§ 97-123 through 97-129: Reserved for future codification purposes.

ARTICLE 4.

North Carolina Self-Insurance Security Association.

§ 97-130. Definitions.

As used in this Article:

(1) "Association" means the North Carolina Self-Insurance Security Association established by G.S. 97-131.

(1a) "Association Aggregate Security System" means the security system established by the Association under G.S. 97-133 whereby individual self-insurers collectively secure their aggregate self-insured workers' compensation liabilities through the North Carolina Self-Insurance Security Association.

(2) "Board" means the Board of Directors of the Association established by G.S. 97-132.

(3) "Commissioner" means the North Carolina Commissioner of Insurance.

(4) "Covered claim" means an unpaid claim against an insolvent individual self-insurer or group self-insurer that relates to an injury that occurs while the individual self-insurer or group self-insurer is a member of the Association and that is compensable under this Chapter.

(5) "Fund" means the North Carolina Self-Insurance Security Fund established by G.S. 97-133.

(5a) "Group" or "Group self-insurer" means a group self-insurer licensed by the Commissioner under Part 1, Article 47 of Chapter 58 of the General Statutes.

(5b) "Individual self-insurer" means an individual employer licensed by the Commissioner under Article 5 of this Chapter.

(6) "Member self-insurer" or "member" means an individual self-insurer or group self-insurer that is required to be a member of the Association under this Article or Part 1, Article 47 of Chapter 58 of the General Statutes.

(7) "Plan" means the Plan of Operation authorized by G.S. 97-134.

(8) Repealed by Session Laws 2005-400, s. 1.2, effective January 1, 2006.

(9) "Servicing facility" means those persons delegated by the Board and approved by the Commissioner to settle or compromise claims and to expend Fund assets to pay claims. (1985 (Reg. Sess., 1986), c. 1013, s. 1; 1987, c. 528, s. 1; 1997-362, s. 8; 2005-400, s. 1.2.)

Effect of Amendments. — Session Laws 2005-400, s. 1.2, effective January 1, 2006, substituted "Security" for "Guaranty" in the section heading and in subdivisions (1) and (5); added subdivisions (1a), (5a), (5b) and (9); inserted "individual self-insurer or group" preceding "self-insurer" in subdivision (4); rewrote subdivision (6) which read: "'Member self-insurer' or 'member' means a self-insurer which is authorized by the Commissioner to self-insure pursuant to G.S. 97-93 and G.S. 97-94"; and deleted former subdivision (8), which related to the definition of "Self-insurer."

§ 97-131. Creation.

(a) There is created a nonprofit unincorporated legal entity to be known as the North Carolina Self-Insurance Security Association. The Association is to provide mechanisms for the payment of covered claims against member self-insurers, to avoid excessive delay in payment of covered claims, to avoid financial loss to claimants because of the insolvency of a member self-insurer, to assist the Commissioner in the detection of self-insurer insolvencies, to fund the Association Aggregate Security System, and to capitalize the Fund to ensure the availability of financial resources to pay covered claims and to fund the activities of the Association.

(b) All individual self-insurers and group self-insurers shall be and remain members of the Association as a condition of being licensed to self-insure in this State. The Association shall perform its functions under a Plan of Operation established or amended, or both, by the Board and approved by the Commissioner, and shall exercise its powers through the Board.

(1) An individual self-insurer or a group self-insurer shall be deemed to be a member of the Association for purposes of another member's insolvency, as defined in G.S. 97-135, when:
   a. The individual self-insurer or group self-insurer is a member of the Association when an insolvency occurs, or
   b. The individual self-insurer or group self-insurer has been a member of the Association at some point in time during the 12-month period immediately preceding the insolvency in question.

(2) An individual self-insurer or a group self-insurer shall be deemed to be a member of the Association for purposes of its own insolvency if it is a member when the compensable injury occurs.

(3) In determining the membership of the Association for the purposes of subdivisions (1) and (2) of this subsection for any date after the effective date of this Article, no individual self-insurer or group self-insurer may be deemed to be a member of the Association on any date after the effective date of this Article, unless that employer is on that date licensed as an individual self-insurer by the Commissioner under Article 5 of this Chapter or a group of employers is at that time licensed as a group self-insurer by the Commissioner under Article 47 of Chapter 58 of the General Statutes. (1985 (Reg. Sess., 1986), c. 1013, s. 1; 1987, c. 528, s. 2; 1997-362, s. 9; 2005-400, s. 2.)

Effect of Amendments. — Session Laws 2005-400, s. 2, effective January 1, 2006, rewrote this section.

CASE NOTES

Cited in Stamey v. North Carolina Self-Insurance Guar. Ass'n, 131 N.C. App. 662, 507 S.E.2d 596 (1998).

§ 97-132. Board of directors.

The Board shall consist of not less than nine directors serving terms as established in the Plan. The directors shall be selected by the members of the Association, subject to the approval of the Commissioner, and shall serve for three-year terms and until a successor is elected and qualified. There is no limitation on the number of terms a director may serve. In approving selections to the Board, the Commissioner shall consider, among other things, whether individual self-insurers and group self-insurers are fairly represented. Directors may be reimbursed from the assets of the Association for expenses incurred by them as directors. (1985 (Reg. Sess., 1986), c. 1013, s. 1; 1987, c. 528, s. 3; 2005-400, s. 3.)

Effect of Amendments. — Session Laws 2005-400, s. 3, effective January 1, 2006, rewrote this section.

§ 97-133. Powers and duties of the Association.

(a) The Association shall:

(1) Repealed by Session Laws 1999-219, s. 7.2, effective June 25, 1999.

(1a) Administer a fund, to be known as the North Carolina Self-Insurance Security Fund, which shall receive the assets of the North Carolina Self-Insurance Guaranty Fund previously established under subdivision (2) of this subsection, the assessments required by subdivisions (2a) and (3a) of this subsection and any other sums received by the Association. In its discretion, the Board may determine that the assets of the Fund should be segregated or that a separate accounting shall be made in order to identify that portion of the Fund which represents assessments paid by individual self-insurers and that portion of the Fund which represents assessments paid by group self-insurers. If the Board segregates the Fund in this manner, the Association shall thereafter pay covered claims against individual member self-insurers from that portion of the Fund that represents assessments against individual self-insurers and shall thereafter pay covered claims against group member self-insurers from that portion of the Fund that represents assessments against group self-insurers. The costs of administering the Association shall be borne by the Fund. The Association is authorized to secure insurance, primary excess insurance, reinsurance, bonds, other insurance, financial guarantees and related financial instruments to effectuate the purposes of the Association. The Board will invest the Fund assets pursuant to an investment policy adopted by the Board and reviewed and approved annually by the Department of the State Treasurer. The earnings from investment of Fund assets shall be placed in or credited to the Fund.

(2) Repealed by Session Laws 2005-400, s. 4, effective January 1, 2006.

(2a) Establish, operate, and maintain the Association Aggregate Security System as defined in G.S. 97-130 and G.S. 97-165 as follows:

a. The Association shall annually prepare and submit to the Commissioner a written plan to provide an Association Aggregate Security System through a combination of cash on deposit in the Fund, securities, surety bonds, irrevocable letters of credit, insurance or other financial instruments or guarantees owned or entered into by the Association and acceptable to the Commissioner. The written plan shall include, but not be limited to, (i) a description of the institutions that will issue or guarantee the securities, surety bonds, irrevocable letters of credit, insurance or other financial instruments or guarantees, including, but not limited to, the credit rating, financial strength, and AM best rating, if applicable to the institutions (ii) applicable cash flow information and financial assumptions (iii) a description of the methodology to be used by the Association to assess and collect the Association Aggregate Security System assessments to be made pursuant to subdivision (3a) of this subsection and (iv) a proposed timetable for the release of existing individual company deposits posted pursuant to G.S. 97-185(c), provided, however, that no individual company deposits posted pursuant to G.S. 97-185(c) shall be released without the written consent of the Commissioner. The noncash elements of the composite security may be one-year or multiple-year instruments.

b. Within 90 days following the submission of the initial plan under sub-subdivision a. of this subdivision, the Commissioner shall either approve or disapprove the initial plan and shall notify the Association in writing. If the Commissioner does not approve or disapprove the initial plan within 90 days following submission, then the initial plan shall be deemed to be approved by the Commissioner. All subsequent plans shall be either approved or disapproved within 60 days following submission.

c. The Commissioner shall also determine the total undiscounted claims liability of each individual self-insurer that will participate in the Association Aggregate Security System as well as the aggregate total undiscounted outstanding claims liabilities of all the individual self-insurers that are to participate in the Association Aggregate Security System and shall notify the Association of this determination.

d. Upon approval by the Commissioner of the Association's plan for the Association Aggregate Security System, the Association shall assess the individual self-insurers that participate in the Association Aggregate Security System pursuant to subdivision (3a) of this subsection.

e. If the Commissioner disapproves the plan for any year, every self-insurer shall deposit with the Commissioner, or continue to deposit, the amount required by G.S. 97-185(b3) in the manner prescribed by G.S. 97-185(c).

f. Group self-insurers shall not participate in the Association Aggregate Security System.

(3) Repealed by Session Laws 2005-400, s. 4, effective January 1, 2006.

(3a) Assess members of the Association as follows:

a. Association Aggregate Security System assessments. — The Association shall assess each individual self-insurer participating in the Association Aggregate Security System a security system assessment. The amount of the security system assessment charged to each individual self-insurer participating in the Association Aggregate Security System shall be based on the Association's reasonable consideration of all of the following factors:

1. The total amount of assessments necessary to provide aggregate security for all participating individual self-insurers.
2. The individual self-insurer's total workers' compensation liabilities under the Act.
3. The financial strength and creditworthiness of the participating individual self-insurer.
4. Any other relevant factors.

b. Special assessment. — In the event that there are covered claims against an insolvent member or members and the assets of the Fund are not sufficient to pay the obligations of the Association, then the Association may collect a special assessment from the members in an amount sufficient to pay the aggregate value of such covered claims. Each member's special assessment shall be determined by the Board and shall be based on the proportion of the member's total obligations under the Act to the aggregate total of all members' obligations under the Act.

c. Initial assessments. — An individual self-insurer that becomes a member and does not initially participate in the Association Aggregate Security System shall pay an initial assessment to the

Association in an amount determined by the Board. A group self-insurer, upon receiving its initial license from the Commissioner, shall pay an initial assessment to the Association in an amount determined by the Board.

d. Each member shall be notified of assessments no later than 30 days before the assessment is due.

e. Delinquent assessments, except as otherwise provided, shall bear interest at a rate to be established by the Board.

(4) Be obligated to pay covered claims.

(5) After paying any covered claim, be subrogated to the rights of the injured employee and dependents and be entitled to enforce liability against the self-insurer or any third party by any appropriate action brought in its own name or in the name of the injured employee and dependents.

(6) Expend Fund assets in amounts necessary to pay all of the following:

a. The obligations of the Association under this Article subsequent to an insolvency.

b. The expenses of handling covered claims subsequent to an insolvency.

c. The cost of examinations under G.S. 97-137.

d. The costs of implementing and operating the Association Aggregate Security System.

e. All other expenses authorized by this Article.

(7) Investigate claims brought against the Association and adjust, compromise, settle, and pay covered claims to the extent of the Association's obligation; and deny all other claims. The Association may review settlements to which the insolvent member was a party to determine the extent to which such settlements may be properly contested.

(8) Notify such persons as the Commissioner directs under G.S. 97-136.

(9) Handle claims through its directors, its employees, or through one or more members or other persons designated as servicing facilities. Designation of a servicing facility is subject to the approval of the Commissioner, but designation of a member as a servicing facility may be declined by such member.

(10) Reimburse each servicing facility for obligations of the Association paid by the facility and for expenses incurred by the facility while handling claims on behalf of the Association.

(11) Pay any other expenses of the Association authorized by this section.

(12) Repealed by Session Laws 2005-400, s. 4, effective January 1, 2006.

(b) The Association may:

(1) Employ or retain such persons, including, but not limited to, adjustors, brokers, accountants, attorneys, financial advisors, investment bankers, placement agents, and consultants, as the Board may determine are necessary to handle claims, perform other duties of, provide services to, and consult with the Association.

(2) Borrow funds necessary to effect the purposes of this Article in accord with the Plan, including entering into standby lines of credit.

(3) Sue or be sued.

(4) Negotiate and become a party to such contracts as are necessary to carry out the purpose of this section.

(5) Perform such other acts as are necessary or proper to effectuate the purpose of this section.

(6) Reimburse the Department of Insurance up to twenty thousand dollars ($20,000) for consultants retained by the Department to review the initial plan submitted pursuant to G.S. 97-133(a)(2a).

(c) Repealed by Session Laws 2005-400, s. 4, effective January 1, 2006.

(c1) The Association shall provide in its Plan that the functions of administration and adjusting claims shall not be performed by the same entity that provides legal representation to the Association for claims.

(d) Repealed by Session Laws 2005-400, s. 4, effective January 1, 2006. (1985 (Reg. Sess., 1986), c. 928, s. 1(a); 1985 (Reg. Sess., 1986), c. 1013, s. 1; 1987, c. 528, ss. 4-10; 1989, c. 485, s. 27; 1995, c. 533, s. 1; 1997-475, ss. 2.3, 2.4; 1999-219, s. 7.2; 2003-115, ss. 1, 2; 2005-400, s. 4.)

Effect of Amendments. — Session Laws 2005-400, s. 4, effective January 1, 2006, rewrote this section.

§ 97-134. Plan of Operation.

The Plan is as follows:

(1) The Association shall submit to the Commissioner a Plan and any amendments necessary or suitable to assure the fair, reasonable, and equitable administration of the Association. The Plan and any amendments become effective upon approval in writing by the Commissioner. If the Association at any time fails to submit a suitable Plan or suitable amendment to the Plan the Commissioner shall, after notice and hearing, adopt such reasonable rules as are necessary or advisable to effectuate this Article. The rules shall continue in force until modified by the Commissioner or superseded by a Plan submitted by the Association and approved by the Commissioner.

(2) All member self-insurers shall comply with the Plan.

(3) The Plan shall:

  a. Establish the procedures whereby all the powers and duties of the Association under G.S. 97-133 will be performed.
  b. Establish procedures for investing and managing Fund assets.
  c. Adopt a reasonable mechanism and procedure to achieve equity in assessing members under G.S. 97-133.
  d. Establish the amount and method of reimbursing members of the Board under G.S. 97-132.
  e. Establish procedures by which claims may be filed with the Association and establish acceptable forms of proof of covered claims.
  f. Establish regular places and times for meetings of the Board.
  g. Establish procedures for records to be kept of all financial transactions of the Association, its agents, and the Board.
  h. Provide that any member self-insurer aggrieved by any final action or decision of the Association may appeal to the Commissioner within 30 days after the action or decision.
  i. Establish the procedures whereby selections for the Board shall be submitted to the Commissioner.
  j. Contain additional provisions necessary or proper for the execution of the powers and duties of the Association. (1985 (Reg. Sess., 1986), c. 1013, s. 1; 1987, c. 528, s. 11; 2005-400, s. 5.)

Effect of Amendments. — Session Laws 2005-400, s. 5, effective January 1, 2006, in subdivision (1), inserted "suitable" preceding "Plan or suitable" in the third sentence and substituted "The rules" for "Such rules" at the beginning of the last sentence; substituted "investing and managing Fund assets" for "handling assets of the Association" in subdivision (3)b.; substituted "members under G.S. 97-133" for "the funds required in G.S. 97-133. Consideration shall be given to adjustments for audited payroll, differential effects caused by rate changes, and other relevant factors" in subdivision (3)c.; deleted the former second sentence in subdivision (3)e., which read: "A list of such claims shall be periodically submitted to the Association"; and made minor punctuation and stylistic changes.

§ 97-135. Insolvency.

A member self-insurer shall be insolvent for the purposes of this Article under any of the following circumstances:

(1) Determination of insolvency by a court of competent jurisdiction.
(2) Institution of bankruptcy proceedings by or regarding the member self-insurer.
(3) The Board determines that the member self-insurer's total liabilities exceed its total assets or the member self-insurer is unable or ceases to pay its debts as they fall due or in the ordinary course of business.
(4) A member self-insurer is deemed to be insolvent, bankrupt, or in default as defined by the terms of any security instrument created pursuant to the Association Aggregate Security System. (1985 (Reg. Sess., 1986), c. 1013, s. 1; 1987, c. 528, s. 12; 2005-400, s. 6.1.)

Effect of Amendments. — Session Laws 2005-400, s. 6.1, effective January 1, 2006, inserted "any of" preceding "the following" in the first paragraph; inserted "member" twice preceding "self-insurer's" in subdivision (3); added subdivision (4); and made minor stylistic and punctuation changes.

§ 97-136. Powers and duties of the Commissioner.

(a) The Commissioner shall:

(1) Notify the Association of the existence of an insolvent member self-insurer not later than 30 days after he receives notice of an insolvency pursuant to the standards set forth in G.S. 97-135.
(2) Approve or disapprove the plan for an Association Aggregate Security System as required under G.S. 97-133(a)(2a)b. and notify the Association of the information required under G.S. 97-133(a)(2a)c.

(b) The Commissioner may:

(1) Require that the Association notify the insureds of the insolvent member self-insurer and any other interested parties of the insolvency and of their rights under this Article. The notifications shall be by mail at their last known addresses, where available; but if required information for notification is not available, notice by publication in a newspaper of general circulation in this State shall be sufficient; and
(2) Revoke the designation of any servicing facility if the Commissioner finds claims are being handled unsatisfactorily. (1985 (Reg. Sess., 1986), c. 1013, s. 1; 2005-400, s. 6.2.)

Effect of Amendments. — Session Laws 2005-400, s. 6.2, effective January 1, 2006, substituted "shall" for "shall notify" in the first paragraph of subsection (a); inserted the subdivision (a)(1) designation; inserted "Notify" at the beginning of present subdivision (a)(1); added subdivision (a)(2); substituted "The notifications" for "Such notifications" at the beginning of the second sentence in subdivision (b)(1); and substituted "the Commissioner" for "he" in subdivision (b)(2).

§ 97-137. Examination of the Association.

The Association shall be subject to examination and regulation by the Commissioner. The Board shall submit, not later than March 30 of each year, a financial report for the preceding calendar year in a form approved by the Commissioner. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-138. Tax exemption.

The Association shall be exempt from payment of all fees and all taxes levied by this State or any of its political subdivisions, except taxes levied on real or personal property. (1985 (Reg. Sess., 1986), c. 928, s. 1(b).)

§ 97-139. Immunity.

There shall be no liability on the part of and no cause of action of any nature may arise against any member self-insurer, the Association, or its agents or employees, the Board or its individual members, or the Commissioner or his representatives for any acts or omissions taken by them in the performance of their powers and duties under this Article. The immunity established by this section shall not extend to willful neglect or malfeasance that would otherwise be actionable. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-140. Nonduplication of recovery.

Any person having a covered claim that may be recovered under more than one insurance or self-insurance guaranty or security association or its equivalent shall seek recovery first from the association of the place or residence of the claimant. Any recovery under this Article shall be reduced by the amount of recovery from any other insurance guaranty or security association or its equivalent. (1985 (Reg. Sess., 1986), c. 1013, s. 1; 2005-400, s. 7.)

Effect of Amendments. — Session Laws 2005-400, s. 7, effective January 1, 2006, inserted "or security" twice preceding "association or its equivalent."

§ 97-141. Stay of proceedings.

All claims or proceedings under this Chapter to which the insolvent member self-insurer is a party either before the Industrial Commission or a court in this State and the running of all time periods against either the insolvent member self-insurer or the Association under this Chapter shall be stayed for 60 days from the later of the date of notice to the Association of the insolvency or the date the Association is notified of a claim or proceeding under this Chapter in order to permit the Association to investigate, prosecute, or defend properly any petition, claim, or appeal under this Chapter, provided that the payment of weekly compensation for incapacity is made whenever time periods or proceedings affecting the payment of weekly compensation are stayed. (1985 (Reg. Sess., 1986), c. 1013, s. 1; 2003-115, s. 6.)

§ 97-142. Disposition of assets upon dissolution.

In the event of dissolution of the Association, all assets remaining after provision for satisfaction of all outstanding claims shall be distributed to the State Treasurer for establishment of a reserve to satisfy potential claims against the Association and, all such claims being satisfied, for inclusion in the general fund of the State. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-143. Use of deposits made by insolvent member self-insurers.

After the Commissioner has notified the Association, under G.S. 97-136(a), that a member is insolvent, the Commissioner shall assign and deliver to the Association, and the Association is authorized to expend any deposit made by the insolvent member under G.S. 58-47-90 or G.S. 97-185, to the extent the deposit is needed by the Association to pay covered claims against the insolvent member as required by this Article, and to the extent the deposit is needed to pay expenses of the Association relating to covered claims against the insolvent member. For insolvent individual member self-insurers that participate in the Association Aggregate Security System, the Association is authorized to pursue recovery under every instrument, contract, and form of security comprising the composite security. The Association shall account to the Commissioner and the insolvent member or its successor for all deposits received from the Commissioner under this section. (1991, c. 644, s. 25; 1997-362, s. 6; 2005-400, s. 8.)

Effect of Amendments. — Session Laws 2005-400, s. 8, effective January 1, 2006, substituted "any deposit" for "the deposit" in the first sentence; and added the second sentence.

§§ 97-144 through 97-164: Reserved for future codification purposes.

Article 5.

Individual Employers.

§ 97-165. Definitions.

As used in this Article:

(1) "Act" means the Workers' Compensation Act established in Article 1 of this Chapter.

(1a) "Affiliate of" or "person affiliated with" a specific person means a person that indirectly through one or more intermediaries or directly controls, is controlled by, or is under common control with the person specified.

(1b) "Association Aggregate Security System" means the security system established pursuant to G.S. 97-133 whereby individual self-insurers collectively secure their aggregate self-insured workers' compensation liabilities under the Act through the North Carolina Self-Insurance Security Association.

(2) "Certified audit" means an audit on which a certified public accountant expresses his or her professional opinion that the accompanying statements fairly present the financial position of the self-insurer or the guarantor, in conformity with accounting principles generally accepted in the United States.

(3) "Certified public accountant" or "CPA" means a CPA who is in good standing with the American Institute of Certified Public Accountants and in all states in which the CPA is licensed to practice. A CPA shall be recognized as independent as long as the CPA conforms to the standards of the profession, as contained in the Code of Professional Ethics of the American Institute of Certified Public Accountants and Rules and Regulations and Code of Ethics and Rules of Professional Conduct of the North Carolina State Board of Certified Public Accountant Examiners, or similar code. The Commissioner may hold a hearing to determine whether a CPA is independent and, considering the evidence presented, may rule that the CPA is not independent for purposes of expressing an opinion on the GAAP financial statement and require the self-insurer or the guarantor to replace the CPA with another whose relationship with the self-insurer or the guarantor is independent within the meaning of this definition.

(4) "Commissioner" means the Commissioner of Insurance.

(4a) "Control", "controlling", "controlled by", and "under common control with" mean the direct or indirect possession of the power to direct or cause the direction of the management and policies of a person through ownership of or through proxies for voting of greater than fifty percent (50%) of the voting securities, or in the case of a not-for-profit entity, the power to direct or cause the direction of the management and policies of the entity.

(5) "Corporate surety" means an insurance company authorized by the Commissioner to write surety business in this State.

(6) "GAAP financial statement" means a financial statement as defined by accounting principles generally accepted in the United States.

(6a) "Guarantor" means a person within the same holding company system who controls the applicant, whose financial statement is used by the applicant to become a self-insurer under the Act, and who has guaranteed the payment of the self-insurer's liability under the Act.

(7) "Hazardous financial condition" means that, based on its present or reasonably anticipated financial condition, a self-insurer or guarantor is insolvent or, although not yet financially impaired or insolvent, is unlikely to be able to meet its obligations with respect to known claims and reasonably anticipated claims or to pay other obligations in the normal course of business.

(7a) "Holding company system" means an entity comprising two or more affiliated persons.

(8) "Management" means those persons who are authorized to direct or control the operations of a self-insurer.

(8a) "Person" means an individual, corporation, partnership, limited liability company, association, joint stock company, trust, unincorporated organization, or any similar entity or any combination of the foregoing acting in concert.

(9) "Qualified actuary" means a member in good standing of the Casualty Actuarial Society or a member in good standing of the American Academy of Actuaries, who has been approved as qualified for signing casualty loss reserve opinions by the Casualty Practice Council of the American Academy of Actuaries, and is in compliance with G.S. 58-2-171.

(10) "Self-insurer" means an individual self-insurer as defined by G.S. 97-130(5b).

(11) "Subsidiary of" a specific person means an affiliate controlled by such person indirectly through one or more intermediaries or an affiliate directly controlled by such person. (1997-362, s. 4; 1999-132, s. 13.5; 2004-199, s. 20(h); 2005-400, s. 9.)

Effect of Amendments. — Session Laws 2005-400, s. 9, effective January 1, 2006, added subdivisions (1a), (1b), (4a), (6a), (7a), (8a), and (11); substituted "self-insurer or the guarantor, in conformity with accounting principles generally accepted in the United States" for "self-insurer, in conformity with generally accepted accounting principles" in subdivision (2); substituted "self-insurer or the guarantor to replace the CPA with another whose relationship with the self-insurer or the guarantor" for "individual to replace the CPA with another whose relationship with the individual" in subdivision (3); substituted "accounting principles generally accepted in the United States" for "generally accepted accounting principles" in subdivision (6); in subdivision (7), inserted "or guarantor" preceding "is insolvent" and "its" preceding "obligations with respect"; and substituted "individual self-insurer as defined by G.S. 97-130(5b)" for "employer who retains liability under the Act and is licensed under this Article" in subdivision (10).

CASE NOTES

Applied in Goodson v. P.H. Glatfelter Co., 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

§ 97-170. License applications; required information.

(a) No employer shall self-insure its workers' compensation liabilities under the Act unless it is licensed by the Commissioner under this Article. This subsection does not apply to an employer authorized to self-insure its workers' compensation liabilities under the Act prior to December 1, 1997, whose authority to self-insure its workers' compensation liabilities under the Act has not terminated after that date.

(b) An applicant for a license as a self-insurer shall file with the Commissioner the information required by subsection (d) of this section on a form prescribed by the Commissioner at least 90 days before the proposed licensing date. No application is complete until the Commissioner has received all required information. A copy of the application must also be filed with the North Carolina Self-Insurance Security Association at least 90 days before the proposed licensing date.

(c) Only an applicant whose total fixed assets amount to five hundred thousand dollars ($500,000) or more may apply for a license. In judging the applicant's financial strength and liquidity relative to its ability to comply with the Act, the Commissioner shall consider all of the following relative to the applicant:

(1) Organizational structure and management.
(2) Financial strength.
(3) Source and reliability of financial information.
(4) Risks to be retained.
(5) Workers' compensation loss history.
(6) Number of employees.
(7) Claims administration.
(8) Excess insurance.
(9) Access to excess insurance.

(d) The license application shall be comprised of the following information:

(1) Applicant name; organizational structure of the applicant, including any controlling entity, subsidiaries, or affiliates; location of principal office; contact person; organization date; type of operations within this State; management background; and addresses of all plants or offices in this State.
(2) Certified audited GAAP financial statements prepared by a CPA for the two most recent years. The financial statement presentation shall facilitate application of ratio and trend analysis.
(3) Evidence of the insurance required by G.S. 97-190.
(4) Repealed by Session Laws 1999-132, s. 13.7, effective June 4, 1999.
(5) For applicants with 20 or more full-time employees, a certificate or other evidence of safety inspection, satisfactory to the Commissioner, that certifies that all safety requirements of the Department of Labor have been met.
(6) Summary of workers' compensation benefits paid for the last three calendar years and the total liability for all open claims within 30 days or some other period acceptable to the Commissioner not to exceed 90 days, before the filing of the application.
(7) Summary, by risk classification, of annual payroll and number of employees within the State.

(8) Repealed by Session Laws 2005-400, s. 10, effective January 1, 2006.

(9) Proof of compliance with the claims administration provisions of Article 47 of Chapter 58 of the General Statutes.

(10) A letter of approval for membership by the North Carolina Self-Insurance Security Association.

(e) Every applicant shall execute and file with the Commissioner an agreement, as part of the application, in which the applicant agrees to participate in the Association Aggregate Security System, or if excluded from the Association Aggregate Security System, to deposit with the Commissioner pursuant to G.S. 97-185 cash, acceptable securities, an irrevocable letter of credit in a form acceptable to the Commissioner issued by a bank acceptable to the Commissioner, or a surety bond issued by a corporate surety, or a combination thereof, that will guarantee the applicant's compliance with this Article and the Act. (1997-362, s. 4; 1999-132, ss. 13.6, 13.7; 2003-212, s. 25; 2005-400, s. 10.)

Effect of Amendments. — Session Laws 2005-400, s. 10, effective January 1, 2006, added the last sentence to subsection (b); substituted "all of the following relative to the applicant" for "the applicant's" in subsection (c); substituted "be comprised of" for "comprise" in subsection (d); rewrote subdivision (d)(1); substituted "presentation" for "formulation" in subdivision (d)(2); substituted "years and" for "years, as well as" in subdivision (d)(6); deleted former subdivision (d)(8), which read: "Book value of fixed assets located within the State."; rewrote subdivision (d)(10); rewrote subsection (e); and made minor stylistic and punctuation changes.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 487.

§ 97-175. License.

(a) After the review of the application and all supporting materials, the Commissioner shall either grant or deny a license. If a license is denied, the Commissioner shall notify the applicant of the denial and inform the applicant of the deficiencies that constitute the basis for denial.

(b) If the deficiencies are resolved within 60 days after the Commissioner's notice of denial, the applicant shall be granted a license. The applicant may be granted additional time to remedy the deficiencies in its application. A request for an extension of time shall be made in writing by the applicant within 30 days after notice of denial by the Commissioner. If the requirements of this Article have not been met, the application shall be withdrawn or denied. (1997-362, s. 4.)

§ 97-177. License covering applicant and any subsidiary or applicant relying on a guarantor; procedure; requirements.

(a) The Commissioner may, in the Commissioner's discretion, upon request by an applicant, issue a license to an applicant or to an applicant and one or more of its subsidiaries if all of the following requirements are satisfied:

(1) The applicant or a guarantor of the applicant executes a guaranty agreement, in a form prescribed by the Commissioner, for the payment of all workers' compensation liabilities covered under the Act. For any applicant or guarantor that is a corporation, there shall be submitted, along with the guaranty agreement, a board of directors' resolution from the respective corporation authorizing the guaranty of the liabilities of the subsidiary company or companies and granting signature authority to each person or officer executing the agreement.

(2) The applicant or guarantor files a statement with the Commissioner that lists the percentage of ownership of voting securities or proxies

representing voting securities owned or held by the applicant or guarantor for each subsidiary, or in the case of a not-for-profit entity, documentation acceptable to the Commissioner evidencing control.

(3) The applicant and its guarantor or the applicant and its subsidiaries, whichever applies, satisfy the requirements of G.S. 97-170(c).

(4) All other applicable requirements for licensure under the Act are satisfied.

(b) A license issued by the Commissioner pursuant to this section shall include the name of the applicant, the name of each licensed subsidiary, and the date of issuance for each licensed subsidiary.

(c) If a self-insurer requests to add a subsidiary to its license, the Commissioner shall review the request in accordance with this section. Upon approval, the Commissioner shall issue to the self-insurer a new license that includes the newly licensed subsidiary and the date of license issuance for the newly licensed subsidiary, and the self-insurer shall return the original license to the Commissioner.

(d) A self-insurer shall neither include nor delete a subsidiary from its license without the Commissioner's prior written approval.

(e) If a controlling relationship or guaranty agreement terminates, the self-insurer shall retain all liabilities under the Act that were incurred by the self-insurer during the period of self-insurance and shall account for all such liabilities until discharged, as evidenced by reports filed with the Commissioner. Termination of a guaranty agreement does not affect the guarantor's liability for payment of liabilities arising prior to termination of the agreement. (2005-400, s. 11.)

Editor's Note. — Session Laws 2005-400, s. 21, made this section effective January 1, 2006.

§ 97-180. Reporting and records.

(a) Every self-insurer shall submit, within 120 days after the end of its fiscal year, a certified audited GAAP financial statement, prepared by a CPA, for that fiscal year. The financial statement presentation shall facilitate the application of ratio and trend analysis. If the self-insurer was issued a license pursuant to G.S. 97-177, the financial statement required under this subsection shall be that of the guarantor.

(b) Every self-insurer shall submit within 120 days after the end of its fiscal year a report from a qualified actuary setting forth an opinion certifying the loss and loss adjustment expense reserves for workers' compensation obligations in North Carolina. The report shall show liabilities, excess insurance carrier and other qualifying credits, if any, and net retained workers' compensation liabilities.

(c) Every self-insurer shall submit within 120 days after the end of its fiscal year a report in the form of a sworn statement prescribed by the Commissioner, setting forth the total workers' compensation benefits paid in the previous fiscal year, and the total outstanding workers' compensation liabilities for each loss year, recorded at the close of its fiscal year for the net retained liability.

(d) Upon the request of the Commissioner, every self-insurer shall submit a report of its annual payroll information. The report shall summarize payroll, by annual amount paid, and the number of employees, by classification, using the rules, classifications, and rates in the most recently approved Workers' Compensation and Employers' Liability Insurance Manual governing the audits of payrolls and the adjustments of premiums. Every self-insurer shall maintain true and accurate payroll records. These payroll records shall be maintained to allow for verification of the completeness and accuracy of the annual payroll report.

(e) Every self-insurer shall report promptly to the Commissioner changes in the name or address of the self-insurer or guarantor; significant changes in the financial condition of the self-insurer, guarantor, or any affiliate, including bankruptcy filings; and changes in its organizational structure, including its subsidiaries and affiliates. Any change shall be reported in writing to the Commissioner within 10 days after the effective date of the change. Upon request by the Commissioner, a self-insurer shall provide the Commissioner copies of documents or information deemed necessary to determine whether any change has affected the privilege of the employer to self-insure. (1997-362, s. 4; 1999-132, ss. 13.8, 13.9; 2005-400, s. 12.)

Effect of Amendments. — Session Laws 2005-400, s. 12, effective January 1, 2006, in subsection (a), substituted "presentation" for "formulation" preceding "shall facilitate" in the second sentence and added the last sentence; rewrote subsections (b) and (e); and substituted "and" for "as well as" preceding "the total outstanding" in subsection (c).

§ 97-185. Deposits; surety bonds; letters of credit.

(a) Repealed by Session Laws 2005-400, s. 13, effective January 1, 2006.

(a1) All individual self-insurers as defined in G.S. 97-130(5b) shall participate in the Association Aggregate Security System established under G.S. 97-131 unless excluded by the Board of Directors of the North Carolina Self-Insurance Security Association. The Board of Directors of the North Carolina Self-Insurance Security Association shall exclude all of the following from the Association Aggregate Security System:

(1) Individual self-insurers whose licenses have previously been revoked by the Commissioner.

(2) Individual self-insurers with a debt rating as established by Standard & Poor's Rating Service or by Moody's Investor Service, below the minimum Standard & Poor's and Moody's ratings established in the written plan for the Association Aggregate Security System submitted by the Association and approved by the Commissioner under G.S. 97-133(a)(2a).

(3) Individual self-insurers that have defaulted on the payment of its self-insured workers' compensation liabilities from participation in the Association Aggregate Security System.

The Board of Directors of the North Carolina Self-Insurance Security Association shall notify the Commissioner of the individual self-insurers that are excluded from participating in the Association Aggregate Security System.

(b) Repealed by Session Laws 2003-115, s. 3, effective January 1, 2004.

(b1) Repealed by Session Laws 2005-400, s. 13, effective January 1, 2006.

(b2) An individual self-insurer that is excluded from participation in the Association Aggregate Security System, including individual self-insurers that are granted a license to self-insure after the North Carolina Self-Insurance Security Association annually implements the Association Aggregate Security System, shall deposit with the Commissioner an amount not less than one hundred percent (100%) of the individual self-insurer's total undiscounted outstanding claims liability per the most recent report from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such greater amount as the Commissioner prescribes based on, but not limited to, the financial condition of the individual self-insurer and the risk retained by the individual self-insurer.

(b3) During any period of time that no Association Aggregate Security System is in effect, individual self-insurers with a debt rating of BBB or better from Standard & Poor's Rating Service, a division of McGraw Hill, Inc., or an equivalent rating from another national rating agency shall deposit with the

Commissioner an amount not less than twenty-five percent (25%) of the individual self-insurer's total undiscounted outstanding claims liability per the most recent report from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000). An individual self-insurer licensed pursuant to G.S. 97-177 may utilize the debt rating of its guarantor for the purpose of establishing the application of this subsection. The Commissioner shall consider and may, in the Commissioner's discretion, increase or reduce the deposit to a greater or lesser percentage of the individual self-insurer's claims liability based on the financial strength of the individual self-insurer and other financial information submitted by the individual self-insurer. All other individual self-insurers shall deposit with the Commissioner an amount not less than one hundred percent (100%) of the individual self-insurer's total undiscounted outstanding claims liability per the most recent report from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such greater amount as the Commissioner prescribes based on, but not limited to, the financial condition of the individual self-insurer and the risk retained by the individual self-insurer.

(c) Deposits received, changes to existing deposits, or deposits exchanged after the effective date of this section, shall be comprised of one or more of the following:

(1) Interest-bearing bonds of the United States of America.

(2) Interest-bearing bonds of the State of North Carolina, or of its cities or counties.

(3) Certificates of deposit issued by any solvent bank domesticated in the State of North Carolina that have a maturity of one year or greater.

(4) Surety bonds in a form acceptable to the Commissioner and issued by a corporate surety. A surety bond deposited pursuant to this subsection shall require that the surety reimburse the Commissioner, or his successors, assigns, or transferees, for any costs incurred in the collection of the proceeds of the surety bond, including reasonable attorneys' fees, and any costs incurred in administering the insolvent self-insurer's workers' compensation claims.

(4a) Irrevocable letters of credit in a form acceptable to the Commissioner issued by a bank acceptable to the Commissioner. An irrevocable letter of credit deposited pursuant to this subsection shall require that the bank reimburse the Commissioner, or his successors, assigns, or transferees for any costs incurred in the collection of the proceeds of the letter of credit, including reasonable attorneys' fees.

(4b) The reimbursement of attorneys' fees and collections cost provided for in subdivisions (4) and (4a) of this subsection shall be no greater than fifteen percent (15%) of the penal amount of the bond and shall not come from the proceeds of the bond or the letter of credit but shall be in addition to the proceeds of the bond or the letter of credit.

(5) Any other investments that are approved by the Commissioner.

(d) All bonds or securities that are posted as a security deposit shall be valued annually at market value. If the market value is less than the face value, the Commissioner may require the self-insurer to post additional securities. In making this determination, the Commissioner shall consider the self-insurer's or guarantor's financial condition, the amount by which market value is less than face value, and the likelihood that the securities will be needed to provide benefits.

(e) Securities deposited under this section shall be assigned to the Commissioner, the Commissioner's successors, assigns, or trustees, on a form prescribed by the Commissioner in a manner that renders the securities negotiable by the Commissioner. If a self-insurer or guarantor is deemed by the

Commissioner to be in a hazardous financial condition, the Commissioner may sell or collect, or both, such amounts that will yield sufficient funds to meet the self-insurer's obligations under the Act. In the case of a letter of credit, the Commissioner may draw the full amount of a letter of credit if the letter of credit is not renewed within 90 days prior to its expiration or at any time that the bank issuing the letter of credit is no longer acceptable to the Commissioner. Interest accruing on any negotiable security deposited under this Article shall be collected and transmitted to the self-insurer if the self-insurer or guarantor is not in a hazardous financial condition.

(f) No judgment creditor, other than a claimant entitled to benefits under the Act, may levy upon any deposits made under this section.

(g) Pursuant to the provisions of this section and with the approval of the Commissioner, deposits held by the Commissioner may be replaced with other acceptable forms of deposit in amount determined by the Commissioner. Any deposit to be replaced with another form of deposit shall not be released until the approved replacement deposit is received by the Commissioner.

(h) Any self-insurer that ceases to self-insure, whether by voluntary termination or by revocation of license, shall continue to secure and be liable for its obligations under the Act and shall continue to report to the Commissioner pursuant to G.S. 97-180. Upon the request of the Commissioner, a self-insurer that ceases to self-insure shall submit filings, as prescribed in G.S. 97-180, to determine whether the deposit is sufficient to satisfy those workers' compensation obligations incurred during the period that the self-insurer was licensed as a self-insurer. The Commissioner may require an increase in the deposit amount or may grant a reduction in the deposit amount to ensure that the deposit is sufficient to cover all existing and future obligations incurred by the self-insurer while subject to the provisions of the Act.

(i) An endorsement to a surety bond shall be filed with the Commissioner within 90 days after the effective date of the endorsement. (1997-362, s. 4; 2003-115, ss. 3, 4, 5; 2005-400, s. 13.)

Effect of Amendments. — Session Laws 2003-115, s. 3, effective January 1, 2004, rewrote the section heading; in subsection (a), substituted "not less than fifty percent (50%)" for "equal to twenty-five percent (25%)" and inserted "greater"; repealed subsection (b) regarding compliance of self-insurer; added subsection (b1); added the second sentence in subdivision (c)(4); added subdivisions (c)(4a) and (c)(4b); and inserted the present third sentence in subsection (e).

Session Laws 2003-115, s. 4, effective January 1, 2005, in subsection (a), as amended by s. 3, substituted "not less than seventy-five percent (75%)" for "not less than fifty percent (50%)."

Session Laws 2003-115, s. 5, effective January 1, 2006, in subsection (a), as amended by ss. 3 and 4, substituted "not less than one hundred percent (100%)" for "not less than seventy-five percent (75%)."

Session Laws 2005-400, s. 13, effective January 1, 2006, deleted subsections (a) and (b1); added subsections (a1), (b2), and (b3); rewrote subsections (g) and (h); and made minor stylistic changes.

CASE NOTES

Surety bond of an employee's former employer was improperly released by the North Carolina Department of Insurance, pursuant to G.S. 97-185(h), because the employer had not secured its obligations under the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., when it sold the division for which the employee worked to a buyer that later went bankrupt, in a manner compliant with G.S. 97-185(g); therefore, the North Carolina Industrial Commission could order the employer to pay the employee's disability award. Goodson v. P.H. Glatfelter Co., 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

§ 97-190. Excess insurance.

(a) Every self-insurer, as a prerequisite for licensure under this Article, shall maintain specific and aggregate excess loss coverage through an insurance policy. A self-insurer shall maintain limits and retentions commensurate with its risk. A self-insurer's retention shall be the lowest retention suitable for the self-insurer's exposures and level of annual premium. The Commissioner may require different levels, or waive the requirement, of specific and aggregate excess loss coverage consistent with the market availability of excess loss coverage, the self-insurer's claims experience, and the self-insurer's or guarantor's financial condition.

(b) An excess insurance policy required by this section shall be issued by either an insurance company licensed in this State or an eligible surplus lines insurer as defined in G.S. 58-21-10 and shall:

(1) Provide for at least 30 days' written notice of cancellation by registered or certified mail, return receipt requested, to the self-insurer and to the Commissioner.

(2) Be renewable automatically at its expiration, except upon 30 days' written notice of nonrenewal by certified mail, return receipt requested, to the self-insurer and to the Commissioner.

(c) Every self-insurer shall provide to the Commissioner evidence of coverage and any amendments within 30 days after their effective dates. Every self-insurer shall, at the request of the Commissioner, furnish copies of its excess insurance policies and amendments. (1997-362, s. 4; 2005-400, s. 14.)

Effect of Amendments. — Session Laws 2005-400, s. 14, effective January 1, 2006, inserted "or guarantor's" preceding "financial condition" in subsection (a); and substituted "an insurance company licensed in this State or an eligible surplus lines insurer as defined in G.S. 58-21-10" for "a licensed insurance company or an approved surplus lines insurance company" in subsection (b).

§ 97-195. Revocation, suspension or restriction of license.

(a) Repealed by Session Laws 2005-400, s. 15, effective January 1, 2006.

(a1) The Commissioner may, upon at least 45 days notice and opportunity for a hearing, revoke, suspend, or restrict the license of a self-insurer if any of the following apply:

(1) The self-insurer fails or refuses to comply with any law, order, or rule applicable to the self-insurer.

(2) There is a determination of insolvency by a court of competent jurisdiction.

(3) The self-insurer is in a hazardous financial condition.

(4) The self-insurer has experienced a material loss or deteriorating operating trends, or has reported a deficit financial position.

(5) Any affiliate or subsidiary is insolvent, threatened with insolvency, or delinquent in payment of its monetary or any other obligation.

(6) The self-insurer has failed to pay premium taxes pursuant to Article 8B of Chapter 105 of the General Statutes.

(7) Contingent liabilities, pledges, or guaranties that either individually or collectively involve a total amount that in the Commissioner's opinion may affect a self-insurer's solvency.

(8) The management of a self-insurer has failed to respond to the Commissioner's inquiries about the condition of the self-insurer or has furnished false and misleading information in response to an inquiry by the Commissioner.

(9) The management of a self-insurer has filed any false or misleading sworn financial statement, has released a false or misleading financial

statement to a lending institution or to the general public, or has made a false or misleading entry or omitted an entry of material amount in the filed financial information.

(10) The self-insurer has experienced, or will experience in the foreseeable future, cash flow or liquidity problems.

(11) The self-insurer has failed to make proper and timely payment of claims, as required by this Article.

(12) Failure to pay any North Carolina Self-Insurance Security Association assessments made pursuant to G.S. 97-133.

(13) Failure to participate in the Association Aggregate Security System or, if excluded from participation in the Association Aggregate Security System, failure to provide and maintain the deposit required by G.S. 97-185.

(b) Repealed by Session Laws 2005-400, s. 15, effective January 1, 2006.

(c) Any self-insurer subject to license revocation, suspension, or restriction under subsection (a1) of this section may request an administrative hearing before the Commissioner to review that order. If a hearing is requested, a notice of hearing shall be served, and the notice shall state the time and place of hearing and the conduct, condition, or ground on which the Commissioner based the order. Unless mutually agreed upon between the Commissioner and the self-insurer, the hearing shall occur not less than 10 days nor more than 30 days after notice is served and shall be either in Wake County or in some other place designated by the Commissioner. The Commissioner shall hold all hearings under this section privately unless the self-insurer requests a public hearing, in which case the hearing shall be public. The request for a hearing shall not stay the effect of the order. (1997-362, s. 4; 2003-221, s. 15; 2005-400, s. 15.)

Effect of Amendments. — Session Laws 2005-400, s. 15, effective January 1, 2006, rewrote this section.

§ 97-196. Civil penalties or restitution for violations; administrative procedure.

(a) Whenever the Commissioner has reason to believe that a self-insurer has violated any of the provisions of this Article, and the violation subjects the license of the self-insurer to suspension or revocation, the Commissioner may, after notice and opportunity for a hearing, proceed under the appropriate subsections of this section.

(b) If the Commissioner finds a violation of this Article, the Commissioner may, in addition to or instead of suspending or revoking the license, order the payment or a monetary penalty as provided in subsection (c) of this section or petition the Superior Court of Wake County for an order directing payment of restitution as provided in subsection (d) of this section, or both. Each day during which a violation occurs constitutes a separate violation.

(c) If the Commissioner orders the payment of a monetary penalty pursuant to subsection (b) of this section, the penalty shall not be less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000). In determining the amount of the penalty, the Commissioner shall consider the degree and extent of harm caused by the violation, the amount of money that inured to the benefit of the violator as a result of the violation, whether the violation was committed willfully, and the prior record of the violator in complying or failing to comply with laws, rules, or orders applicable to the violator. The clear proceeds of the penalty shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Payment of the civil penalty under this section shall be in addition to payment of any other penalty for a violation of the criminal laws of this State.

(d) Upon petition of the Commissioner, the court may order the self-insurer who committed a violation specified in subsection (b) of this section to make restitution in an amount that would make whole any person harmed by the violation. The petition may be made at any time, and the petition may be made in any appeal of the Commissioner's order.

(e) Restitution to any State agency for extraordinary administrative expenses incurred in the investigation and hearing of the violation may also be ordered by the court in such amount that would reimburse the agency for the expenses.

(f) Nothing in this section prevents the Commissioner from negotiating a mutually acceptable agreement with any self-insurer as to the status of the self-insurer's license or as to any civil penalty or restitution.

(g) Unless otherwise specifically provided for, all administrative proceedings under this Article are governed by Chapter 150B of the General Statutes. Appeals of the Commissioner's orders under this section shall be governed by G.S. 58-2-75. (2005-400, s. 16.)

Editor's Note. — Session Laws 2005-400, s. 21, made this section effective January 1, 2006.

§ 97-200. Claims administration.

(a) A self-insurer shall not utilize any claims adjuster unless the adjuster is licensed under G.S. 58-33-25.

(b) Every self-insurer shall comply with the provisions of Article 47 of Chapter 58 of the General Statutes that are related to claims administration. (1997-362, s. 4.)

Chapter 98.

Burnt and Lost Records.

Sec.
98-1. Copy of destroyed record as evidence; may be recorded.
98-2. Originals may be again recorded.
98-3. Establishing boundaries and interest, where conveyance and copy lost.
98-4. Copy of lost will may be probated.
98-5. Copy of lost will as evidence; letters to issue.
98-6. Establishing contents of will, where original and copy destroyed.
98-7. Perpetuating destroyed judgments and proceedings.
98-8. Color of title under destroyed instrument.
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Sec.
98-11. Replacing lost official conveyances.
98-12. Court records as proof of destroyed instruments set out therein.
98-13. Copies contained in court records may be recorded.
98-14. Rules for petitions and motions.
98-15. Records allowed under this Chapter to have effect of original records.
98-16. Destroyed court records proved prima facie by recitals in conveyances executed before their destruction.
98-17. Conveyances reciting court records prima facie evidence thereof.
98-18. Court records and conveyances to which Chapter extends.
98-19, 98-20. [Repealed.]

§ 98-1. Copy of destroyed record as evidence; may be recorded.

When the office of any registry is destroyed by fire or other accident, and the records and other papers thereof are burnt or destroyed, the copies of all such proceedings, instruments and papers as are of record or registry, certified by the proper officer, though without the seal of office, shall be received in evidence whenever the original or duly certified exemplifications would be. Such copies, when the court is satisfied of their genuineness, may be ordered to be recorded or registered. (1865-6, c. 41, ss. 1, 2; Code, s. 55; Rev., s. 327; C.S., s. 365.)

CASE NOTES

Admissibility of Parol Evidence. — This Chapter is an enabling act and does not exclude oral evidence, admissible at common law, to prove the contents of a lost deed or record. Hughes v. Pritchard, 153 N.C. 23, 68 S.E. 906 (1910). See Mobley v. Watts, 98 N.C. 284, 3 S.E. 677 (1887); Varner v. Johnston, 112 N.C. 570, 17 S.E. 483 (1893).

When a deed is lost or destroyed, a copy must be produced if there is one, but if there is none, parol evidence may be admitted to prove its contents. Baker v. Webb, 2 N.C. 43 (1794); Dumas v. Powell, 14 N.C. 103 (1831); Cowles v. Hardin, 91 N.C. 231 (1884).

Parol Evidence Not Admissible to Change Certified Copy. — This section does not permit parol evidence to be introduced to show that the lost or destroyed original had a different description and thus correct a recorded certified copy of a deed. Hopper v. Justice, 111 N.C. 418, 16 S.E. 626 (1892).

§ 98-2. Originals may be again recorded.

All original papers, once admitted to record or registry, whereof the record or registry is destroyed, may, on motion, be again recorded or registered, on such proof as the court shall require. (1865-6, c. 41, s. 3; Code, s. 56; Rev., s. 328; C.S., s. 366.)

CASE NOTES

Jurisdiction. — Jurisdiction in the superior court sustained. McCormick v. Jernigan, 110 N.C. 406, 14 S.E. 971 (1892).

Jurisdiction in the superior court tacitly recognized. Tuttle v. Rainey, 98 N.C. 513, 4 S.E. 475 (1887).

Section Is Not Exclusive. — In an action to establish a lost deed, the record of which was also destroyed, a motion to dismiss upon the ground that the action should have been brought under G.S. 56 of the Code (now this section) was properly refused, as the section is an enabling act giving an additional, but not an exclusive, remedy. Jones v. Ballou, 139 N.C. 526, 52 S.E. 254 (1905).

Use of Common Law to Establish Contents. — A party whose deed with its registration had been destroyed, instead of having it set up and recorded, could depend upon the rules of the common law to establish its contents whenever an occasion might arise, as in the course of a trial. Cowles v. Hardin, 91 N.C. 231 (1884); Mobley v. Watts, 98 N.C. 284, 3 S.E. 677 (1887); Hopper v. Justice, 111 N.C. 418, 16 S.E. 626 (1892).

Compliance with Statute. — When the proceeding is brought by virtue of G.S. 56 of the Code (now this section), its requirements must be complied with. Cowles v. Hardin, 79 N.C. 577 (1878); Jones v. Ballou, 139 N.C. 526, 52 S.E. 254 (1905).

Original Recorded by Clerk upon Sufficient Evidence. — Where the registry of partition is destroyed and a paper purporting to be the original is presented to the clerk, it is his duty, after satisfying himself upon evidence that the paper is the original one, to record it. Hill v. Lane, 149 N.C. 267, 62 S.E. 1074 (1908).

Effect of Failure to Register Anew. — This statutory provision admonished all persons having such original papers to prove and register them anew in the way prescribed, and good faith required that they should do so. Moreover, it gave the public reason to expect that it would be faithfully observed by persons interested. Thus, where the plaintiff has been negligent in again registering or recording an original deed, such reregistration would not defeat the rights of bona fide purchasers. Waters v. Crabtree, 105 N.C. 394, 11 S.E. 240 (1890).

Cited in Harrelson v. Soles, 94 N.C. App. 557, 380 S.E.2d 528 (1989).

§ 98-3. Establishing boundaries and interest, where conveyance and copy lost.

When any conveyance of real estate, or of any right or interest therein, is lost, the registry thereof being also destroyed, any person claiming under the same may cause the boundaries thereof to be established in the manner provided in the Chapter entitled Boundaries, or he may proceed in the following manner to establish both the boundaries and the nature of his estate:

He shall file his petition before the clerk of the superior court, setting forth the whole substance of the conveyance as truly and specifically as he can, the location and boundaries of his land, whose land it adjoins, the estate claimed therein, and a prayer to have his own boundaries established and the nature of his estate declared.

All persons claiming any estate in the premises, and those whose lands adjoin, shall be notified of the proceedings. Unless they or some of them, by answer on oath, deny the truth of all or some of the matters alleged, the clerk shall order a surveyor to run and designate the boundaries of the petitioner's land, and return his survey, with a plot thereof, to the court. This, when confirmed, shall, with the declaration of the court as to the nature of the estate of the petitioner, be registered and have, as to the persons notified, the effect of a deed for the same, executed by the person possessed of the same next before the petitioner. But in all cases, however, wherein the process of surveying is disputed, and the surveyor is forbidden to proceed by any person interested, the same proceedings shall be had as under the Chapter entitled Boundaries.

If any of the persons notified deny by answer the truth of the conveyance, the clerk shall transfer the issues of fact to the superior court, to be tried as other issues of fact are required by law to be tried; and on the verdict and the pleadings the judge shall adjudge the rights of the parties, and declare the contents of the deed, if any deed is found by the jury, and allow the registration of such judgment and declaration, which shall have the force and effect of a deed. (1865-6, c. 41, s. 3; Code, s. 56; Rev., s. 328; C.S., s. 367; 1973, c. 108, s. 44.)

Cross References. — As to boundaries, see Chapter 38.

CASE NOTES

Remedy Additional and Not Exclusive. — This section is an enabling statute providing, not an exclusive remedy, but merely an additional one. Mobley v. Watts, 98 N.C. 284, 3 S.E. 677 (1887); Jones v. Ballou, 139 N.C. 526, 52 S.E. 254 (1905).

This section does not repeal but rather aids the common-law rules for establishing deeds, and a party may choose either mode. Cowles v. Hardin, 91 N.C. 231 (1884).

Evidence Must Show Existence, Nature and Loss. — Before the deed can be made, the plaintiff must clearly prove that a deed did exist, its legal operation, and the loss thereof. Plummer v. Baskerville, 36 N.C. 252 (1840); Loftin v. Loftin, 96 N.C. 94, 1 S.E. 837 (1887).

Judgment Only Has Force of Original. — A judgment under this section has only such force as the original conveyance would have as evidence had it not been destroyed. McNeely v. Laxton, 149 N.C. 327, 63 S.E. 278 (1908).

Private Acts. — In a special proceeding under a private act, similar to this section, to restore certain records lost by fire or other casualty, it is necessary to conform exactly to all the terms prescribed by the statute. Cowles v. Hardin, 79 N.C. 577 (1878).

§ 98-4. Copy of lost will may be probated.

In counties where the original wills on file in the office of the clerk of superior court, and will books containing copies, are lost or destroyed, if the executor or any other person has preserved a copy of a will (the original being so lost or destroyed) with a certificate appended, signed by a clerk of the court in whose office the will was, or is required to be filed, stating that said copy is a correct one, this copy may be admitted to probate, under the same rules and in the same manner as now prescribed by law for proving wills. The proceedings in such cases shall be the same as though such copy was the original offered for the first time for probate, except that the clerk who signed such certificate shall, on oath, acknowledge his signature, or in case it appears that he has died or left the State, then his signature shall be proved by a competent witness; and the witness or witnesses to the original, who may be examined, shall be required to swear that he or they signed in the presence of the testator and by his direction a paper-writing purporting to be his last will and testament. (1868-69, c. 160, s. 1; Code, s. 57; Rev., s. 329; C.S., s. 368.)

Cross References. — As to probate of wills generally, see G.S. 31-12 et seq.

CASE NOTES

Probate Before Clerk. — The probate of a lost will must be made before the clerk of the superior court, he alone having jurisdiction. McCormick v. Jernigan, 110 N.C. 406, 14 S.E. 971 (1892).

Statute of Limitation Does Not Apply. — The statute of limitation does not apply to simply taking probate of a will; hence, it has no application to proceedings under this section. McCormick v. Jernigan, 110 N.C. 406, 14 S.E. 971 (1892).

§ 98-5. Copy of lost will as evidence; letters to issue.

In any action or proceeding at law, where it becomes necessary to introduce such will to establish title, or for any other purpose, a copy of the will and of the record of the probate, with a certificate signed by the clerk of the superior court for the county where the will may be recorded, stating that said record and copy are full and correct, shall be admitted as competent evidence; and when a copy of a will is admitted to probate, the clerk shall thereupon issue letters testamentary. (1868-69, c. 160, s. 2; Code, s. 58; Rev., s. 330; C.S., s. 369.)

§ 98-6. Establishing contents of will, where original and copy destroyed.

Any person desirous of establishing the contents of a will destroyed as aforesaid, there being no copy thereof, may file his petition in the office of the clerk of the superior court, setting forth the entire contents thereof, according to the best of his knowledge, information and belief. All persons having an interest under the same shall be made parties, and if the truth of such petition is denied, the issues of fact shall be transferred to the superior court for trial by a jury, whether the will was recorded, and if so recorded, the contents thereof, and the declarations of the judge shall be recorded as the will of the testator. Any devisee or legatee is a competent witness as to the contents of every part of said will, except such as may concern his own interest in the same. (1865-6, c. 41, s. 4; Code, s. 59; Rev., s. 331; C.S., s. 370; 1973, c. 108, s. 45.)

CASE NOTES

Parol Evidence. — Parol evidence may be introduced to show the contents of a will which has been lost or destroyed. Cox v. Beaufort County Lumber Co., 124 N.C. 78, 32 S.E. 381 (1899). See also Varner v. Johnston, 112 N.C. 570, 17 S.E. 483 (1893).

Parol evidence is also admissible to show the existence of such a will, its probate and its registration. Cox v. Beaufort County Lumber Co., 124 N.C. 78, 32 S.E. 381 (1899).

§ 98-7. Perpetuating destroyed judgments and proceedings.

Every person desirous of perpetuating the contents of destroyed judgments, orders or proceedings of court, or any paper admitted to record or registration, or directed to be filed for safekeeping, other than wills or conveyances of real estate, or some right or interest therein, or any deed or other instrument of writing, required to be recorded or registered, but not having been recorded or registered, it being competent to register or record said deed or other instrument at the time of its loss or destruction, may file his petition in the court having jurisdiction of like matters with the original proceeding, setting forth the substance of the whole record, deed, proceeding, or paper, which he desires to perpetuate. If, on the hearing, the court shall declare the existence of such record, deed, or proceeding, or paper at the time of the burning of the office wherein the same was lodged or kept, or other destruction thereof, and that the same was there destroyed, and shall declare the contents thereof, such declaration shall be recorded or registered, or filed, according to the nature of the paper destroyed. (1865-6, c. 41, s. 5; Code, s. 60; Rev., s. 332; C.S., s. 371.)

CASE NOTES

Restored Record Free from Collateral Attack. — Where the destroyed record has been restored, the record so restored cannot be collaterally attacked. Branch v. Griffin, 99 N.C. 173, 5 S.E. 393 (1888).

§ 98-8. Color of title under destroyed instrument.

Every person who has been in the continual, peaceable and quiet possession of land, tenements, or hereditaments, situated in the county, claiming, using and occupying them as his own, for the space of seven years, under known boundaries, the title thereto being out of the State, is deemed to have been lawfully possessed, under color of title, of such estate therein as has been claimed by him during his possession, although he may exhibit no conveyance therefor: Provided, that such possession commenced before the destruction of the registry office, or other destruction as aforesaid, and also that any such person, or any person claiming by, through or under him, makes affidavit and produces such proof as is satisfactory to the court that the possession was rightfully taken; and if taken under a written conveyance, that the registry thereof was destroyed by fire or other means, or was destroyed before registry as aforesaid, and that neither the original nor any copy thereof is in existence: Provided further, that such presumption shall not arise against infants, persons of nonsane memory, and persons residing out of the State, who were such at the time of possession taken, and were not therefore barred, nor were so barred at the time of the burning of the office or other destruction. (1865-6, c. 41, s. 6; Code, s. 61; Rev., s. 333; C.S., s. 372.)

Cross References. — As to title by adverse possession generally, see G.S. 1-35 et seq.

CASE NOTES

In an action to recover land under this section, the plaintiff showed title out of the State by a 30 years' possession. It was held that this statute did not make it necessary to show seven years' adverse possession in addition to the 30 years. The lapse of seven years' adverse possession concurrently with the 30 years was sufficient. Hill v. Overton, 81 N.C. 393 (1879).

§ 98-9. Action on destroyed bond.

Actions on official or other bonds lodged in any office which are destroyed with the registry thereof may be prosecuted by petition against the principal and sureties thereto, and the proceedings shall be as in the former courts of equity. (1865-6, c. 41, s. 7; Code, s. 62; Rev., s. 334; C.S., s. 373.)

CASE NOTES

Nature of Proceedings Is Equitable. — The nature of the proceedings under this section is equitable. McCormick v. Jernigan, 110 N.C. 406, 14 S.E. 971 (1892).

§ 98-10. Destroyed witness tickets; duplicates may be filed.

The court having jurisdiction of the action may allow other witness tickets to be filed in place of such as may be destroyed, upon the oath of the witness or other satisfactory proof. (1865-6, c. 41, s. 8; Code, s. 63; Rev., s. 335; C.S., s. 374.)

§ 98-11. Replacing lost official conveyances.

Where any conveyance executed by any person, sheriff, clerk and master, or commissioner of court has been lost, and registry thereof destroyed as aforesaid, and there is no copy thereof, such persons, whether in or out of office, may execute another of like tenor and date, reciting therein that the same is a duplicate, and such deed shall be evidence of the facts therein recited, in all cases wherein the parties thereto are dead, or are incompetent witnesses to prove the same, to the extent as if it was the original conveyance. (1865-6, c. 41, s. 9; Code, s. 64; Rev., s. 336; C.S., s. 375.)

§ 98-12. Court records as proof of destroyed instruments set out therein.

The records of any court in or out of the State, and all transcripts of such records, and the exhibits filed therewith in any case, are admissible to prove the existence and contents of all deeds, wills, conveyances, depositions and other papers, copies whereof are therein set forth or exhibited, in all cases where the records and registry of such as were or ought to have been recorded and registered, or the originals of such as were not proper to be recorded or registered, have been destroyed as aforesaid, although such transcripts or exhibits have been informally certified; and when offered in evidence have the like effect as though the transcript or record was the record of the court whose records are destroyed, and the deeds, wills and conveyances, depositions and other papers therein copied or therewith exhibited were original. (1865-6, c. 41, s. 10; Code, s. 65; Rev., s. 337; C.S., s. 376.)

CASE NOTES

When papers have been lost and, under competent evidence and instructions, the jury has found their contents to be as contended by the plaintiff, the plaintiff prevails. Fain v. Gaddis, 144 N.C. 765, 57 S.E. 1111 (1907).

§ 98-13. Copies contained in court records may be recorded.

The copies aforesaid of all such deeds, wills, conveyances and other instruments proper to be recorded or registered, as are mentioned in G.S. 98-12, may be recorded or registered on application to the clerk of the superior court and due proof that the original thereof was genuine. (1865-6, c. 41, s. 11; Code, s. 66; Rev., s. 338; C.S., s. 377.)

§ 98-14. Rules for petitions and motions.

The following rules shall be observed in petitions and motions under this Chapter:

(1) The facts stated in every petition or motion shall be verified by affidavit of the petitioner that they are true according to the best of his knowledge, information, and belief.

(2) The instrument or paper sought to be established by any petition shall be fully set forth in its substance, and its precise language shall be stated when the same is remembered.

(3) All persons interested in the prayers of the petition or decree shall be made parties.

(4) Petitions to establish a record of any court shall be filed in the superior court of the county where the record is sought to be established. Other petitions may be filed in the office of the clerk.

(5) The costs shall be paid as the court may decree.

(6) Appeals shall be allowed as in all other cases, and where the error alleged shall be a finding by the superior court of a matter of fact, the same may be removed on appeal to the appellate division, and the proper judgments directed to be entered below.

(7) It shall be presumed that any order or record of the court of pleas and quarter sessions, which was made and has been lost or destroyed, was made by a legally constituted court, and the requisite number of justices, without naming said justices. (1865-6, c. 41, s. 12; 1874-5, c. 51; c. 254, s. 3; Code, s. 67; 1893, c. 295; Rev., s. 339; C.S., s. 378; 1969, c. 44, s. 64; 1973, c. 108, s. 46.)

CASE NOTES

Affidavit by Agent Held Insufficient. — In a proceeding under this section, an affidavit by the agent of the petitioner to the effect that the facts set forth in the complaint were "true to the best of his knowledge, information and belief" was an insufficient verification. Cowles v. Hardin, 79 N.C. 577 (1878).

Waiver of Verification. — The requirement that when one pleading in a court of record is verified, every subsequent pleading in the same proceeding, except a demurrer, must be verified also, is one which may be waived except in those cases where the form and substance of the verification is made an essential part of the pleading, as in an action for divorce in which a special form of affidavit is required under G.S. 50-8, or in a proceeding to restore a lost record under this section. Calaway v. Harris, 229 N.C. 117, 47 S.E.2d 796 (1948).

Parties. — It seems that all persons whose estates may be affected by a proceeding to restore lost records should be made parties. Cowles v. Hardin, 79 N.C. 577 (1878).

§ 98-15. Records allowed under this Chapter to have effect of original records.

The records and registries allowed by the court in pursuance of this Chapter shall have the same force and effect as original records and registries. (1865-6, c. 41, s. 14; Code, s. 68; Rev., s. 340; C.S., s. 379.)

CASE NOTES

Copies Only Have Effect of Originals. — The copies have only the same force and effect as the lost or destroyed deeds would have had, if produced. McNeely v. Laxton, 149 N.C. 327, 63 S.E. 278 (1908).

Negligently Delayed Reregistration Held Not to Affect Rights of Bona Fide Purchasers. — When a deed, absolute on its face, but intended as a mortgage, was executed in 1859, and a defeasance was executed in pursuance of the intention of the parties in 1861, and recorded in 1862, and in 1864 the records were destroyed, subsequent purchasers for value, without actual notice, whose deeds were duly recorded, were not affected with notice of such registration. Nor could reregistration of the defeasance in 1886, after the registration of the mesne conveyances to the innocent purchasers, avail to defeat their rights. Waters v. Crabtree, 105 N.C. 394, 11 S.E. 240 (1890).

§ 98-16. Destroyed court records proved prima facie by recitals in conveyances executed before their destruction.

The recitals, reference to, or mention of any decree, order, judgment or other record of any court of record of any county in which the courthouse, or records of said courts, or both, have been destroyed by fire or otherwise, contained, recited or set forth in any deed of conveyance, paper-writing, or other bona fide written evidence of title, executed prior to the destruction of the courthouse and records of said county, by any executor or administrator with a will annexed, or by any clerk and master, superior court clerk, clerk of the court of pleas and quarter sessions, sheriff, or other officer, or commissioners appointed by either of said courts, and authorized by law to execute said deed or other paper-writing, are deemed, taken and recognized as true in fact, and are prima facie evidence of the existence, validity and binding force of said decree, order, judgment or other record so referred to or recited in said deed or paper-writing, and are to all intents and purposes binding and valid against all persons mentioned or described in said instrument of writing, deed, etc., as purporting to be parties thereto, and against all persons who were parties to said decree, judgment, order or other record so referred to or recited, and against all persons claiming by, through or under them or either of them. (1870-1, c. 86, s. 1; 1871-2, c. 64, s. 1; Code, s. 69; Rev., s. 341; C.S., s. 380.)

CASE NOTES

Constitutionality. — This section is constitutional. Barefoot v. Musselwhite, 153 N.C. 208, 69 S.E. 71 (1910).

Evidence Must Show Destruction of Records. — The fact of the destruction by fire or otherwise of the records must be shown before the recitals, reference to, or mention of any decree, judgement, or other record recited in a deed of conveyance, etc., shall have the effect of evidence under this section. Barefoot v. Musselwhite, 153 N.C. 208, 69 S.E. 71 (1910). See Dail v. Suggs, 85 N.C. 104 (1881).

Where the original papers of the judgment roll have been lost, the minute docket of the court may be introduced to prove the contents thereof. Hare v. Hollomon, 94 N.C. 14 (1886); Everett v. Newton, 118 N.C. 919, 23 S.E. 961 (1896).

This section was applied where a deed made in compliance to a decree of court was destroyed, the recitals in the decree being taken as prima facie evidence of facts and authority. Irvin v. Clark, 98 N.C. 437, 4 S.E. 30 (1887). See Isler v. Isler, 88 N.C. 576 (1883).

The recitals in a deed which refer to the decree, so as to identify it, are of themselves prima facie evidence of its binding force and validity as against all persons who were parties to said decree. Pinnell v. Burroughs, 172 N.C. 182, 90 S.E. 218 (1916). See also Hare v. Hollomon, 94 N.C. 14 (1886); Everett v. Newton, 118 N.C. 919, 23 S.E. 961 (1896); Pinnell v. Burroughs, 168 N.C. 315, 84 S.E. 364 (1915).

Cited in Henderson County v. Johnson, 230 N.C. 723, 55 S.E.2d 502 (1949).

§ 98-17. Conveyances reciting court records prima facie evidence thereof.

Such deed of conveyance, or other paper-writing, executed as aforesaid, and registered according to law, may be read in any suit now pending or which may hereafter be instituted in any court of this State, as prima facie evidence of the existence and validity of the decree, judgment, order, or other record upon which the same purports to be founded, without any other or further restoration or reinstatement of said decree, order, judgment, or record than is contained in this Chapter. (1870-1, c. 86, s. 2; Code, s. 70; Rev., s. 342; C.S., s. 381.)

CASE NOTES

Constitutionality. — The constitutionality and validity of this section cannot now be open to dispute. Barefoot v. Musselwhite, 153 N.C. 208, 69 S.E. 71 (1910).

§ 98-18. Court records and conveyances to which Chapter extends.

This Chapter shall extend to records of any court which have been or may be destroyed by fire or otherwise, and to any deed of conveyance, paper-writing, or other bona fide evidence of title executed before the destruction of said records. (1871-2, c. 64, s. 2; 1874-5, c. 254, s. 2; Code, s. 71; Rev., s. 343; C.S., s. 382.)

Local Modification. — Cherokee, Graham, Haywood and Madison: C.S., G.S. 384, 1935, c. 25; Moore: C.S., G.S. 383.

§§ 98-19, 98-20: Repealed by Session Laws 1971, c. 780, s. 37.

Cross References. — For present provisions covering the subject matter of the repealed sections, see G.S. 142-15.1, 159-137.

Chapter 99.

Libel and Slander.

Sec.
99-1. Libel against newspaper; defamation by or through radio or television station; notice before action.
99-2. Effect of publication or broadcast in good faith and retraction.
99-3. Anonymous communications.
99-4. [Repealed.]
99-5. Negligence in permitting defamatory statements by others essential to liability of operator, etc., of broadcasting station.

§ 99-1. Libel against newspaper; defamation by or through radio or television station; notice before action.

(a) Before any action, either civil or criminal, is brought for the publication, in a newspaper or periodical, of a libel, the plaintiff or prosecutor shall at least five days before instituting such action serve notice in writing on the defendant, specifying the article and the statements therein which he alleges to be false and defamatory.

(b) Before any action, either civil or criminal, is brought for the publishing, speaking, uttering, or conveying by words, acts or in any other manner of a libel or slander by or through any radio or television station, the plaintiff or prosecutor shall at least five days before instituting such action serve notice in writing on the defendant, specifying the time of and the words or acts which he or they allege to be false and defamatory. (1901, c. 557; Rev., s. 2012; C.S., s. 2429; 1943, c. 238, s. 1.)

Cross References. — As to statute of limitations for libel and slander, see G.S. 1-54. As to pleadings in libel and slander, see G.S. 1A-1, Rule 9. As to allowance of costs in an action for libel and slander, see G.S. 6-18. As to criminal statutes on libel and slander, see G.S. 14-47. As to the making of derogatory reports concerning banks, see G.S. 53-128.

Legal Periodicals. — For article, "Restrictions on a Free Press," wherein various phases of rights arising out of libel are discussed, see 4 N.C.L. Rev. 24 (1926).

For note on misstatement of fact about public figure, see 44 N.C.L. Rev. 442 (1966).

For note on requirements for collection of substantial damages in actionable per se defamation, see 46 N.C.L. Rev. 160 (1967).

For note, "Renwick v. News & Observer Publishing Co.: North Carolina Rejects the False Light Invasion of Privacy Tort," see 63 N.C.L. Rev. 767 (1985).

CASE NOTES

Constitutionality. — Session Laws 1901, c. 557, known as the "London Libel Law" and subsequently appearing as G.S. 2429, 2430 and 2431 of the Consolidated Statutes (now subsection (a) of this section, G.S. 99-2(a), and G.S. 99-3, respectively), was held constitutional in Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904). See also Pentuff v. Park, 194 N.C. 146, 138 S.E. 616, 53 A.L.R. 626 (1927).

Complaint Must Allege Notice. — Under this section, a complaint in an action for libel must allege the giving of five days' notice to the defendant in writing, specifying the article and the statements alleged to be false. Williams v. Smith, 134 N.C. 249, 46 S.E. 502 (1904).

Failure to Allege Notice. — In an action against a newspaper for libel, the failure of the complainant to allege the five days' notice rendered it demurrable. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

Amendment Showing Notice. — Where a demurrer was sustained to a complaint for libel against a newspaper because it failed to appear that notice of the action had been given, the trial court could permit an amendment showing that fact. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

Letter as Sufficient Notice. — A letter written by plaintiff and received by defendant, in which demand was made for a retraction and apology for a clearly specified article, and in which the alleged false and defamatory statements were plainly indicated, was a sufficient notice in writing as required by this section, the provisions of former G.S. 1-585 (see now G.S. 1A-1, Rule 5) relating to notice in judicial proceedings after suit has been instituted, not being applicable. Roth v. Greensboro News Co., 214 N.C. 23, 197 S.E. 569 (1938).

Failure to Give Notice. — In an action for libel against a newspaper, the failure to give notice of the action as required only relieves the paper of punitive damages. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

When Notice Unnecessary. — In an action for libel, where the newspaper publishes a retraction, no notice need be given. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

Whether the provisions of this Chapter as to notice to the defendant in an action for libel, looking to retraction and apology, apply to individuals having no connection with a newspaper publishing the libel, was questioned in Paul v. National Auction Co., 181 N.C. 1, 105 S.E. 881 (1921).

Compensatory Damages. — This section and G.S. 99-2, relating to notice looking to a retraction and apology, having significance only on the question of punitive damages, do not include compensatory damages for "pecuniary loss, physical pain, mental suffering, and injury to reputation." In Osborn v. Leach, 135 N.C. 628, 43 S.E. 811 (1904), it was held that an action for libel may proceed for the recovery of compensatory damages, whether the notice has been given or otherwise. Paul v. National Auction Co., 181 N.C. 1, 105 S.E. 881 (1921). See Kindley v. Privette, 241 N.C. 140, 84 S.E.2d 660 (1954).

For case in which service of notice under former § 1-585 was distinguished, see Roth v. Greensboro News Co., 214 N.C. 23, 197 S.E. 569 (1938).

Applied in Harrell v. Goerch, 209 N.C. 741, 184 S.E. 489 (1936).

Cited in Woody v. Catawba Valley Broadcasting Co., 272 N.C. 459, 158 S.E.2d 578 (1968); Cline v. Brown, 24 N.C. App. 209, 210 S.E.2d 446 (1974); Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983); Neill Grading & Constr. Co. v. Lingafelt, 168 N.C. App. 36, 606 S.E.2d 734, 2005 N.C. App. LEXIS 160 (2005).

§ 99-2. Effect of publication or broadcast in good faith and retraction.

(a) If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within 10 days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of "guilty" is rendered on such a state of facts, the defendant shall be fined a penny and the costs, and no more.

(b) If it appears upon the trial that such words or acts were conveyed and broadcast in good faith, that their falsity was due to an honest mistake of the facts, or without prior knowledge or approval of such station, and if with prior knowledge or approval that there were reasonable grounds for believing that the words or acts were true, and that within 10 days after the service of said notice a full and fair correction, apology and retraction was conveyed or broadcast by or over such radio or television station at approximately the same time of day and by the same sending power so as to be as visible and audible as the original acts or words complained of, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of "guilty" is rendered on such state of facts, the defendant shall be fined a penny and costs, and no more. (1901, c. 557; Rev., s. 2013; C.S., s. 2430; 1943, c. 238, s. 2.)

CASE NOTES

Constitutionality. — Subsection (a) of this section, providing that a newspaper publishing a libel may avoid, under certain conditions, the payment of punitive damages, is not discriminatory, and is a constitutional enactment. Pentuff v. Park, 194 N.C. 146, 138 S.E. 616, 53 A.L.R. 626 (1927). See also Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

A recovery of actual damages does not abridge the freedom of the press. Pentuff v. Park, 194 N.C. 146, 138 S.E. 616, 53 A.L.R. 626 (1927).

Where a statute for libel applies equally to all newspapers and periodicals, it does not amount to unconstitutional discrimination. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

Form of Retraction. — While this section does not prescribe any particular form of retraction, it does require a categorical retraction and apology. The mere statement that defendant had come into possession of information contrary to that theretofore published was insufficient to meet the requirements of this section, nor was it incumbent on plaintiff to approve or disapprove thereof, and this failure to do so did not exculpate defendant or preclude the submission of an issue of punitive damages. Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1940).

"Actual Damages". — The "actual damages" recoverable in a suit for libelous publication by a newspaper in the event of a retraction, allowed by the statute, is for pecuniary loss, direct or indirect, or for physical pain and inconvenience. Pentuff v. Park, 194 N.C. 146, 138 S.E. 616, 53 A.L.R. 626 (1927).

Actual damages also include mental suffering and injury to reputation. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

Damages When Defendants Do Not Comply. — Where the defendants did not avail themselves of the privilege given them under this section, the damages that could be awarded would include punitive as well as actual damages. Pentuff v. Park, 194 N.C. 146, 138 S.E. 616, 53 A.L.R. 626 (1927).

Damages as "Property". — The right to have punitive damages assessed is not property, but the right to recover actual or compensatory damages is property. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

Only Actual Damages Recoverable Where Publication in Good Faith Is Followed by Correction. — Where plaintiff's evidence established a false publication, and defendant's evidence showed that the publication was made in good faith through error, and that a correction and retraction was published upon defendant ascertaining the facts, plaintiff was entitled to recover the actual damage sustained by him. Lay v. Gazette Publishing Co., 209 N.C. 134, 183 S.E. 416 (1936).

No Punitive Damages May Be Recovered in the Absence of Malice or Wantonness and Recklessness. See Lay v. Gazette Publishing Co., 209 N.C. 134, 183 S.E. 416 (1936).

For definition of actual malice, see Cline v. Brown, 24 N.C. App. 209, 210 S.E.2d 446 (1974), cert. denied, 286 N.C. 412, 211 S.E.2d 793 (1975).

When Malice May Not Be Inferred by Jury. — Malice may not be inferred by the jury from a false publication when defendant's uncontradicted evidence rebuts the presumption by showing that the publication was made in good faith through error, and that a correction and retraction was published upon defendant ascertaining the facts. Lay v. Gazette Publishing Co., 209 N.C. 134, 183 S.E. 416 (1936).

Defendant's Pleading. — In an action for libel against a newspaper, the paper having pleaded a retraction of the publication, it is necessary for the defendant to show that the publication was made in good faith, and with reasonable ground to believe it to be true, in order to relieve the paper from punitive damages. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

Cited in Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983); Neill Grading & Constr. Co. v. Lingafelt, 168 N.C. App. 36, 606 S.E.2d 734, 2005 N.C. App. LEXIS 160 (2005).

§ 99-3. Anonymous communications.

The two preceding sections [G.S. 99-1 and 99-2] shall not apply to anonymous communications and publications. (1901, c. 557, s. 3; Rev., s. 2014; C.S., s. 2431.)

CASE NOTES

An article signed "Smith" is not an anonymous publication under this section. Williams v. Smith, 134 N.C. 249, 46 S.E. 502 (1904).

§ 99-4: Repealed by Session Laws 1975, c. 402.

§ 99-5. Negligence in permitting defamatory statements by others essential to liability of operator, etc., of broadcasting station.

The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damage for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof, unless such owner, licensee or operator shall be guilty of negligence in permitting any such defamatory statement. (1949, c. 262.)

Legal Periodicals. — For brief comment on this section, see 27 N.C.L. Rev. 488 (1949).

Chapter 99A.

Civil Remedies for Criminal Actions.

Sec.
99A-1. Recovery of damages for interference with property rights.

§ 99A-1. Recovery of damages for interference with property rights.

Notwithstanding any other provisions of the General Statutes of North Carolina, when personal property is wrongfully taken and carried away from the owner or person in lawful possession of such property without his consent and with the intent to permanently deprive him of the use, possession and enjoyment of said property, a right of action arises for recovery of actual and punitive damages from any person who has or has had, possession of said property knowing the property to be stolen.

An agent having possession, actual or constructive, of property lawfully owned by his principal, shall have a right of action in behalf of his principal for any unlawful interference with that possession by a third person.

In cases of bailments where the possession is in the bailee, a trespass committed during the existence of the bailment shall give a right of action to the bailee for the interference with his special property and a concurrent right of action to the bailor for the interference with his general property.

Any abuse of, or damage done to, the personal property of another or one who is in possession thereof, unlawfully, is a trespass for which damages may be recovered. (1973, c. 809.)

CASE NOTES

Owner May Collect Actual and Punitive Damages from One Criminally Guilty of Receiving Stolen Property. — It is reasonably clear that the first paragraph of this section is fairly consistent with the title of the bill from which it was enacted, and that the owner of stolen property may collect actual and punitive damages from one who is criminally guilty of receiving the stolen property. Russell v. Taylor, 37 N.C. App. 520, 246 S.E.2d 569 (1978).

This section creates a right of action in the owner, his agent or a bailee of stolen property for recovery of damages from one who is criminally guilty of receiving stolen property. Noell v. Winston, 51 N.C. App. 455, 276 S.E.2d 766, cert. denied, 303 N.C. 315, 281 S.E.2d 652 (1981).

Finding of Knowledge by Defendant Required to Support Award Under First Paragraph. — No actual or punitive damages could be awarded pursuant to the first paragraph of this section in an action in which the plaintiff alleged that the defendant sold a mobile home to her and thereafter wrongfully took possession of and converted the mobile home and its contents, where there was no finding of fact that the defendant received the property knowing it to be stolen. Russell v. Taylor, 37 N.C. App. 520, 246 S.E.2d 569 (1978).

Paragraphs two and three of this section merely create rights of action in agents of the owners and bailees of the personal property the possession of which has been unlawfully interfered with. Russell v. Taylor, 37 N.C. App. 520, 246 S.E.2d 569 (1978).

Punitive Damages Not Authorized Under Last Paragraph. — Applying a strict construction to the last paragraph of this section, it does not authorize the recovery of punitive damages. Russell v. Taylor, 37 N.C. App. 520, 246 S.E.2d 569 (1978).

While the last paragraph of this section provides for the recovery of damages for an "unlawful" abuse of or damage to the personal property of another, it says nothing about punitive damages. Russell v. Taylor, 37 N.C. App. 520, 246 S.E.2d 569 (1978).

Deletion of Attorney's Name from Appointment Lists. — Plaintiff attorney's allegations that defendant members of a county bar association committee had deleted plaintiff's name from indigent defendant appointment lists and that the district bar had not adopted a plan authorizing defendants to formulate rules for appointment of counsel failed to state a claim for damages based on a denial of due process or trespass against plaintiff's property rights under this section. Noell v. Winston, 51 N.C. App. 455, 276 S.E.2d 766, cert. denied, 303 N.C. 315, 281 S.E.2d 652 (1981).

Chapter 99B.

Products Liability.

Sec.
99B-1. Definitions.
99B-1.1. Strict liability.
99B-1.2. Breach of warranty.
99B-2. Seller's opportunity to inspect; privity requirements for warranty claims.
99B-3. Alteration or modification of product.
99B-4. Knowledge or reasonable care.
99B-5. Claims based on inadequate warning or instruction.
Sec.
99B-6. Claims based on inadequate design or formulation.
99B-7 through 99B-9. [Reserved.]
99B-10. Immunity for donated food.
99B-11. Claims based on defective design of firearms.

§ 99B-1. Definitions.

When used in this Chapter, unless the context otherwise requires:

(1) "Claimant" means a person or other entity asserting a claim and, if said claim is asserted on behalf of an estate, an incompetent or a minor, "claimant" includes plaintiff's decedent, guardian, or guardian ad litem.

(2) "Manufacturer" means a person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or component part of a product prior to its sale to a user or consumer, including a seller owned in whole or significant part by the manufacturer or a seller owning the manufacturer in whole or significant part.

(3) "Product liability action" includes any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling of any product.

(4) "Seller" includes a retailer, wholesaler, or distributor, and means any individual or entity engaged in the business of selling a product, whether such sale is for resale or for use or consumption. "Seller" also includes a lessor or bailor engaged in the business of leasing or bailment of a product. (1979, c. 654, s. 1; 1995, c. 522, s. 1.)

Editor's Note. — Session Laws 1979, c. 654, s. 6, provided: "The provisions of this act shall not be construed to amend or repeal the provisions of G.S. 1-17."

Session Laws 1995, c. 522, s. 3 provides that this act, which amended existing sections in this Chapter and enacted new ones, shall not apply to product liability actions for injury or death resulting from any silicone gel breast implant implanted prior to January 1, 1996.

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For article, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

For survey of 1981 tort law, see 60 N.C.L. Rev. 1465 (1982).

For discussion of the "reasonable notice" aspect of warranty law, in light of Maybank v. S.S. Kresge, 302 N.C. 129, 273 S.E.2d 681 (1981), see 61 N.C.L. Rev. 177 (1982).

For a symposium on the North Carolina Commercial Code, see 18 Wake Forest L. Rev. 161 (1982).

For comment, "The Crashworthy Vehicle: Heading For a Collision in the North Carolina Courts," see 18 Wake Forest L. Rev. 711 (1982).

For note on the six-year statutory bar to products liability actions, in light of Tetterton v. Long Manufacturing Co., 314 N.C. 44, 332 S.E.2d 67 (1985), see 64 N.C.L. Rev. 1155 (1986).

For note discussing products liability and the sufficiency of causation evidence to warrant submission of the case to the jury, in light of Owens ex rel. Owens v. Bourns, Inc., 766 F.2d 145 (4th Cir.), reh'g denied, 106 S. Ct. 608 (1985), see 21 Wake Forest L. Rev. 1155 (1986).

For comment on stand against tort reform, see 10 Campbell L. Rev. 439 (1988).

For article, "Toward a Process-Based Approach to Failure-to-Warn Law," see 71 N.C.L. Rev. 121 (1992).

For article, "Strictly No Strict Liability: The 1995 Amendments to Chapter 99B, the Products Liability Act," see 74 N.C.L. Rev. 2240 (1996).

For article, "Products Liability — Emerging Consensus and Persisting Problems: An Analytical Review Presenting Some Options," 25 Campbell L. Rev. 1 (2002).

CASE NOTES

Purpose. — This Chapter provides protection for merchants who merely sell products while allowing the purchaser of the product to proceed against the manufacturer of the product. Travelers Ins. Co. v. Chrysler Corp., 845 F. Supp. 1122 (M.D.N.C. 1994).

This Chapter does not adopt strict liability in product liability cases. Smith v. Fiber Controls Corp., 300 N.C. 669, 268 S.E.2d 504 (1980).

North Carolina expressly rejects strict liability in products liability actions. Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), cert. denied, 339 N.C. 736, 454 S.E.2d 647 (1995).

The North Carolina legislature intended to establish a fixed cut-off date to bar actions brought after six years involving an injury caused by a manufactured good. A defendant escapes liability if the action is not brought within the six-year window provided by G.S. 1-50(6) (now G.S. 1-50(a)(6)). Lindsay v. Public Serv. Co., 725 F. Supp. 278 (W.D.N.C. 1989), appeal dismissed, 732 F. Supp. 623 (W.D.N.C. 1990).

With No Exception for Failure to Warn. — The statute of repose, G.S. 1-50(6) (now G.S. 1-50(a)(6)), as incorporated into this Chapter, the North Carolina products liability statute, anticipates that the statute includes any action brought for or on account of personal injury. Specifically, the statute includes those injuries caused by or resulting from a warning or lack thereof. Thus, the statute of repose contains no exception for failure to warn. Lindsay v. Public Serv. Co., 725 F. Supp. 278 (W.D.N.C. 1989), appeal dismissed, 732 F. Supp. 623 (W.D.N.C. 1990).

Period of Limitations. — Section 1-50(6) (now G.S. 1-50(a)(6)) was enacted with this Chapter to provide a period of limitations for actions to which this Chapter applies. Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982).

Statute of Repose. — This section does not completely eviscerate the statute of repose in the case of minors and others under disability. If a product is over six years old at the time of injury, which would be the time that the claim accrues, than the statute of repose operates as a total bar on that claim; however, if a claim accrues before the six year statute of repose has expired, this section simply operates to extend the time period within which a minor or other with disability may bring suit under Chapter 99B. Therefore, claims accruing after six years will still be barred. Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), cert. denied, 339 N.C. 736, 454 S.E.2d 647 (1995).

Recovery for Economic Losses. — In the context of a products liability suit, purely economic losses cannot ordinarily be recovered in an action for negligence. Chicopee, Inc. v. Sims Metal Works, Inc., 98 N.C. App. 423, 391 S.E.2d 211 (1990), appeal withdrawn, 328 N.C. 329, 402 S.E.2d 826 (1991).

Recoverable Losses. — With respect to what losses are recoverable in a products liability suit, North Carolina follows the majority rule and does not allow recovery of purely economic losses in an action for negligence. AT & T Corp. v. Medical Review of N.C., Inc., 876 F. Supp. 91 (E.D.N.C. 1995).

Purely Economic Loss. — Purely economic loss is not recoverable under tort law in a products liability action in North Carolina. AT & T Corp. v. Medical Review of N.C., Inc., 876 F. Supp. 91 (E.D.N.C. 1995).

Where third party plaintiff claimed it was entitled to maintain an action under the Products Liability Act that would fall within the exception to the privity requirement in the context of breach or implied warranty, but did not allege that defects in the voice mail system resulted in any physical injury or property damage and only alleged economic loss, the general rule regarding privity remained intact and third party plaintiff could not maintain its breach of implied warranty claim. AT & T Corp. v. Medical Review of N.C., Inc., 876 F. Supp. 91 (E.D.N.C. 1995).

The imprinting of retailer's trademark in shoe was insufficient to bring retailer within the definition of manufacturer in subdivision (2) of this section. Morrison v. Sears, Roebuck & Co., 80 N.C. App. 224, 341 S.E.2d 40, rev'd on other grounds, 319 N.C. 298, 354 S.E.2d 495 (1987).

"Selling" encompasses delivery of products. Champs Convenience Stores, Inc. v. United Chem. Co., 99 N.C. App. 275, 392 S.E.2d 761 (1990), rev'd on other grounds, 329 N.C. 446, 406 S.E.2d 856 (1991).

Action of Breach of Implied Warranty of Merchantability. — The implied warranty of merchantability arises under the UCC upon the sale of goods when the seller is a merchant with respect to goods of the kind sold. The term "product liability action" as used in the Products Liability Act includes "any action brought for or on account of personal injury, death or property damage caused by or resulting from . . . the selling . . . of any product." Therefore, an action of breach of implied warranty of merchantability under the UCC is a "product liability action" within the meaning of the Products Liability Act if the action is for injury to person or property resulting from the sale of a product. Morrison v. Sears, Roebuck & Co., 319 N.C. 298, 354 S.E.2d 495 (1987).

Negligence Action for Injuries Caused by the Warning or Instructing of Products. — Although the legislature did not undertake to define what "products" are covered by Chapter 99B, subsection (3) of this section anticipates, that a products liability action may include an action for personal injuries caused by or resulting from the "warning or instructing" of any product. Driver v. Burlington Aviation, Inc., 110 N.C. App. 519, 430 S.E.2d 476 (1993).

Where plaintiff's amended complaint alleged that aircraft manufacturer had a duty to the pilot and his passengers to provide complete and accurate instruction concerning various mechanical functions, and that the manual wrongfully instructed concerning these functions and that the negligence of the aircraft manufacturer actually and proximately caused the damages to the plaintiffs, the allegations were sufficient to state a claim for relief based on a theory of negligence against the aircraft manufacturer in the preparation and publication of the information manual. Driver v. Burlington Aviation, Inc., 110 N.C. App. 519, 430 S.E.2d 476 (1993).

Applied in Wilson Bros. v. Mobil Oil, 63 N.C. App. 334, 305 S.E.2d 40 (1983); Crews v. W.A. Brown & Son, 106 N.C. App. 324, 416 S.E.2d 924 (1992).

Cited in Matthews v. Johnson Publishing Co., 89 N.C. App. 522, 366 S.E.2d 525 (1988); Morgan v. Cavalier Acquisition Corp., 111 N.C. App. 520, 432 S.E.2d 915 (1993); Moore v. Coachmen Indus., Inc., 129 N.C. App. 376, 499 S.E.2d 772 (1998); Vogl v. LVD Corp., 132 N.C. App. 797, 514 S.E.2d 113 (1999); Red Hill Hosiery Mill v. Magnetek, Inc., 138 N.C. App. 70, 530 S.E.2d 321, 2000 N.C. App. LEXIS 542 (2000); DeWitt v. Eveready Battery Co., 355 N.C. 672, 565 S.E.2d 140, 2002 N.C. LEXIS 548 (2002); Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 34011 (M.D.N.C. July 8, 2005).

§ 99B-1.1. Strict liability.

There shall be no strict liability in tort in product liability actions. (1995, c. 522, s. 1.)

CASE NOTES

Cited in Gbye v. Gbye, 130 N.C. App. 585, 503 S.E.2d 434 (1998), cert. denied, 349 N.C. 357, 517 S.E.2d 893 (1998); Ward v. Am. Med. Sys., 170 F. Supp. 2d 594, 2001 U.S. Dist. LEXIS 16969 (W.D.N.C. 2001); DeWitt v. Eveready Battery Co., 355 N.C. 672, 565 S.E.2d 140, 2002 N.C. LEXIS 548 (2002); Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 34011 (M.D.N.C. July 8, 2005).

§ 99B-1.2. Breach of warranty.

Nothing in this act shall preclude a product liability action that otherwise exists against a manufacturer or seller for breach of warranty. The defenses provided for in this Chapter shall apply to claims for breach of warranty unless expressly excluded under this Chapter. (1995, c. 522, s. 1.)

CASE NOTES

Cited in Dewitt v. Eveready Battery Co., 144 N.C. App. 143, 550 S.E.2d 511, 2001 N.C. App. LEXIS 432 (2001), cert. denied, 354 N.C. 216, 553 S.E.2d 398 (2001), aff'd, 355 N.C. 672, 565 S.E.2d 140 (2002); DeWitt v. Eveready Battery Co., 355 N.C. 672, 565 S.E.2d 140, 2002 N.C. LEXIS 548 (2002); Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 34011 (M.D.N.C. July 8, 2005).

§ 99B-2. Seller's opportunity to inspect; privity requirements for warranty claims.

(a) No product liability action, except an action for breach of express warranty, shall be commenced or maintained against any seller when the product was acquired and sold by the seller in a sealed container or when the product was acquired and sold by the seller under circumstances in which the seller was afforded no reasonable opportunity to inspect the product in such a manner that would have or should have, in the exercise of reasonable care, revealed the existence of the condition complained of, unless the seller damaged or mishandled the product while in his possession; provided, that the provisions of this section shall not apply if the manufacturer of the product is not subject to the jurisdiction of the courts of this State or if such manufacturer has been judicially declared insolvent.

(b) A claimant who is a buyer, as defined in the Uniform Commercial Code, of the product involved, or who is a member or a guest of a member of the family of the buyer, a guest of the buyer, or an employee of the buyer may bring a product liability action directly against the manufacturer of the product involved for breach of implied warranty; and the lack of privity of contract shall not be grounds for the dismissal of such action. (1979, c. 654, s. 1; 1989, c. 420; 1995, c. 522, s. 1.)

Cross References. — As to demand for monetary relief in products liability actions, see G.S. 1A-1, Rule 8(a)(2).

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For article, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

For note on requirement of privity and express warranties, see 16 Wake Forest L. Rev. 857 (1980).

For symposium on the North Carolina Commercial Code, see 18 Wake Forest L. Rev. 161 (1982).

For note discussing sufficiency of causation evidence to warrant submission of products liability case to the jury, in light of Owens ex rel. Owens v. Bourns, Inc., 766 F.2d 145 (4th Cir.), reh'g denied, 106 S. Ct. 608 (1985), see 21 Wake Forest L. Rev. 1155 (1986).

CASE NOTES

Subsection (a) as Defense Under UCC. — The legislature intended that subsection (a) be available as a defense to actions for breach of an implied warranty of merchantability brought under the UCC. Morrison v. Sears, Roebuck & Co., 319 N.C. 298, 354 S.E.2d 495 (1987).

Subsection (a) as Defense in Breach of Implied Warranty Actions. — In products liability actions arising from breaches of implied warranties, unlike those arising from breaches of express warranties, the defenses provided by subsection (a) are available to defendants. Morrison v. Sears, Roebuck & Co., 319 N.C. 298, 354 S.E.2d 495 (1987).

Intent of Defenses. — The defenses established in this section were intended to limit the liability of merchants who merely sell products without any knowledge of any defect in the product. Travelers Ins. Co. v. Chrysler Corp., 845 F. Supp. 1122 (M.D.N.C. 1994).

Act Held Inapplicable to Purchaser's Employee. — The protections of the Products Liability Act would not extend to the employee of a purchaser where the employee was covered by workers' compensation insurance. Davis v. Siloo Inc., 47 N.C. App. 237, 267 S.E.2d 354, cert. denied, 301 N.C. 234, 283 S.E.2d 131 (1980).

Where it was undisputed that plaintiff's employer purchased potato whitener for use in store, plaintiff used the product in her work, and plaintiff was covered by the Worker's Compensation Act, this section prevented plaintiff from being a claimant on an implied warranty theory against the manufacturer; therefore, defendant's motion for summary judgment on the implied warranty was properly granted. Sutton v. Major Prods. Co., 91 N.C. App. 610, 372 S.E.2d 897 (1988).

Essential elements of an action for products liability based upon negligence include: (1) Evidence of a standard of care owed by the reasonably prudent person in similar circumstances; (2) breach of that standard of care; (3) injury caused directly or proximately by the breach, and; (4) loss because of the injury. McCollum v. Grove Mfg. Co., 58 N.C. App. 283, 293 S.E.2d 632, aff'd, 307 N.C. 695, 300 S.E.2d 374 (1983), decided under law applicable prior to effective date of this Chapter.

Purely Economic Loss. — Where third party plaintiff claimed it was entitled to maintain an action under the Products Liability Act that would fall within the exception to the privity requirement in the context of breach or implied warranty, but did not allege that defects in the voice mail system resulted in any physical injury or property damage and only alleged economic loss, the general rule regarding privity remained intact and third party plaintiff could not maintain its breach of implied warranty claim. AT & T Corp. v. Medical Review of N.C., Inc., 876 F. Supp. 91 (E.D.N.C. 1995).

Privity Requirement. — This Chapter (products liability) expressly abrogates privity requirement in certain claims based upon implied warranty. However, outside exceptions created by this Chapter, general rule is that privity is required to assert claim for breach of implied warranty involving only economic loss. Sharrard, McGee & Co. v. Suz's Software, Inc., 100 N.C. App. 428, 396 S.E.2d 815 (1990).

North Carolina's Products Liability Act relaxes the privity requirement with respect to a claim for breach of implied warranty. AT & T Corp. v. Medical Review of N.C., Inc., 876 F. Supp. 91 (E.D.N.C. 1995).

Trial court did not err in dismissing general contractor's breach of implied warranty claims against the manufacturer because there was no privity. Since the generators were installed as a component part of the system, the plant only suffered economic loss and, pursuant to G.S. 99B-2(b), of the North Carolina Products Liability Act, in order for the general contractor to maintain an action against the manufacturer there had to be privity. Atl. Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc., 175 N.C. App. 339, 623 S.E.2d 334, 2006 N.C. App. LEXIS 58 (2006).

Privity Not Abolished for Employee. — A buyer's employee is barred from suit against a seller grounded upon breach of implied warranty in that neither the Act nor the U.C.C. provisions regarding implied warranties abolish the privity requirement in such instance. Nicholson v. American Safety Util. Corp., 124 N.C. App. 59, 476 S.E.2d 672, 1996 N.C. App. LEXIS 1016 (1996), cert. granted, 483 S.E.2d 173 (1997), cert. granted, 483 S.E.2d 174 (1997), modified and aff'd, 346 N.C. 767, 488 S.E.2d 240 (1997).

Lack of Privity. — This section allows a buyer to bring a product liability action against a manufacturer of a product regardless of the lack of privity of contract. Travelers Ins. Co. v. Chrysler Corp., 845 F. Supp. 1122 (M.D.N.C. 1994).

Seller Representing Itself as Manufacturer Is Not Protected. — Trial court erred in granting summary judgment for seller because a genuine issue of material fact existed as to whether seller was the apparent manufacturer of the heaters; a seller who holds himself out to the public as the manufacturer of a product is not protected from products liability actions by subsection (a) of this section. Warzynski v. Empire Comfort Sys., 102 N.C. App. 222, 401 S.E.2d 801 (1991).

Principles of Negligence Govern. — In products liability cases, the duty of the manufacturer in tort must be determined by the principles of negligence. The doctrine of strict liability, except for a few exceptional situations, has not been adopted. McCollum v. Grove Mfg. Co., 58 N.C. App. 283, 293 S.E.2d 632, aff'd, 307 N.C. 695, 300 S.E.2d 374 (1983), decided under law applicable prior to effective date of this Chapter.

The failure of manufacturers and distributors to properly inform purchasers of a product's hazards, uses, and misuses is a basis for rendering them legally liable for injuries resulting therefrom under some circumstances. Millikan v. Guilford Mills, Inc., 70 N.C. App. 705, 320 S.E.2d 909 (1984), cert. denied, 312 N.C. 798, 325 S.E.2d 631 (1984).

Liability for Sale of Inherently Dangerous Product. — Liability may be imposed upon a manufacturer who sells a product that is inherently dangerous. McCollum v. Grove Mfg. Co., 58 N.C. App. 283, 293 S.E.2d 632, aff'd, 307 N.C. 695, 300 S.E.2d 374 (1983), decided under law applicable prior to effective date of this Chapter.

Manufacturer of a machine which is dangerous because of the way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers. In a case against such a manufacturer, the plaintiff must prove the existence of a latent defect or of a danger not known to the plaintiff or other users. McCollum v. Grove Mfg. Co., 58 N.C. App. 283, 293 S.E.2d 632, aff'd, 307 N.C. 695, 300 S.E.2d 374 (1983), decided under law applicable prior to effective date of this Chapter.

Protection Against Obvious Defects Not Required. — A manufacturer has no duty to equip his product with safety devices to protect against defects and dangers that are obvious. In cases dealing with a manufacturer's liability for injuries to remote users, the courts have always stressed the duty of guarding against hidden defects and of giving notice of concealed dangers. McCollum v. Grove Mfg. Co., 58 N.C. App. 283, 293 S.E.2d 632, aff'd, 307 N.C. 695, 300 S.E.2d 374 (1983), decided under law applicable prior to effective date of this Chapter.

Standard of Care in Product Design. — As to the standard of care, a manufacturer is under a duty to those who use his product to exercise that degree of care in its design and manufacture that a reasonably prudent man would use in similar circumstances. McCollum v. Grove Mfg. Co., 58 N.C. App. 283, 293 S.E.2d 632, aff'd, 307 N.C. 695, 300 S.E.2d 374 (1983), decided under law applicable prior to effective date of this Chapter.

Liability Under Crashworthiness Theory. — Under the law of North Carolina, an automobile manufacturer would not be held liable for defects in the design and manufacture of a vehicle which neither caused nor contributed to the cause of a collision, but served to exacerbate injuries sustained thereafter. Wilson v. Ford Motor Co., 656 F.2d 960 (4th Cir. 1981).

Where 1964 Volkswagen occupied by decedents and designed, manufactured and distributed by VW, burst into flames due to an allegedly defective gas tank when it was struck by a 1972 Dodge being operated on the wrong side of the highway, and it was not alleged that the defective gas tank caused the collision, the district court erred in denying VW's motions for dismissal and for summary judgment in a suit to recover damages for the wrongful deaths of decedents as a result of the alleged failure of VW to design a crashworthy vehicle. Martin v. Volkswagen of Am., Inc., 707 F.2d 823 (4th Cir. 1983).

A cause of action for enhanced injuries is permissible under North Carolina law. Warren v. Colombo, 93 N.C. App. 92, 377 S.E.2d 249 (1989); Mumford v. Colombo, 93 N.C. App. 107, 377 S.E.2d 258 (1989); Corbitt v. Colombo, 93 N.C. App. 111, 377 S.E.2d 259 (1989); Holmes v. Colombo, 93 N.C. App. 117, 377 S.E.2d 261 (1989); Corbitt v. Colombo, 93 N.C. App. 113, 377 S.E.2d 262 (1989); Albritton v. Colombo, 93 N.C. App. 115, 377 S.E.2d 264 (1989); Mumford v. Colombo, 93 N.C. App. 109, 377 S.E.2d 265 (1989).

Under the negligence theory of enhanced injury, recovery may be allowed when defects in a vehicle enhance or increase plaintiff's injuries in an accident, although the defect did not cause the accident. Warren v. Colombo, 93 N.C. App. 92, 377 S.E.2d 249 (1989).

In action to recover for death of farm worker who died after drinking pesticide, trial court properly entered summary judgment for the seller of the pesticide where plaintiff did not present any specific facts tending to show that the seller knew or should have known that manufacturer's written warnings on the product's label were inadequate, nor did plaintiff demonstrate that seller should have known that purchaser would not appreciate the possible harm involved in using a toxic pesticide which was packaged in a clear plastic container and looked like water. Ziglar v. E.I. Du Pont De Nemours & Co., 53 N.C. App. 147, 280 S.E.2d 510, cert. denied, 304 N.C. 393, 285 S.E.2d 838 (1981), decided under law applicable prior to effective date of this Chapter.

In action to recover for wrongful death of a farm laborer who drank a toxic pesticide, trial court erred in entering summary judgment for the manufacturer of the pesticide where evidence raised questions for the jury as to whether the manufacturer exercised the required degree of due care in its general manufacture and packaging of the pesticide, whether the manufacturer failed to provide adequate warnings on the product's label to notify others of its toxicity, and whether the manufacturer's first aid instructions on the product's label were ambiguous and incomplete. Ziglar v. E.I. Du Pont De Nemours & Co., 53 N.C. App. 147, 280 S.E.2d 510, cert. denied, 304 N.C. 393, 285 S.E.2d 838 (1981), decided under law applicable prior to effective date of this Chapter.

Language in Seller's Ad Held "Puffing." — Seller's advertisement that it sold "America's most complete line of reliable, economical gas heating appliances" was, under the Uniform Commercial Code, "a statement purporting to be merely the seller's opinion or commendation of the goods does not create warranty." Seller's statement that the heater was "reliable" could not be regarded by the buyers to be part of the reason for their purchase; therefore, the language in seller's advertisement was mere puffing and not an express warranty. Warzynski v. Empire Comfort Sys., 102 N.C. App. 222, 401 S.E.2d 801 (1991).

Denial of Relief Held Proper. — Where defendant distributors acquired and sold potato whitener in sealed cartons, and defendant food service, plaintiff's employer, obtained the product in sealed jars, and there was no evidence that they damaged or altered the product, this section constituted a complete bar to recovery on plaintiff's implied warranty claims against both defendants. Sutton v. Major Prods. Co., 91 N.C. App. 610, 372 S.E.2d 897 (1988).

Applied in Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982); Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985); Cato Equip. Co. v. Matthews, 91 N.C. App. 546, 372 S.E.2d 872 (1988).

Cited in Martin v. Worth Chem. Corp., 620 F. Supp. 64 (W.D.N.C. 1985); Roy Burt Enters., Inc. v. Marsh, 328 N.C. 262, 400 S.E.2d 425 (1991); Crews v. W.A. Brown & Son, 106 N.C. App. 324, 416 S.E.2d 924 (1992); Goodman v. Wenco Foods, Inc., 331 N.C. 1, 423 S.E.2d 444 (1992); Haymore v. Thew Shovel Co., 116 N.C. App. 40, 446 S.E.2d 865 (1994); AT & T Corp. v. Medical Review of N.C., Inc., 876 F. Supp. 91 (E.D.N.C. 1995); DeWitt v. Eveready Battery Co., 355 N.C. 672, 565 S.E.2d 140, 2002 N.C. LEXIS 548 (2002); Lord v. Customized Consult-ing Specialty, Inc., — N.C. App. —, 643 S.E.2d 28, 2007 N.C. App. LEXIS 782 (2007).

§ 99B-3. Alteration or modification of product.

(a) No manufacturer or seller of a product shall be held liable in any product liability action where a proximate cause of the personal injury, death, or damage to property was either an alteration or modification of the product by a party other than the manufacturer or seller, which alteration or modification occurred after the product left the control of such manufacturer or such seller unless:

(1) The alteration or modification was in accordance with the instructions or specifications of such manufacturer or such seller; or

(2) The alteration or modification was made with the express consent of such manufacturer or such seller.

(b) For the purposes of this section, alteration or modification includes changes in the design, formula, function, or use of the product from that originally designed, tested, or intended by the manufacturer. It includes failure to observe routine care and maintenance, but does not include ordinary wear and tear. (1979, c. 654, s. 1; 1995, c. 522, s. 1.)

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For article, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

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Recovery from Manufacturer Barred. — Where the forecast of evidence demonstrated that a proximate cause of plaintiff's injury was the modification or alteration of machine in question by a party other than the manufacturer after it left the control of the manufacturer, and that the alteration of the machine was contrary to the instructions of the manufacturer and done without its express consent, this section barred recovery from the manufacturer. Rich v. Shaw, 98 N.C. App. 489, 391 S.E.2d 220, cert. denied, 327 N.C. 432, 395 S.E.2d 689 (1990).

Product liability claim against a restaurant franchisor based on an employee's spitting into a customer's food was properly dismissed; even if the franchisor had manufactured the food, the food was altered in a manner not originally intended by the franchisor, at a time after it left the franchisor's control and without its express consent. Phillips v. Restaurant Mgt. of Carolina, L.P., 146 N.C. App. 203, 552 S.E.2d 686, 2001 N.C. App. LEXIS 851 (2001).

Manufacturer of a home heater was not liable to consumers for carbon monoxide poisoning under G.S. 99B-3 because the heater had been converted from a natural gas unit to one using liquefied petroleum after it left the manufacturer's control. Edmondson v. Macclesfield L-P Gas Co., — N.C. App. —, 642 S.E.2d 265, 2007 N.C. App. LEXIS 693 (2007).

Misuse of Product Must Be a Proximate Cause. — In order for this section to act as a bar to plaintiff's recovery, the minor plaintiff's misuse of the fence and gate must have been a proximate cause of her injury, and since issues of proximate cause and foreseeability are best left to a jury, summary judgment was improper. Hastings v. Seegars Fence Co., 128 N.C. App. 166, 493 S.E.2d 782 (1997).

Summary judgment denied. — Helicopter manufacturer and related defendants were not entitled to summary judgment on product liability claims stemming from the crash of a medical helicopter because a fact issue remained as to whether there was an improper alteration or misuse of the helicopter's gearbox by the pilot or mechanic under the provisions of G.S. 99B-3 and whether the pilot and mechanic used the product (helicopter) contrary to express and adequate instructions or acted unreasonably under the provisions of G.S. 99B-4. Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 34011 (M.D.N.C. July 8, 2005).

Applied in Cato Equip. Co. v. Matthews, 91 N.C. App. 546, 372 S.E.2d 872 (1988); Westover Prods., Inc. v. Gateway Roofing Co., 94 N.C. App. 63, 380 S.E.2d 369 (1989).

Cited in Goodman v. Wenco Foods, Inc., 331 N.C. 1, 423 S.E.2d 444 (1992).

§ 99B-4. Knowledge or reasonable care.

No manufacturer or seller shall be held liable in any product liability action if:

(1) The use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings delivered with, appearing on, or attached to the product or on its original container or wrapping, if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings; or

(2) The user knew of or discovered a defect or dangerous condition of the product that was inconsistent with the safe use of the product, and then unreasonably and voluntarily exposed himself or herself to the danger, and was injured by or caused injury with that product; or

(3) The claimant failed to exercise reasonable care under the circumstances in the use of the product, and such failure was a proximate cause of the occurrence that caused the injury or damage complained of. (1979, c. 654, s. 1; 1995, c. 522, s. 1.)

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For article, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

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Subdivision (3) codifies the common law standard of contributory negligence and does not limit the defense to a plaintiff's misuse of the product. Nicholson v. American Safety Util. Corp., 346 N.C. 767, 488 S.E.2d 240 (1997).

The manufacturer has a duty to warn of known dangers which can be encountered during foreseeable use of the product. Lee v. Crest Chem. Co., 583 F. Supp. 131 (M.D.N.C. 1984).

A manufacturer may be held liable for negligence if he sells a dangerous article likely to cause injury in its ordinary use and the manufacturer fails to guard against hidden defects and fails to give notice of the concealed danger. Smith v. Selco Prods., Inc., 96 N.C. App. 151, 385 S.E.2d 173 (1989), cert. denied, 326 N.C. 598, 393 S.E.2d 883 (1990).

Continuing Duty to Provide Post-Sale Warnings. — A manufacturer does not completely discharge its duty to warn simply by providing some warnings of some dangerous propensity of its product at the time of sale; a continuing duty exists to provide post-sale warnings of any deficiencies it learns exist in the product to users. Smith v. Selco Prods., Inc., 96 N.C. App. 151, 385 S.E.2d 173 (1989), cert. denied, 326 N.C. 598, 393 S.E.2d 883 (1990).

Failure to adequately warn of dangerous propensities of a product may underlie a claim of breach of the implied warranty of merchantability. Lee v. Crest Chem. Co., 583 F. Supp. 131 (M.D.N.C. 1984).

The failure of manufacturers and distributors to properly inform purchasers and other users of a product's hazards, uses, and misuses is a basis for rendering them legally liable for injuries resulting therefrom under some circumstances. Millikan v. Guilford Mills, Inc., 70 N.C. App. 705, 320 S.E.2d 909 (1984), cert. denied, 312 N.C. 798, 325 S.E.2d 631 (1985).

This section codifies a form of contributory negligence. Lee v. Crest Chem. Co., 583 F. Supp. 131 (M.D.N.C. 1984).

Subdivisions (1) and (3) merely codify the doctrine of contributory negligence as it applies in actions brought under this Chapter. Champs Convenience Stores v. United Chem. Co., 329 N.C. 446, 406 S.E.2d 856 (1991).

In addition to codifying the general doctrine of contributory negligence, this section sets out or explains more specialized fact patterns which would amount to contributory negligence in a products liability action. Champs Convenience Stores v. United Chem. Co., 329 N.C. 446, 406 S.E.2d 856 (1991).

Defense of Contributory Negligence Reaffirmed. — This section specifically reaffirms the applicability of contributory negligence as a defense in product liability actions. Smith v. Fiber Controls Corp., 300 N.C. 669, 268 S.E.2d 504 (1980); Wilson Bros. v. Mobile Oil, 63 N.C. App. 334, 305 S.E.2d 40, cert. denied, 309 N.C. 634, 308 S.E.2d 718, 308 S.E.2d 719 (1983).

What Constitutes Contributory Negligence. — Plaintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety. Smith v. Fiber Controls Corp., 300 N.C. 669, 268 S.E.2d 504 (1980).

People who acquire or use machines and devices usually read and follow the accompanying information, since the failure to do so is evidence of contributory negligence under some circumstances. Millikan v. Guilford Mills, Inc., 70 N.C. App. 705, 320 S.E.2d 909 (1984), cert. denied, 312 N.C. 798, 325 S.E.2d 631 (1925).

The defense of contributory negligence is not invariably barred by defendant's failure to warn of a danger, when the facts indicate that plaintiff, in the exercise of ordinary care, should have known of the danger of injury independent of any warning by defendant. Smith v. Fiber Controls Corp., 300 N.C. 669, 268 S.E.2d 504 (1980).

Contributory Negligence as No Defense in Contract Claim. — Where jury found that plaintiff used walnut finish contrary to expressed and adequate instructions which plaintiff knew or should have known in the exercise of reasonable and diligent care, and defendant claimed plaintiff's contributory negligence defeated plaintiff's claim, plaintiff's breach of contract claim did not fall within the purview or effect of the Products Liability Act; where a plaintiff is able to convince a trier of fact that he or she has suffered damages flowing from the failure of a defendant to meet direct and express contractual obligations, the defense of contributory negligence has no application to that claim. Steelcase, Inc. v. Lilly Co., 93 N.C. App. 697, 379 S.E.2d 40, cert. denied, 325 N.C. 276, 384 S.E.2d 530 (1989).

Failure to Follow Instructions. — Where plaintiff would not have been burned but for her failure to follow express instructions concerning a safety precaution, and the instructions on the product's label expressly warned of the burn potential, plaintiff's omission was the proximate cause of the very injury she suffered. Lee v. Crest Chem. Co., 583 F. Supp. 131 (M.D.N.C. 1984).

Helicopter manufacturer and related defendants were not entitled to summary judgment on product liability claims stemming from the crash of a medical helicopter because a fact issue remained as to whether there was an improper alteration or misuse of the helicopter's gearbox by the pilot or mechanic under the provisions of G.S. 99B-3 and whether the pilot and mechanic used the product (helicopter) contrary to express and adequate instructions or acted unreasonably under the provisions of G.S. 99B-4. Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 34011 (M.D.N.C. July 8, 2005).

Warnings regarding surgical implant given in insert to physician were sufficient notice to plaintiff patient. Padgett v. Synthes, Ltd., 677 F. Supp. 1329 (W.D.N.C. 1988), aff'd, 872 F.2d 418 (4th Cir. 1989).

Latent Hazards in Machine Could Have Rendered Warning Inadequate. — Where an issue arose as to whether or not latent hazards existed in a cardboard box baler, so as to render attached warning label inadequate, trial court erred in finding plaintiff contributorily negligent as a matter of law for failing to heed the warning. Smith v. Selco Prods., Inc., 96 N.C. App. 151, 385 S.E.2d 173, cert. denied, 325 N.C. 276, 384 S.E.2d 530 (1989).

Summary Judgment on Issue of Contributory Negligence Held Improper. — Questions about the design of a cardboard box baler, its violation of OSHA industry standards, and the workplace practice this design provoked, created questions of whether the warning sticker attached to the machine was adequate and whether plaintiff's action in putting his arm inside the baler involved contributory negligence; therefore, summary judgment based on plaintiff's contributory negligence was not proper. Smith v. Selco Prods., Inc., 96 N.C. App. 151, 385 S.E.2d 173, cert. denied, 325 N.C. 276, 384 S.E.2d 530 (1989).

Evidence that plaintiffs failed to exercise reasonable care under the circumstances in their use of asbestos-containing products because they continued to smoke cigarettes after the hazards of cigarette smoking and the relationship between cigarette smoking and asbestos exposure became widely known, and their smoking, combined with their exposure to asbestos-containing products, was a proximate cause of their injuries and could support a finding of contributory negligence. The district court erroneously did not permit defendant to establish this defense at trial, by granting partial summary judgment on the issue of contributory negligence. Jones v. Owens-Corning Fiberglas Corp., 69 F.3d 712 (4th Cir. 1995).

Exercise of Reasonable Care. — The court could not conclude as a matter of law that decedent, killed when the vending machine fell on him, failed to exercise reasonable care under the circumstances, where several students, contemporaries of decedent, testified that it was well known that if the soft drink vending machine at issue was tilted, a canned drink would be dispensed and plaintiff presented evidence that decedent was attempting to retrieve the canned drink for which he had already paid. Morgan v. Cavalier Acquisition Corp., 111 N.C. App. 520, 432 S.E.2d 915 (1993).

Section Held Not Available as Defense. — Roof manufacturer, who argued that roof was not properly installed by subcontractor and that, thus, under this Chapter, it was not liable, was not able to use this section as a defense, since it had contracted to instruct subcontractor on installation procedures, and since it had assisted subcontractor in the installation of the roof on the building. Westover Prods., Inc. v.

Gateway Roofing Co., 94 N.C. App. 63, 380 S.E.2d 369 (1989).

Negligence of Plaintiff. — A manufacturer or seller can avoid liability under the Act if plaintiff was negligent in his use of the product, or if he used the product even after he discovered a defect or unreasonably dangerous condition. Nicholson v. American Safety Util. Corp., 124 N.C. App. 59, 476 S.E.2d 672, 1996 N.C. App. LEXIS 1016 (1996), cert. granted, 483 S.E.2d 173 (1997), cert. granted, 483 S.E.2d 174 (1997), modified and aff'd, 346 N.C. 767, 488 S.E.2d 240 (1997).

Applied in Oates v. Jag, Inc., 66 N.C. App. 244, 311 S.E.2d 369 (1984).

Cited in Goodman v. Wenco Foods, Inc., 331 N.C. 1, 423 S.E.2d 444 (1992); Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), cert. denied, 339 N.C. 736, 454 S.E.2d 647 (1995); Lienhart v. Dryvit Sys., 255 F.3d 138, 2001 U.S. App. LEXIS 14242 (4th Cir. 2001).

§ 99B-5. Claims based on inadequate warning or instruction.

(a) No manufacturer or seller of a product shall be held liable in any product liability action for a claim based upon inadequate warning or instruction unless the claimant proves that the manufacturer or seller acted unreasonably in failing to provide such warning or instruction, that the failure to provide adequate warning or instruction was a proximate cause of the harm for which damages are sought, and also proves one of the following:

(1) At the time the product left the control of the manufacturer or seller, the product, without an adequate warning or instruction, created an unreasonably dangerous condition that the manufacturer or seller knew, or in the exercise of ordinary care should have known, posed a substantial risk of harm to a reasonably foreseeable claimant.

(2) After the product left the control of the manufacturer or seller, the manufacturer or seller became aware of or in the exercise of ordinary care should have known that the product posed a substantial risk of harm to a reasonably foreseeable user or consumer and failed to take reasonable steps to give adequate warning or instruction or to take other reasonable action under the circumstances.

(b) Notwithstanding subsection (a) of this section, no manufacturer or seller of a product shall be held liable in any product liability action for failing to warn about an open and obvious risk or a risk that is a matter of common knowledge.

(c) Notwithstanding subsection (a) of this section, no manufacturer or seller of a prescription drug shall be liable in a products liability action for failing to provide a warning or instruction directly to a consumer if an adequate warning or instruction has been provided to the physician or other legally authorized person who prescribes or dispenses that prescription drug for the claimant unless the United States Food and Drug Administration requires such direct consumer warning or instruction to accompany the product. (1995, c. 522, s. 1.)

Legal Periodicals. — For article, "Strictly No Strict Liability: The 1995 Amendments to Chapter 99B, the Products Liability Act," see 74 N.C.L. Rev. 2240 (1996).

For a comment on the effect of direct-to-consumer pharmaceutical advertising on the learned intermediary doctrine, see 20 Campbell L. Rev. 113 (1997).

CASE NOTES

Failure to Warn Was Not Proven To Be the Proximate Cause of Worker's Injuries. — Where a worker sued a clamp manufacturer after the worker was injured when a clamp failed on an irrigation system, the trial court properly directed a verdict in favor of the manufacturer on the worker's claim that the manufacturer was liable for failing to provide adequate warnings regarding the clamp, as the worker proffered no evidence that the manufacturer's failure to provide the warnings that were suggested by the worker's expert was the proximate cause of the worker's injuries. Evans v. Evans, 153 N.C. App. 54, 569 S.E.2d 303, 2002 N.C. App. LEXIS 1082 (2002), cert. denied, 356 N.C. 670, 577 S.E.2d 296 (2003).

No exception to the Learned Intermediary Doctrine. — There is no evidence that North Carolina has adopted a direct-to-consumer exception to the Learned Intermediary Doctrine, codified at G.S. 99B-5. Cowley v. Abbott Labs., 476 F. Supp. 2d 1053, 2007 U.S. Dist. LEXIS 14582 (Feb. 28, 2007).

Defendant's Knowledge, or Lack Thereof, Regarding the Potential Dangers of its Product Are Indeed Relevant to the Issues of Duty and Causation. — In an action in which defendant pharmaceutical company filed a motion to exclude or limit the testimony of plaintiff individual's expert witnesses, the company's motion requesting that the court exclude all evidence regarding side effects of Pondimin other than primary pulmonary hypertension, namely, valvular heart disease or "VHD" was denied; in light of its probative value on the issue of notice to the company, duty to warn, and causation, the probative value of VHD evidence was not substantially outweighed by the risk of unfair prejudice to the company. Smith v. Wyeth-Ayerst Labs. Co., 278 F. Supp. 2d 684, 2003 U.S. Dist. LEXIS 19972 (W.D.N.C. 2003).

Duty to Warn Physician Was Satisfied. — Drug manufacturer and a distributor were entitled to summary judgment on a patient and his spouse's product liability action because North Carolina law governed where the patient resided in North Carolina when a resident doctor prescribed the TNF inhibitor for the patient's rheumatoid arthritis, and under the Learned Intermediary Doctrine, codified at G.S. 99B-5(c), the manufacturer met its duty to warn the doctor about the drug's dangers and side effects. Cowley v. Abbott Labs., 476 F. Supp. 2d 1053, 2007 U.S. Dist. LEXIS 14582 (Feb. 28, 2007).

Cited in Dewitt v. Eveready Battery Co., 144 N.C. App. 143, 550 S.E.2d 511, 2001 N.C. App. LEXIS 432 (2001), cert. denied, 354 N.C. 216, 553 S.E.2d 398 (2001), aff'd, 355 N.C. 672, 565 S.E.2d 140 (2002).

§ 99B-6. Claims based on inadequate design or formulation.

(a) No manufacturer of a product shall be held liable in any product liability action for the inadequate design or formulation of the product unless the claimant proves that at the time of its manufacture the manufacturer acted unreasonably in designing or formulating the product, that this conduct was a proximate cause of the harm for which damages are sought, and also proves one of the following:

(1) At the time the product left the control of the manufacturer, the manufacturer unreasonably failed to adopt a safer, practical, feasible, and otherwise reasonable alternative design or formulation that could then have been reasonably adopted and that would have prevented or substantially reduced the risk of harm without substantially impairing the usefulness, practicality, or desirability of the product.

(2) At the time the product left the control of the manufacturer, the design or formulation of the product was so unreasonable that a reasonable person, aware of the relevant facts, would not use or consume a product of this design.

(b) In determining whether the manufacturer acted unreasonably under subsection (a) of this section, the factors to be considered shall include, but are not limited to, the following:

(1) The nature and magnitude of the risks of harm associated with the design or formulation in light of the intended and reasonably foreseeable uses, modifications, or alterations of the product.

(2) The likely awareness of product users, whether based on warnings, general knowledge, or otherwise, of those risks of harm.

(3) The extent to which the design or formulation conformed to any applicable government standard that was in effect when the product left the control of its manufacturer.

(4) The extent to which the labeling for a prescription or nonprescription drug approved by the United States Food and Drug Administration conformed to any applicable government or private standard that was in effect when the product left the control of its manufacturer.

(5) The utility of the product, including the performance, safety, and other advantages associated with that design or formulation.
(6) The technical, economic, and practical feasibility of using an alternative design or formulation at the time of manufacture.
(7) The nature and magnitude of any foreseeable risks associated with the alternative design or formulation.

(c) No manufacturer of a product shall be held liable in any product liability action for a claim under this section to the extent that it is based upon an inherent characteristic of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and that is recognized by the ordinary person with the ordinary knowledge common to the community.

(d) No manufacturer of a prescription drug shall be liable in a product liability action on account of some aspect of the prescription drug that is unavoidably unsafe, if an adequate warning and instruction has been provided pursuant to G.S. 99B-5(c). As used in this subsection, "unavoidably unsafe" means that, in the state of technical, scientific, and medical knowledge generally prevailing at the time the product left the control of its manufacturer, an aspect of that product that caused the claimant's harm was not reasonably capable of being made safe.

(e) Nothing in this section precludes an action against a manufacturer in accordance with the provisions of G.S. 99B-5. (1995, c. 522, s. 1.)

Legal Periodicals. — For article, "Strictly No Strict Liability: The 1995 Amendments to Chapter 99B, the Products Liability Act," see 74 N.C.L. Rev. 2240 (1996).

CASE NOTES

Jury Instruction Regarding Product Design Was Properly Denied Absent Evidence That Manufacturer Designed the Product in Issue. — In an action by a worker against a clamp manufacturer after the worker was injured when a clamp failed on an irrigation system, the trial court properly refused to give the worker's requested jury instruction that a manufacturer had a duty to exercise reasonable care in the design of a product, as there was no evidence that the manufacturer designed the clamp. Evans v. Evans, 153 N.C. App. 54, 569 S.E.2d 303, 2002 N.C. App. LEXIS 1082 (2002), cert. denied, 356 N.C. 670, 577 S.E.2d 296 (2003).

Duty of Design. — G.S. 99B-6(a) does not impose a duty of design on a manufacturer; rather, if a manufacturer designs a product, then it has a duty to use reasonable care in the design. Evans v. Evans, 153 N.C. App. 54, 569 S.E.2d 303, 2002 N.C. App. LEXIS 1082 (2002), cert. denied, 356 N.C. 670, 577 S.E.2d 296 (2003).

Summary Judgment Improper Where Conflict Raised by Consumer's Expert. — Summary judgment was improperly granted to a motorcycle helmet manufacturer in a consumer's action alleging that the manufacturer unreasonably failed to adopt a safer, feasible design alternative, where there was a legitimate conflict of evidence raised by the deposition testimony of the consumer's expert that created a genuine issue of material fact. Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674, 2004 N.C. LEXIS 667 (2004).

Applied in Dewitt v. Eveready Battery Co., 144 N.C. App. 143, 550 S.E.2d 511, 2001 N.C. App. LEXIS 432 (2001), cert. denied, 354 N.C. 216, 553 S.E.2d 398 (2001), aff'd, 355 N.C. 672, 565 S.E.2d 140 (2002).

Cited in Howerton v. Arai Helmet, Ltd., 158 N.C. App. 316, 581 S.E.2d 816, 2003 N.C. App. LEXIS 1193 (2003), cert. granted, 357 N.C. 459, 585 S.E.2d 757 (2003).

§§ 99B-7 through 99B-9: Reserved for future codification purposes.

§ 99B-10. Immunity for donated food.

(a) Notwithstanding the provisions of Article 12 of Chapter 106 of the General Statutes, or any other provision of law, any person, including but not limited to a seller, farmer, processor, distributor, wholesaler, or retailer of food, who donates an item of food for use or distribution by a nonprofit organization or nonprofit corporation shall not be liable for civil damages or criminal penalties resulting from the nature, age, condition, or packaging of the donated food, unless an injury is caused by the gross negligence, recklessness, or intentional misconduct of the donor.

(b) Notwithstanding any other provision of law, any nonprofit organization or nonprofit corporation that uses or distributes food that has been donated to it for such use or distribution shall not be liable for civil damages or criminal penalties resulting from the nature, age, condition, or packaging of the donated food, unless an injury is caused by the gross negligence, recklessness, or intentional misconduct of the organization or corporation. (1979, 2nd Sess., c. 1188, s. 1; 1989, c. 365; 1991 (Reg. Sess., 1992), c. 935, s. 2; 1995, c. 522, s. 1.)

§ 99B-11. Claims based on defective design of firearms.

(a) In a products liability action involving firearms or ammunition, whether a firearm or ammunition shell is defective in design shall not be based on a comparison or weighing of the benefits of the product against the risk of injury, damage, or death posed by its potential to cause that injury, damage, or death when discharged.

(b) In a products liability action brought against a firearm or ammunition manufacturer, importer, distributor, or retailer that alleges a design defect, the burden is on the plaintiff to prove, in addition to any other elements required to be proved:

(1) That the actual design of the firearm or ammunition was defective, causing it not to function in a manner reasonably expected by an ordinary consumer of firearms or ammunition; and

(2) That any defective design was the proximate cause of the injury, damage, or death. (1987 (Reg. Sess., 1988), c. 1059, s. 1; 1995, c. 522, s. 1.)

Legal Periodicals. — For article, “Strictly No Strict Liability: The 1995 Amendments to Chapter 99B, the Products Liability Act,” see 74 N.C.L. Rev. 2240 (1996).

Chapter 99C.

Actions Relating to Skier Safety and Skiing Accidents.

Sec.
99C-1. Definitions.
99C-2. Duties of ski operators and skiers.
99C-3. Violation constitutes negligence.
99C-4. Competition.
99C-5. Operation of passenger tramway.

§ 99C-1. Definitions.

When used in this Chapter, unless the context otherwise requires:

(1) "Competitor" means a skier actually engaged in competition or in practice therefor with the permission of the ski area operator on any slope or trail or portion thereof designated by the ski area operator for the purpose of competition.

(2) "Passenger" means any person who is being transported or is awaiting transportation, or being conveyed on a passenger tramway or is moving from the disembarkation point of a passenger tramway or is in the act of embarking upon or disembarking from a passenger tramway.

(3) "Passenger Tramway" shall mean any device used to transport passengers uphill on skis, or in cars on tracks, or suspended in the air, by the use of steel cables, chains, belts or ropes. Such definition shall include such devices as a chair lift, J Bar, or platter pull, rope tow, and wire tow.

(4) "Ski Area" means all the ski slopes, ski trails, and passenger tramways, that are administered or operated as a ski area enterprise within this State.

(5) "Ski Area Operator" means a person, corporation, or organization that is responsible for the safe operation and maintenance of the ski area.

(6) "Skier" means any person who is wearing skis or any person who for the purpose of skiing is on a designated and clearly marked ski slope or ski trail that is located at a ski area, or any person who is a passenger or spectator at a ski area. (1981, c. 939, s. 1.)

Cross References. — As to regulation of aerial passenger tramways, chair lifts and similar devices, see G.S. 95-116 et seq.

§ 99C-2. Duties of ski operators and skiers.

(a) A ski area operator shall be responsible for the maintenance and safe operation of any passenger tramway in his ski area and insure that such is in conformity with the rules and regulations prescribed and adopted by the North Carolina Department of Labor pursuant to G.S. 95-120(1) as such appear in the North Carolina Administrative Procedures Act. The North Carolina Department of Labor shall conduct certifications and inspections of passenger tramways.

A ski area operator's responsibility regarding passenger tramways shall include, but is not limited to, insuring operating personnel are adequately trained and are adequate in number; meeting all standards set forth for terminals, stations, line structures, and line equipment; meeting all rules and regulations regarding the safe operation and maintenance of all passenger lifts and tramways, including all necessary inspections and record keeping.

(b) A skier and/or a passenger shall have the following responsibilities:

(1) To know the range of his own abilities to negotiate any ski slope or trail and to ski within the limits of such ability;
(2) To maintain control of his speed and course at all times when skiing and to maintain a proper lookout so as to be able to avoid other skiers and visible objects;
(3) To stay clear of snow grooming equipment, all vehicles, lift towers, signs, and any other equipment on the ski slopes and trails;
(4) To heed all posted information and other warnings and to refrain from acting in a manner which may cause or contribute to the injury of the skier or others;
(5) To wear retention straps, ski brakes, or other devices to prevent runaway skis;
(6) Before beginning to ski from a stationary position or before entering a ski slope or trail from the side, to avoid moving skiers already on the ski slope or trail;
(7) To not move uphill on any passenger tramway or use any ski slope or trail while such person's ability to do so is impaired by the consumption of alcohol or by the use of any narcotic or other drug or while such person is under the influence of alcohol or any narcotic or any drug;
(8) If involved in a collision with another skier or person, to not leave the vicinity of the collision before giving his name and current address to an employee of the ski area operator, a member of the ski patrol, or the other skier or person with whom the skier collided, except in those cases when medical treatment is required; in which case, said information shall be provided as soon as practical after the medical treatment has been obtained. If the other person involved in the collision is unknown, the skier shall leave the personal identification required by this subsection with the ski area operator;
(9) Not to embark upon or disembark from a passenger tramway except at an area that is designated for such purpose;
(10) Not to throw or expel any object from a passenger tramway;
(11) Not to perform any action that interferes with the operation or running of a passenger tramway;
(12) Not to use such tramway unless he has the ability to use it with reasonable safety;
(13) Not to engage willfully or negligently in any type conduct that contributes to or causes injury to another person or his properties;
(14) Not to embark upon a passenger tramway without the authority of the ski area operator.

(c) A ski area operator shall have the following responsibilities:
(1) To mark all trails and maintenance vehicles and to furnish such vehicles with flashing or rotating lights that shall be in operation whenever the vehicles are working or moving in the ski area;
(2) To mark with a visible sign or other warning implement the location of any hydrant or similar equipment that is used in snowmaking operations and located anywhere in the ski area;
(3) To indicate the relative degree of difficulty of a slope or trail by appropriate signs. Such signs are to be prominently displayed at the base of a slope where skiers embark on a passenger tramway serving the slope or trail, or at the top of a slope or trail. The signs must be of the type that have been approved by the National Ski Areas Association and are in current use by the industry;
(4) To post at or near the top of or entrance to, any designated slope or trail, signs giving reasonable notice of unusual conditions on the slope or trail;
(5) To provide adequate ski patrols;

(6) To mark clearly any hidden rock, hidden stump, or any other hidden hazard known by the ski area operator to exist;
(7) Not to engage willfully or negligently in any type conduct that contributes to or causes injury to another person or his properties. (1981, c. 939, s. 1.)

§ 99C-3. Violation constitutes negligence.

A violation of any responsibility placed on the skier, passenger or ski area operator as set forth in G.S. 99C-2, to the extent such violation proximately causes injury to any person or damage to any property, shall constitute negligence on the part of the person violating the provisions of that section. (1981, c. 939, s. 1.)

§ 99C-4. Competition.

The ski area operator shall, prior to the beginning of a competition, allow each competitor a reasonable visual inspection of the course or area where the competition is to be held. The competitor shall be held to assume risk of all course conditions including, but not limited to, weather and snow conditions, course construction or layout, and obstacles which a visual inspection should have revealed. No liability shall attach to a ski area operator for injury or death of any competitor proximately caused by such assumed risk. (1981, c. 939, s. 1.)

§ 99C-5. Operation of passenger tramway.

The operation of a passenger tramway shall not constitute the operation of a common carrier. (1981, c. 939, s. 1.)

Chapter 99D.

Civil Rights.

Sec.
99D-1. Interference with Civil Rights.

§ 99D-1. Interference with Civil Rights.

(a) It is a violation of this Chapter if:

(1) Two or more persons, motivated by race, religion, ethnicity, or gender, but whether or not acting under color of law, conspire to interfere with the exercise or enjoyment by any other person or persons of a right secured by the Constitutions of the United States or North Carolina, or of a right secured by a law of the United States or North Carolina that enforces, interprets, or impacts on a constitutional right; and

(2) One or more persons engaged in such a conspiracy use force, repeated harassment, violence, physical harm to persons or property, or direct or indirect threats of physical harm to persons or property to commit an act in furtherance of the object of the conspiracy; and

(3) The commission of an act described in subdivision (2) interferes, or is an attempt to interfere, with the exercise or enjoyment of a right, described in subdivision (1), of another person.

(b) Any person whose exercise or enjoyment of a right described in subdivision (a)(1) has been interfered with, or against whom an attempt has been made to interfere with the exercise or enjoyment of such a right, by a violation of this Chapter may bring a civil action. The court may restrain and enjoin such future acts, and may award compensatory and punitive damages to the plaintiff. The court may award court costs and attorneys' fees to the prevailing party. However, a prevailing defendant may be awarded reasonable attorneys' fees only upon a showing that the case is frivolous, unreasonable, or without foundation.

(b1) The North Carolina Human Relations Commission may bring a civil action on behalf, and with the consent, of any person subjected to a violation of this Chapter. In any such action, the court may restrain and enjoin such future acts, and may award compensatory damages and punitive damages to the person on whose behalf the action was brought. Court costs may be awarded to the Commission or the defendant, whichever prevails. Notwithstanding the provisions of G.S. 114-2, the Commission shall be represented by the Commission's staff attorney.

(c) No civil action may be brought or maintained, and no liability may be imposed, under this Chapter against a governmental unit, a government official with respect to actions taken within the scope of his official governmental duties, or an employer or his agent with respect to actions taken concerning his employees within the scope of the employment relationship. (1987, c. 718, s. 1; 1991, c. 433, ss. 1, 2.)

CASE NOTES

Cause of Action Stated. — The plaintiff stated a cause of action for a violation of this chapter where she alleged (1) that the defendant was reponsible for mixing drinks which rendered the plaintiff physically helpless and otherwise participated in an incident in which the plaintiff was stripped naked and videotaped, and (2) that the defendant later sought to conceal her involvement in the incident and acted on a scheme with other defendants to harass and discredit the plaintiff and to destroy evidence and obstruct justice. Zenobile v. McKecuen, 144 N.C. App. 104, 548 S.E.2d 756, 2001 N.C. App. LEXIS 328 (2001), cert. denied, 354 N.C. 75, 553 S.E.2d 214 (2001).

Suits Barred Against Governmental

Units or Officials. — Discrimination action was dismissed against the U.S. Equal Employment Opportunity Commission since the plain language of the statute barred suits against a governmental unit or officials. Jaffer v. Nat'l Caucus & Ctr. on Black Aged, Inc., 296 F. Supp. 2d 639, 2003 U.S. Dist. LEXIS 23243 (M.D.N.C. 2003).

Conspiracy Must Be Averred. — Claim brought by a Senior Environmental Employment program participant was dismissed because she had not averred the existence of a conspiracy designed to interfere with her constitutional rights. Jaffer v. Nat'l Caucus & Ctr. on Black Aged, Inc., 296 F. Supp. 2d 639, 2003 U.S. Dist. LEXIS 23243 (M.D.N.C. 2003).

Public Duty Doctrine Not Applicable. — Because the mother's claims on behalf of her daughter were not based on negligence, but rather were based on the assertion that a school resource officer was aware that a teacher was facilitating sexual liaisons between a 14-year-old girl and an 18-year-old boy, but did nothing (in violation of G.S. 99D-1), the public duty doctrine did not apply. Smith v. Jackson County Bd. of Educ., 168 N.C. App. 452, 608 S.E.2d 399, 2005 N.C. App. LEXIS 347 (2005).

Applied in Bynum v. Hobbs Realty, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 19499 (M.D.N.C. Apr. 4, 2002).

Cited in Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993); Hobbs Realty & Constr. Co. v. Scottsdale Ins. Co., 163 N.C. App. 285, 593 S.E.2d 103, 2004 N.C. App. LEXIS 373 (2004), cert. dismissed, 358 N.C. 543, 599 S.E.2d 47 (2004), cert. denied, — N.C. —, 599 S.E.2d 907 (2004).

Chapter 99E.

Special Liability Provisions.

Article 1.

Equine Activity Liability.

Sec.
99E-1. Definitions.
99E-2. Liability.
99E-3. Warning required.
99E-4 through 99E-9. [Reserved.]

Article 2.

Roller Skating Rink Safety and Liability.

99E-10. Definitions.
99E-11. Duties of an operator.
99E-12. Duties of a roller skater.
99E-13. Assumption of risk.
99E-14. Defense to suit.
99E-15 through 99E-20. [Reserved.]

Article 3.

Hazardous Recreation Parks Safety and Liability.

Sec.
99E-21. Purpose.
99E-22. Definitions.
99E-23. Duties of operators of skateboard parks.
99E-24. Duties of persons engaged in hazardous recreational activities.
99E-25. Liability of governmental entities.
99E-26 through 99E-29 [Reserved.]

Article 4.

Agritourism Activity Liability.

99E-30. Definitions.
99E-31. Liability.
99E-32. Warning required.

ARTICLE 1.

Equine Activity Liability.

§ 99E-1. Definitions.

As used in this Article, the term:

(1) "Engage in an equine activity" means participate in an equine activity, assist a participant in an equine activity, or assist an equine activity sponsor or equine professional. The term "engage in an equine activity" does not include being a spectator at an equine activity, except in cases in which the spectator places himself in an unauthorized area and in immediate proximity to the equine activity.

(2) "Equine" means a horse, pony, mule, donkey, or hinny.

(3) "Equine activity" means any activity involving an equine.

(4) "Equine activity sponsor" means an individual, group, club, partnership, or corporation, whether the sponsor is operating for profit or nonprofit, which sponsors, organizes, or provides the facilities for an equine activity. The term includes operators and promoters of equine facilities.

(5) "Equine professional" means a person engaged for compensation in any one or more of the following:
  a. Instructing a participant.
  b. Renting an equine to a participant for the purpose of riding, driving, or being a passenger upon the equine.
  c. Renting equipment or tack to a participant.
  d. Examining or administering medical treatment to an equine.
  e. Hooftrimming or placing or replacing horseshoes on an equine.

(6) "Inherent risks of equine activities" means those dangers or conditions that are an integral part of engaging in an equine activity, including any of the following:
  a. The possibility of an equine behaving in ways that may result in injury, harm, or death to persons on or around them.

b. The unpredictability of an equine's reaction to such things as sounds, sudden movement, unfamiliar objects, persons, or other animals.

Inherent risks of equine activities does not include a collision or accident involving a motor vehicle.

(7) "Participant" means any person, whether amateur or professional, who engages in an equine activity, whether or not a fee is paid to participate in the equine activity. (1997-376, s. 1.)

Editor's Note. — This Article was enacted as Chapter 99E of the General Statutes by Session Laws 1997-376, s. 1. It has been set out as Article 1 of Chapter 99E at the direction of the Revisor of Statutes.

Legal Periodicals. — For comment, "Saying 'Neigh' to North Carolina's Equine Activity Liability Act," see 24 N.C. Cent. L.J. 156 (2001).

§ 99E-2. Liability.

(a) Except as provided in subsection (b) of this section, an equine activity sponsor, an equine professional, or any other person engaged in an equine activity, including a corporation or partnership, shall not be liable for an injury to or the death of a participant resulting from the inherent risks of equine activities and, except as provided in subsection (b) of this section, no participant or participant's representative shall maintain an action against or recover from an equine activity sponsor, an equine professional, or any other person engaged in an equine activity for injury, loss, damage, or death of the participant resulting exclusively from any of the inherent risks of equine activities.

(b) Nothing in subsection (a) of this section shall prevent or limit the liability of an equine activity sponsor, an equine professional, or any other person engaged in an equine activity if the equine activity sponsor, equine professional, or person engaged in an equine activity does any one or more of the following:

(1) Provides the equipment or tack, and knew or should have known that the equipment or tack was faulty, and such faulty equipment or tack proximately caused the injury, damage, or death.

(2) Provides the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity or to safely manage the particular equine.

(3) Commits an act or omission that constitutes willful or wanton disregard for the safety of the participant, and that act or omission proximately caused the injury, damage, or death.

(4) Commits any other act of negligence or omission that proximately caused the injury, damage, or death.

(c) Nothing in subsection (a) of this section shall prevent or limit the liability of an equine activity sponsor, an equine professional, or any other person engaged in an equine activity under liability provisions as set forth in the products liability laws. (1997-376, s. 1.)

Legal Periodicals. — For comment, "Saying 'Neigh' to North Carolina's Equine Activity Liability Act," see 24 N.C. Cent. L.J. 156 (2001).

§ 99E-3. Warning required.

(a) Every equine professional and every equine activity sponsor shall post and maintain signs which contain the warning notice specified in subsection (b) of this section. The signs required by this section shall be placed in a clearly visible location on or near stables, corrals, or arenas where the equine professional or the equine activity sponsor conducts equine activities. The warning notice specified in subsection (b) of this section shall be designed by the Department of Agriculture and Consumer Services and shall consist of a sign in black letters, with each letter to be a minimum of one inch in height. Every written contract entered into by an equine professional or by an equine activity sponsor for the providing of professional services, instruction, or the rental of equipment or tack or an equine to a participant, whether or not the contract involves equine activities on or off the location or site of the equine professional's or the equine activity sponsor's business, shall contain in clearly readable print the warning notice specified in subsection (b) of this section.

(b) The signs and contracts described in subsection (a) of this section shall contain the following warning notice:

“WARNING

Under North Carolina law, an equine activity sponsor or equine professional is not liable for an injury to or the death of a participant in equine activities resulting exclusively from the inherent risks of equine activities. Chapter 99E of the North Carolina General Statutes.”

(c) Failure to comply with the requirements concerning warning signs and notices provided in this Article shall prevent an equine activity sponsor or equine professional from invoking the privileges of immunity provided by this Article. (1997-376, s. 1.)

Legal Periodicals. — For comment, “Saying ‘Neigh’ to North Carolina's Equine Activity Liability Act,” see 24 N.C. Cent. L.J. 156 (2001).

§§ 99E-4 through 99E-9: Reserved for future codification purposes.

ARTICLE 2.

Roller Skating Rink Safety and Liability.

§ 99E-10. Definitions.

As used in this Article:

(1) “Operator” means a person or entity who owns, manages, controls, or directs, or who has operational responsibility for a roller skating rink.

(2) “Roller skater” means an individual wearing roller skates while in a roller skating rink for the purpose of recreational or competitive roller skating. “Roller skater” includes any individual in the roller skating rink who is an invitee, whether or not this individual pays consideration.

(3) “Roller skating rink” means a building, facility, or premises that provide an area specifically designed to be used by the public for recreational or competitive roller skating.

(4) “Spectator” means an individual who is present in a roller skating rink only for the purpose of observing recreational or competitive roller skating. (1997-376, s. 2.)

Editor's Note. — This Article was enacted as Chapter 99F of the General Statutes by Session Laws 1997-376, s. 2. It has been set out as Article 2 of Chapter 99E at the direction of the Revisor of Statutes.

The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1997-376, s. 2, having been 99F-1.

§ 99E-11. Duties of an operator.

The operator, to the extent practicable, shall:

(1) Post the duties of roller skaters and spectators and the duties, obligations, and liabilities of the operator as prescribed in this Article in conspicuous places in at least three locations in the roller skating rink.
(2) Maintain the stability and legibility of all signs, symbols, and posted notices required under subdivision (1) of this section.
(3) Comply with all roller skating rink safety standards published by the Roller Skating Rink Operators Association, including, but not limited to, the proper maintenance of roller skating equipment and roller skating surfaces.
(4) When the rink is open for sessions, have at least one floor guard on duty for approximately every 200 skaters.
(5) Maintain the skating surface in reasonably safe condition and clean and inspect the skating surface before each session.
(6) Maintain in good condition the railings, kickboards, and walls surrounding the skating surface.
(7) In rinks with step-up or step-down skating surfaces, ensure that the covering on the riser is securely fastened.
(8) Install fire extinguishers and inspect fire extinguishers at recommended intervals.
(9) Provide reasonable security in parking areas during operational hours.
(10) Inspect emergency lighting units periodically to ensure the lights are in proper order.
(11) Keep exit lights and lights in service areas on when skating surface lights are turned off during special numbers.
(12) Check rental skates on a regular basis to ensure the skates are in good mechanical condition.
(13) Prohibit the sale or use of alcoholic beverages on the premises.
(14) Comply with all applicable State and local safety codes.
(15) Not engage willfully or negligently in any conduct that may proximately cause injury, damage, or death to a roller skater or spectator. (1997-376, s. 2.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1997-376, s. 2, having been 99F-2.

§ 99E-12. Duties of a roller skater.

Each roller skater shall, to the extent commensurate with the person's age:

(1) Maintain reasonable control of his or her speed and course at all times.
(2) Heed all posted signs and warnings.
(3) Maintain a proper lookout to avoid other roller skaters and objects.
(4) Accept the responsibility for knowing the range of his or her ability to negotiate the intended direction of travel while on roller skates and to skate within the limits of that ability.
(5) Refrain from acting in a manner that may cause or contribute to the injury of himself, herself, or any other person. (1997-376, s. 2.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1997-376, s. 2, having been 99F-3.

§ 99E-13. Assumption of risk.

Roller skaters and spectators are deemed to have knowledge of and to assume the inherent risks of roller skating, insofar as those risks are obvious and necessary. The obvious and necessary inherent risks include, but are not limited to, injury, damage, or death that:

(1) Results from incidental contact with other roller skaters or spectators,
(2) Results from falls caused by loss of balance, or
(3) Involves objects or artificial structures properly within the intended path of travel of the roller skater,

and that is not otherwise attributable to a rink operator's breach of the operator's duties as set forth in G.S. 99E-11. (1997-376, s. 2.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1997-376, s. 2, having been 99F-4.

§ 99E-14. Defense to suit.

Assumption of risk pursuant to G.S. 99E-13 is a complete defense to a suit against an operator by a roller skater or a spectator for injuries resulting from any obvious and necessary inherent risks, unless the operator has violated the operator's duties under G.S. 99E-11. (1997-376, s. 2.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1997-376, s. 2, having been 99F-5.

§§ 99E-15 through 99E-20: Reserved for future codification purposes.

ARTICLE 3.

Hazardous Recreation Parks Safety and Liability.

§ 99E-21. Purpose.

The purpose of this Article is to encourage governmental owners or lessees of property to make land available to a governmental entity for skateboarding, inline skating, or freestyle bicycling. It is recognized that governmental owners or lessees of property have failed to make property available for such activities because of the exposure to liability from lawsuits and the prohibitive cost of insurance, if insurance can be obtained for such activities. It is also recognized that risks and dangers are inherent in these activities, which risks and dangers should be assumed by those participating in the activities. (2003-334, s. 1.)

Editor's Note. — Session Laws 2003-334, s. 2, made this Article effective October 1, 2003, and applicable to activities engaged in on or after that date and to actions that arise on or after that date.

§ 99E-22. Definitions.

The following definitions apply in this Article:

(1) Governmental entity. -

a. The State, any county or municipality, or any department, agency, or other instrumentality thereof.
b. Any school board, special district, authority, or other entity exercising governmental authority.

(2) Hazardous recreational activity. — Skateboarding, inline skating, or freestyle bicycling.
(3) Inherent risk. — Those dangers or conditions that are characteristic of, intrinsic to, or an integral part of skateboarding, inline skating, and freestyle bicycling. (2003-334, s. 1.)

§ 99E-23. Duties of operators of skateboard parks.

(a) No operator of a skateboard park shall permit any person to ride a skateboard therein, unless that person is wearing a helmet, elbow pads, and kneepads.

(b) For any facility owned or operated by a governmental entity that is designed and maintained for the purpose of recreational skateboard use, and that is not supervised on a regular basis, the requirements under subsection (a) of this section are satisfied when all of the following occur:

(1) The governmental entity adopted an ordinance requiring any person riding a skateboard at the facility to wear a helmet, elbow pads, and kneepads.
(2) Signs are posted at the facility affording reasonable notice that any person riding a skateboard in the facility must wear a helmet, elbow pads, and kneepads and that any person failing to do so will be subject to citation under the ordinance under subdivision (1) of this subsection. (2003-334, s. 1.)

§ 99E-24. Duties of persons engaged in hazardous recreational activities.

(a) Any person who participates in or assists in hazardous recreational activities assumes the known and unknown inherent risks in these activities, irrespective of age, and is legally responsible for all damages, injury, or death to himself or herself or other persons or property that result from these activities. Any person who observes hazardous recreational activities assumes the known and unknown inherent risks in these activities, irrespective of age, and is legally responsible for all damages, injury, or death to himself or herself that result from these activities. No public entity that sponsors, allows, or permits skateboarding, inline skating, or freestyle bicycling on its property is required to eliminate, alter, or control the inherent risks in these activities.

(b) While engaged in hazardous recreational activities, irrespective of where such activities occur, a participant is responsible for doing all of the following:

(1) Acting within the limits of his or her ability and the purpose and design of the equipment used.
(2) Maintaining control of his or her person and the equipment used.
(3) Refraining from acting in any manner that may cause or contribute to death or injury of himself or herself or other persons.

(c) Failure to comply with the requirement of subsection (b) of this section constitutes negligence. (2003-334, s. 1.)

§ 99E-25. Liability of governmental entities.

(a) This section does not grant authority or permission for a person to engage in hazardous recreational activities on property owned or controlled by a governmental entity unless such governmental entity has specifically designated such area for these activities.

(b) No governmental entity or public employee who has complied with G.S. 99E-23 shall be liable to any person who voluntarily participates in hazardous recreation activities for any damage or injury to property or persons that arises out of a person's participation in the activity and that takes place in an area designated for the activity.

(c) This section does not limit liability that would otherwise exist for any of the following:

(1) The failure of the governmental entity or public employee to guard against or warn of a dangerous condition of which a participant does not have and cannot reasonably be expected to have had notice.

(2) An act of gross negligence by the governmental entity or public employee that is the proximate cause of the injury.

(d) Nothing in this section creates a duty of care or basis of liability for death, personal injury, or damage to personal property. Nothing in this section shall be deemed to be a waiver of sovereign immunity under any circumstances.

(e) Nothing in this section limits the liability of an independent concessionaire or any person or organization other than a governmental entity or public employee, whether or not the person or organization has a contractual relationship with a governmental entity to use the public property, for injuries or damages suffered in any case as a result of the operation of equipment for hazardous recreational activities on public property by the concessionaire, person, or organization.

(f) The fact that a governmental entity carries insurance that covers any activity subject to this Article does not constitute a waiver of the liability limits under this section, regardless of the existence or limits of the coverage. (2003-334, s. 1.)

§§ 99E-26 through 99E-29: Reserved for future codification purposes.

ARTICLE 4.

Agritourism Activity Liability.

§ 99E-30. Definitions.

As used in this Article, the following terms mean:

(1) Agritourism activity. — Any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions. An activity is an agritourism activity whether or not the participant paid to participate in the activity. "Agritourism activity" includes an activity involving any animal exhibition at an agricultural fair licensed by the Commissioner of Agriculture pursuant to G.S. 106-520.3.

(2) Agritourism professional. — Any person who is engaged in the business of providing one or more agritourism activities, whether or not for compensation.

(3) Inherent risks of agritourism activity. — Those dangers or conditions that are an integral part of an agritourism activity including certain hazards, including surface and subsurface conditions, natural conditions of land, vegetation, and waters, the behavior of wild or domestic animals, and ordinary dangers of structures or equipment ordinarily used in farming and ranching operations. Inherent risks of

agritourism activity also include the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, including failing to follow instructions given by the agritourism professional or failing to exercise reasonable caution while engaging in the agritourism activity.

(4) Participant. — Any person, other than the agritourism professional, who engages in an agritourism activity.

(5) Person. — An individual, fiduciary, firm, association, partnership, limited liability company, corporation, unit of government, or any other group acting as a unit. (2005-236, s. 1; 2007-171, s. 1.)

Editor's Note. — Session Laws 2005-236, s. 2, made this article effective January 1, 2006, and applicable to agritourism activities, as defined in G.S. 99E-30, that occur on or after that date.

Effect of Amendments. — Session Laws 2007-171, s. 1, effective July 4, 2007, and applicable to causes of action arising on or after that date, added the last sentence in subdivision (1).

§ 99E-31. Liability.

(a) Except as provided in subsection (b) of this section, an agritourism professional is not liable for injury to or death of a participant resulting from the inherent risks of agritourism activities, so long as the warning contained in G.S. 99E-32 is posted as required and, except as provided in subsection (b) of this section, no participant or participant's representative can maintain an action against or recover from an agritourism professional for injury, loss, damage, or death of the participant resulting exclusively from any of the inherent risks of agritourism activities. In any action for damages against an agritourism professional for agritourism activity, the agritourism professional must plead the affirmative defense of assumption of the risk of agritourism activity by the participant.

(b) Nothing in subsection (a) of this section prevents or limits the liability of an agritourism professional if the agritourism professional does any one or more of the following:

(1) Commits an act or omission that constitutes negligence or willful or wanton disregard for the safety of the participant, and that act or omission proximately causes injury, damage, or death to the participant.

(2) Has actual knowledge or reasonably should have known of a dangerous condition on the land, facilities, or equipment used in the activity or the dangerous propensity of a particular animal used in such activity and does not make the danger known to the participant, and the danger proximately causes injury, damage, or death to the participant.

(c) Nothing in subsection (a) of this section prevents or limits the liability of an agritourism professional under liability provisions as set forth in Chapter 99B of the General Statutes.

(d) Any limitation on legal liability afforded by this section to an agritourism professional is in addition to any other limitations of legal liability otherwise provided by law. (2005-236, s. 1.)

§ 99E-32. Warning required.

(a) Every agritourism professional must post and maintain signs that contain the warning notice specified in subsection (b) of this section. The sign must be placed in a clearly visible location at the entrance to the agritourism location and at the site of the agritourism activity. The warning notice must consist of a sign in black letters, with each letter to be a minimum of one inch in height. Every written contract entered into by an agritourism professional for the providing of professional services, instruction, or the rental of equipment to a participant, whether or not the contract involves agritourism activities on or off the location or at the site of the agritourism activity, must contain in clearly readable print the warning notice specified in subsection (b) of this section.

(b) The signs and contracts described in subsection (a) of this section must contain the following notice of warning:

"WARNING

Under North Carolina law, there is no liability for an injury to or death of a participant in an agritourism activity conducted at this agritourism location if such injury or death results from the inherent risks of the agritourism activity. Inherent risks of agritourism activities include, among others, risks of injury inherent to land, equipment, and animals, as well as the potential for you to act in a negligent manner that may contribute to your injury or death. You are assuming the risk of participating in this agritourism activity."

(c) Failure to comply with the requirements concerning warning signs and notices provided in this subsection will prevent an agritourism professional from invoking the privileges of immunity provided by this Article. (2005-236, s. 1.)

Chapter 100.

Monuments, Memorials and Parks.

Article 1.

Approval of Memorials, Works of Art, etc.

Sec.
100-1. [Repealed.]
100-2. Approval of memorials before acceptance by State; regulation of existing memorials, etc.; "work of art" defined; highway markers.
100-3. Approval of design, etc., of certain bridges and other structures.
100-4. Governor to accept works of art approved by North Carolina Historical Commission.
100-5. Duties as to buildings erected or remodeled by State.
100-6. Disqualification to vote on work of art, etc.; vacancy.
100-7. Construction.
100-8. Memorials to persons within 25 years of death; acceptance of commemorative funds for useful work.

Article 2.

Memorials Financed by Counties and Cities.

100-9. County commissioners may protect monuments.
Sec.
100-10. Counties, cities, and towns may contribute toward erection of memorials.

Article 3.

Mount Mitchell Park.

100-11. Duties.
100-12. Roads, trails, and fences authorized; protection of property.
100-13. Fees for use of improvements; fees for other privileges; leases; rules.
100-14. Use of fees and other collections.
100-15. Annual reports.

Article 4.

Toll Roads or Bridges in Public Parks.

100-16. Private operation of toll roads or bridges in public parks prohibited.

Article 5.

Flagpoles and Display of Flags in State Parks.

100-17. Flagpole to be erected in each State park.
100-18. Display of flags.
100-19. Donation of flagpoles.

ARTICLE 1.

Approval of Memorials, Works of Art, etc.

§ **100-1:** Repealed by Session Laws 1973, c. 476, s. 48.

Cross References. — As to the North Carolina Historical Commission, see G.S. 143B-62 through 143B-65.

§ 100-2. Approval of memorials before acceptance by State; regulation of existing memorials, etc.; "work of art" defined; highway markers.

No memorial or work of art shall hereafter become the property of the State by purchase, gift or otherwise, unless such memorial or work of art or a design of the same, together with the proposed location of the same, shall first have been submitted to and approved by the North Carolina Historical Commission; nor shall any memorial or work of art, until so submitted and approved, be contracted for, placed in or upon or allowed to extend over any property belonging to the State. No existing memorial or work of art owned by the State shall be removed, relocated, or altered in any way without approval of the North Carolina Historical Commission. The term "work of art" as used in this section shall include any painting, portrait, mural decoration, stained glass, statue, bas-relief, sculpture, monument, tablet, fountain, or other article or structure of a permanent character intended for decoration or commemoration. This section, however, shall not apply to markers set up by the Board of Transportation in cooperation with the Department of Environment and Natural Resources and the Department of Cultural Resources as provided by Chapter 197 of the Public Laws of 1935. (1941, c. 341, s. 2; 1957, c. 65, s. 11; 1973, c. 476, s. 48; c. 507, s. 5; c. 1262, s. 86; 1977, c. 771, s. 4; 1979, 2nd Sess., c. 1306, ss. 3, 4; 1989, c. 727, s. 218(27); 1997-443, s. 11A.119(a).)

§ 100-3. Approval of design, etc., of certain bridges and other structures.

No bridge, arch, gate, fence or other structure intended primarily for ornamental or memorial purposes and which is paid for either wholly or in part by appropriation from the State treasury, or which is to be placed on or allowed to extend over any property belonging to the State, shall be begun unless the design and proposed location thereof shall have been submitted to the North Carolina Historical Commission and approved by it. Furthermore, no existing structures of the kind named and described in the preceding part of this section owned by the State, shall be removed or remodeled without submission of the plans therefor to the North Carolina Historical Commission and approval of said plans by the North Carolina Historical Commission. This section shall not be construed as amending or repealing Chapter 197 of the Public Laws of 1935. (1941, c. 341, s. 3; 1973, c. 476, s. 48; 1979, 2nd Sess., c. 1306, s. 3.)

§ 100-4. Governor to accept works of art approved by North Carolina Historical Commission.

The Governor of North Carolina is hereby authorized to accept, in the name of the State of North Carolina, gifts to the State of works of art as defined in G.S. 100-2. But no work of art shall be so accepted unless and until the same shall have been first submitted to the North Carolina Historical Commission and by it judged worthy of acceptance. (1941, c. 341, s. 4; 1973, c. 476, s. 48; 1979, 2nd Sess., c. 1306, s. 3.)

§ 100-5. Duties as to buildings erected or remodeled by State.

Upon request of the Governor and the Board of Public Buildings and Grounds, the North Carolina Historical Commission shall act in an advisory capacity relative to the artistic character of any building constructed, erected, or remodeled by the State. The term “building” as used in this section shall include structures intended for human occupation, and also bridges, arches, gates, walls, or other permanent structures of any character not intended primarily for purposes of decoration or commemoration. (1941, c. 341, s. 5; 1973, c. 476, s. 48; 1979, 2nd Sess., c. 1306, s. 3.)

§ 100-6. Disqualification to vote on work of art, etc.; vacancy.

Any member of the North Carolina Historical Commission who shall be employed by the State to execute a work of art or structure of any kind requiring submission to the North Carolina Historical Commission, or who shall take part in a competition for such work of art or structure, shall be disqualified from voting thereon, and the temporary vacancy thereby created may be filled by appointment by the Governor. (1941, c. 341, s. 6; 1973, c. 476, s. 48; 1979, 2nd Sess., c. 1306, s. 3.)

§ 100-7. Construction.

The provisions of this Article shall not be construed to include exhibits of an educational nature arranged by museums or art galleries administered by the State or any of its agencies or institutions, or to prevent the placing of portraits of officials, officers, or employees of the State in the offices or buildings of the departments, agencies, or institutions with which such officials, officers, or employees are or have been connected. But upon request of such museums or agencies, the North Carolina Historical Commission shall act in an advisory capacity as to the artistic qualities and appropriations of memorial exhibits or works of art submitted to it. (1941, c. 341, s. 7; 1973, c. 476, s. 48; 1979, 2nd Sess., c. 1306, s. 3.)

§ 100-8. Memorials to persons within 25 years of death; acceptance of commemorative funds for useful work.

No monument, statue, tablet, painting, or other article or structure of a permanent nature intended primarily to commemorate any person or persons shall be purchased from State funds or shall be placed in or upon or allowed to extend over State property within 25 years after the death of the person or persons so commemorated: Provided, nevertheless, that nothing in this Article shall be interpreted as prohibiting the acceptance of funds by State agencies or institutions from individuals or societies who wish to commemorate some person or persons by providing funds for educational, health, charitable, or other useful work. The agency or institution to which such funds are offered for memorial enterprises shall exercise its discretion as to the acceptance and expenditure of such funds. Nothing in this Article shall be interpreted as prohibiting the erection on the lands of the Cliffs of the Neuse State Park an appropriate tablet or plaque honoring the life and memory of the late Lionel Weil of Wayne County. Nothing in this Article shall be interpreted as prohibiting the erection on the lands of the Morrow Mountain State Park an appropriate tablet or plaque honoring the life and memory of the late James McKnight Morrow of Stanly County. Nothing in this Article shall be interpreted as prohibiting the erection on the lands of the Cliffs of the Neuse State Park an appropriate tablet or plaque, of such size and containing such language, as may be agreed upon by the donors and Director of State Parks, honoring the Whitfield heirs for their contributions to the establishment of the said park. (1941, c. 341, s. 8; 1957, c. 181; 1961, c. 976; 1963, c. 1128; 1979, 2nd Sess., c. 1306, s. 4.)

Article 2.

Memorials Financed by Counties and Cities.

§ 100-9. County commissioners may protect monuments.

When any monument has been or shall hereafter be erected to the memory of our Confederate dead or to perpetuate the memory and virtues of our distinguished dead, if such monument is erected by the voluntary subscription of the people and is placed on the courthouse square, the board of county commissioners of such county are permitted to expend from the public funds of the county an amount sufficient to erect a substantial iron fence around such monument in order that the same may be protected. (1905, c. 457; Rev., s. 3928; C.S., s. 6934.)

Cross References. — As to criminal liability for defacing or removing monuments, see G.S. 14-148.

§ 100-10. Counties, cities, and towns may contribute toward erection of memorials.

Any county, city or town by resolution first adopted by its governing body may become a member of any memorial association or organization for perpetuating the memory of the soldiers and sailors of North Carolina who served the United States in the great World War, or in the global war known as World War II, or who fought in the War Between the States, and may subscribe and pay toward the cost of the erection of any memorial to the memory of such soldiers and sailors such sums of money as its governing body may determine, and may be represented in such association or organization by such persons as its governing body may select. Any contribution so made shall be paid out of the general fund of such county, city, or town making same, on such terms as may be agreed upon by its governing body, and the officers having the control and management of the association or organization to which subscription and contribution are made. (1919, c. 21, ss. 1, 2, 3; C.S., s. 6938; 1923, c. 200; 1945, c. 117.)

Article 3.

Mount Mitchell Park.

§ 100-11. Duties.

The Department of Environment and Natural Resources shall have complete control, care, protection and charge of that part of Mitchell's Park acquired by the State. (1915, c. 76; 1919, c. 316, s. 3; C.S., s. 6940; 1921, c. 222, s. 1; 1925, c. 122, s. 23; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1989, c. 727, s. 218(28); 1997-443, s. 11A.119(a).)

§ 100-12. Roads, trails, and fences authorized; protection of property.

The Department of Environment and Natural Resources is authorized and empowered to enter upon the land hereinbefore referred to, and to build a fence or fences around the same, also roads, paths, and trails and protect the property against trespass and fire and injury of any and all kinds whatsoever; cut wood and timber upon the same, but only for the purpose of protecting the other timber thereon and improving the property generally. (1919, c. 316, s. 5; C.S., s. 6942; 1921, c. 222, s. 1; 1925, c. 122, s. 23; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1989, c. 727, s. 218(29); 1997-443, s. 11A.119(a).)

§ 100-13. Fees for use of improvements; fees for other privileges; leases; rules.

The Department of Environment and Natural Resources is further authorized to charge and collect fees for the use of such improvements as have already been constructed, or may hereafter be constructed, on the park, and for other privileges connected with the full use of the park by the public; to lease sites for camps, houses, hotels, and places of amusement and business; and to make and enforce such necessary rules as may best tend to protect, preserve and increase the value and attractiveness of the park. (1921, c. 222, s. 2; C.S., s. 6942(a); 1925, c. 122, s. 23; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1989, c. 727, s. 25; 1997-443, s. 11A.119(a).)

§ 100-14. Use of fees and other collections.

All fees and other money collected and received by the Department of Environment and Natural Resources in connection with its proper administration of the North Carolina State Parks System shall be used by said Department for the administration, protection, improvement, and maintenance of the State Parks System. (1921, c. 22, s. 3; C.S., s. 6942(b); 1925, c. 122, s. 23; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1989, c. 727, s. 26; 1997-443, s. 11A.119(a).)

§ 100-15. Annual reports.

The Department shall make an annual report to the Governor of all money received and expended by it in the administration of the North Carolina State Parks System, and of such other items as may be called for by him or by the General Assembly. (1921, c. 222, s. 4; C.S., s. 6942(c); 1925, c. 122, s. 23; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1989, c. 727, s. 27.)

ARTICLE 4.

Toll Roads or Bridges in Public Parks.

§ 100-16. Private operation of toll roads or bridges in public parks prohibited.

No person, firm or corporation shall have the right or privilege to privately operate any toll road or toll bridge in this State upon lands belonging to the State, set apart or designated as a public park.

In the event any such toll road or bridge is on March 17, 1939 being privately operated under any real or assumed right, privilege, or lease, the State institution or department having such state-owned property in charge or under its supervision shall immediately give notice to such person, firm or corporation so operating such toll road or toll bridge to discontinue the operation of the same.

Any person, firm or corporation who sustains any legal damage by reason of the exercise of the authority hereinbefore granted shall be entitled to just compensation therefor, and, in the event satisfactory settlement cannot be made with the department or State agency exercising the authority herein contained, the amount of just compensation may be determined by a special proceeding instituted by the claimant against the department or agency having such property in custody under the provisions of the Chapter on Eminent Domain, insofar as the same may be applicable hereto: Provided, such proceedings shall be instituted within six months from the time such notice is given. Any compensation awarded shall be a valid claim against the

State of North Carolina, payable out of the funds of the department or State agency having such property in charge. (1939, c. 127.)

Article 5.

Flagpoles and Display of Flags in State Parks.

§ 100-17. Flagpole to be erected in each State park.

At each of the State parks of North Carolina an adequate flagpole shall be erected, in keeping with the construction of other structures thereupon, upon which flags of the United States of America and the State of North Carolina may be flown. (1963, c. 317, s. 1.)

Cross References. — As to state salute to the North Carolina flag, G.S. 144-8.

§ 100-18. Display of flags.

Where personnel are available upon the State parks, the flags of the United States and of the State of North Carolina shall be flown on every Saturday and Sunday and on every State holiday from May 1 to October 1 of each year, in conformity with appropriate national and State policy and procedures concerning the display of the State and federal flag. (1963, c. 317, s. 2.)

§ 100-19. Donation of flagpoles.

Flagpoles at State parks may be donated by donors of the lands upon which State parks are situated, and if such donors express a desire to donate flagpoles, such donations shall be accepted in preference to that of any other individual or group. In the event that the donors of the lands upon which the State parks are situated shall not indicate a desire to donate flagpoles therefor within six months of the date of the passage of this Article, donations for flagpoles shall be accepted from individuals or groups who may desire to make such donations and erect the said flagpoles in keeping with the State park regulations. (1963, c. 317, s. 3.)

Chapter 101.

Names of Persons.

Sec.
101-1. Legislature may regulate change by general but not private law.
101-2. Procedure for changing name; petition; notice.
101-3. Contents of petition.
101-4. Proof of good character to accompany petition.
101-5. Clerk to order change; certificate and record.
101-6. Effect of change; only one change, except as provided.
101-7. Recording name change.
101-8. Resumption of name by widow or widower.

§ 101-1. Legislature may regulate change by general but not private law.

The General Assembly shall not have power to pass any private law to alter the name of any person, but shall have power to pass general laws regulating the same. (Const., Art. II, s. 11; Rev., s. 2146; C.S., s. 2970.)

Cross References. — As to changing name of minor child upon adoption, see G.S. 48-14. As to resumption of maiden name, etc., by a woman after divorce, see G.S. 50-12. As to duty to disclose real name when trading as "company" or "agent," see G.S. 66-72. As to trademarks, etc., see Chapter 80, G.S. 80-1 et seq.

CASE NOTES

Common Law. — General laws regulating the change of a person's name, and prescribing a procedure therefor, do not abrogate the common-law rule which allows a person to change his name without resort to legal procedure or repeal it by implication or otherwise. They merely affirm and are in aid of the common-law rule and provide an additional method of effecting a change of name and, more importantly, provide a method for recording the change. In re Mohlman, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

Under the common-law standard, a showing of fraud or misrepresentation akin to fraud is necessary to deny a change of name. In re Mohlman, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

To provide a procedure whereby one can secure a change of name through legal procedure with a provision for proper recordation thereof among the public records is desirable and far less objectionable than the common-law provision. In re Mohlman, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

Married Women. — Nothing in the law states that by marriage a woman gives up her right as a person to change her name as anyone else might change his or hers. In re Mohlman, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

OPINIONS OF ATTORNEY GENERAL

The Division of Motor Vehicles does not have the authority to establish a policy to require documented proof from the Register of Deeds or official court documents for a name change on driver licenses and identification cards as the only method of establishing a name change. See opinion of Attorney General to Mr. William S. Hiatt, Commissioner of Motor Vehicles, 58 N.C.A.G. 4 (1988).

§ 101-2. Procedure for changing name; petition; notice.

(a) A person who wishes, for good cause shown, to change his or her name must file an application before the clerk of the superior court of the county in which the person lives, after giving 10 days' notice of the application by publication at the courthouse door.

(b) The publication in subsection (a) of this section is not required if the applicant:

- (1) Is a participant in the address confidentiality program under Chapter 15C of the General Statutes; or
- (2) Provides evidence that the applicant is a victim of domestic violence, sexual offense, or stalking. This evidence may include any of the following:
  - a. Law enforcement, court, or other federal or state agency records or files.
  - b. Documentation from a program receiving funds from the Domestic Violence Center Fund, if the applicant is alleged to be a victim of domestic violence.

(c) The application and the court's entire record of the proceedings relating to the applicant's name change is not a matter of public record where the applicant has complied with subsection (b)(1) or (b)(2) of this section. Records qualifying under this subsection shall be maintained separately from other records, shall be withheld from public inspection, and may be examined only by order of the court or with the written consent of the applicant.

(d) An application to change the name of a minor child may be filed by the child's parent or parents, guardian, or guardian ad litem, and this application may be joined in the application for a change of name filed by the parent or parents. Nothing in this section shall be construed to permit one parent to make an application on behalf of a minor child without the consent of the other parent if both parents are living; except that a minor who has reached the age of 16 years, upon proper application to the clerk, may change his or her name with the consent of the parent who has custody of the minor and has supported the minor, without the necessity of obtaining the consent of the other parent, when the clerk of court is satisfied that the other parent has abandoned the minor. A change of parentage or the addition of information relating to parentage on the birth certificate of any person is governed by G.S. 130A-118.

The consent of a parent who has abandoned a minor child is not required if a copy of an order of a court of competent jurisdiction adjudicating that parent's abandonment of the minor if filed with the clerk. If a court of competent jurisdiction has not declared the minor to be an abandoned child, the clerk, on 10 days' written notice by registered or certified mail, directed to the last known address of the parent alleged to have abandoned the child, may determine whether the parent has abandoned the child. If the parent denies that the parent abandoned the child, this issue of fact shall be transferred and determined as provided in G.S. 1-301.2. If abandonment is determined, the consent of the parent is not required. Upon final determination of this issue of fact the proceeding shall be transferred back to the special proceedings docket for further action by the clerk. (1891, c. 145; Rev., s. 2147; C.S., s. 2971; 1947, c. 115; 1953, c. 678; 1955, c. 951, s. 3; 1957, c. 1442; 1959, c. 1161, s. 7; 1971, c. 444, s. 1; 1995, c. 509, s. 135.2(f); 1999-216, s. 13; 2007-116, s. 1.)

Local Modification. — Chowan: 1945, c. 455; Mitchell: 1945, c. 389.

Cross References. — As to amendment of birth and death certificates, see G.S. 130A-118.

Effect of Amendments. — Session Laws 2007-116, s. 1, effective October 1, 2007, designated the existing provisions as subsections (a) and (d), and added subsections (b) and (c).

Legal Periodicals. — For an article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

For article, "'We Are Family': Valuing Associationalism in Disputes Over Children's Surnames," see 75 N.C.L. Rev. 1625 (1997).

CASE NOTES

The words "for good cause shown" and "good and sufficient reason" mean more than merely the absence of fraud. In re Mohlman, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

Burden on Petitioner at Hearing. — This procedure contemplates a hearing, and petitioner has the burden of establishing that it is just and reasonable that the petition be granted, not merely that petitioner desires it and that the request is without fraud. In re Mohlman, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

Inquiry into Child's Best Interests Not Appropriate. — The fact that the General Assembly specifically required a "best interests of the child" inquiry in contexts such as termination of parental rights, child custody and placement, parental visitation rights, and even in the change in surname on a birth certificate following legitimization, yet failed to require such inquiry in connection with name changes under this section and G.S. 130A-101(f)(4), was taken as clear evidence of its intent that no such inquiry was required in these contexts. In re Crawford, 134 N.C. App. 137, 517 S.E.2d 161 (1999).

Consent Required for Change of Name of Minor Child. — The name of a minor child may not be changed without the consent of both parents, if both be living, unless one of the parents has abandoned the minor child. In re Dunston, 18 N.C. App. 647, 197 S.E.2d 560 (1973).

Determination of Abandonment by Clerk of Superior Court. — In the event that a court of competent jurisdiction has not previously declared child to be an abandoned child, the clerk of the superior court is authorized to determine whether an abandonment has taken place. In re Dunston, 18 N.C. App. 647, 197 S.E.2d 560 (1973).

This section contemplates only the situation where one natural or adoptive parent petitions for the change of name of a child, and the other parent stands to lose his name with respect to that child. In re Dunston, 18 N.C. App. 647, 197 S.E.2d 560 (1973).

It has no application to a stepfather. In re Dunston, 18 N.C. App. 647, 197 S.E.2d 560 (1973).

Neither the consent of a child's stepfather, nor a finding that the stepfather has abandoned the child is necessary in a petition by the natural mother of that child to have the child's name changed. In re Dunston, 18 N.C. App. 647, 197 S.E.2d 560 (1973).

Nor to Natural Father of Child Born Out of Wedlock. — This section was not designed to require the consent of the natural father to a name change where the child was born out of wedlock. In re Dunston, 18 N.C. App. 647, 197 S.E.2d 560 (1973).

Unless His Name Appears on Birth Certificate After Both Parents Execute Affidavit of Paternity. — Where unmarried parents executed an Affidavit of Paternity and entered respondent's name on the birth certificate as the father, court held that there was no authority, statutory or decisional, permitting petitioner to unilaterally change the name of her son, born out of wedlock and not yet legitimated, absent the father's consent. In re Crawford, 134 N.C. App. 137, 517 S.E.2d 161 (1999), distinguishing In re Dunston, 18 N.C. App. 647, 197 S.E.2d 560 (1973).

§ 101-3. Contents of petition.

The applicant shall state in the application his true name, county of birth, date of birth, the full name of parents as shown on birth certificate, the name he desires to adopt, his reasons for desiring such change, and whether his name has ever before been changed by law, and, if so, the facts with respect thereto. (1891, c. 145; Rev., s. 2147; C.S., s. 2972; 1945, c. 37, s. 1; 1957, c. 1233, s. 1.)

CASE NOTES

Cited in In re Mohlman, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

§ 101-4. Proof of good character to accompany petition.

The applicant shall also file with said petition proof of his good character, which proof must be made by at least two citizens of the county who know his standing: Provided, however, proof of good character shall not be required when the application is for the change of name of a child under 16 years of age. (1891, c. 145; Rev., s. 2148; C.S., s. 2973; 1963, c. 206.)

CASE NOTES

Cited in In re Mohlman, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

§ 101-5. Clerk to order change; certificate and record.

If the clerk thinks that good and sufficient reason exists for the change of name, it shall be his duty to issue an order changing the name of the applicant from his true name to the name sought to be adopted. Such order shall contain the true name, the county of birth, the date of birth, the full name of parents as shown on birth certificate, and the name sought to be adopted. He shall issue to the applicant a certificate under his hand and seal of office, stating the change made in the applicant's name, and shall also record said application and order on the docket of special proceedings in his court. He shall forward the order to the State Registrar of Vital Statistics on a form provided by him. If the applicant was born in North Carolina, the State Registrar shall note the change of name of the individual or individuals specified in the order on the birth certificate of that individual or those individuals and shall notify the register of deeds in the county of birth. If the applicant was born in another state of the United States, the State Registrar shall forward the notice of change of name to the registration office of the state of birth. (1891, c. 145; Rev., ss. 2149, 2150; C.S., s. 2974; 1955, c. 951, s. 4; 1957, c. 1233, s. 2; 1971, c. 444, s. 2.)

CASE NOTES

Discretion of Court. — The statutes providing a procedure for change of name are not absolute in granting privileges, but are usually so phrased as to leave it in the reasonable discretion of the court hearing the petition either to grant or deny it. In re Mohlman, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

The court is not subject to the whim or capricious desire of a petitioner to change his name. In re Mohlman, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

OPINIONS OF ATTORNEY GENERAL

The Division of Motor Vehicles does not have the authority to establish a policy to require documented proof from the Register of Deeds or official court documents for a name change on driver licenses and identification cards as the only method of establishing a name change. See opinion of Attorney General to Mr. William S. Hiatt, Commissioner of Motor Vehicles, 58 N.C.A.G. 4 (1988).

§ 101-6. Effect of change; only one change, except as provided.

(a) When the order is made and the applicant's name changed, he is entitled to all the privileges and protection under his new name as he would have been under the old name. No person shall be allowed to change his name under this Chapter but once, except that he shall be permitted to resume his former name upon compliance with the requirements and procedure set forth in this Chapter for change of name, and except as provided in subsection (b) of this section.

(b) For good cause shown, and upon compliance with the requirements and procedure set forth in this Chapter for change of name, the name of a minor child may be changed not more than two times under this Chapter. (1891, c. 145; Rev., ss. 2147, 2149; C.S., s. 2975; 1945, c. 37, s. 2; 1991, c. 333, s. 1.)

§ 101-7. Recording name change.

When the name of any individual, corporation, partnership, or association has been changed in a manner provided by law, any attorney licensed to practice law in this State may file an affidavit with the clerk of superior court stating facts concerning the change of name. The clerk shall cause the affidavit to be filed and indexed among the records of his office, pursuant to G.S. 7A-180(3) and G.S. 7A-343(3). The clerk shall also forward a copy of the affidavit under the seal of his office to the clerk of superior court of any other county named in the affidavit where it shall also be filed and indexed in accordance with this section. Affidavits filed and indexed under this section are for informational purposes only and neither the affidavit nor the manner of its filing and indexing shall in any manner affect the rights or liabilities of any person. (1971, c. 592, s. 1.)

Legal Periodicals. — For an article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

§ 101-8. Resumption of name by widow or widower.

A person at any time after the person is widowed may, upon application to the clerk of court of the county in which the person resides setting forth the person's intention to do so, resume the use of her maiden name or the name of a prior deceased husband or of a previously divorced husband in the case of a widow, or his premarriage surname in the case of a widower. The application shall set forth the full name of the last spouse of the applicant, shall include a copy of the spouse's death certificate, and shall be signed by the applicant in the applicant's full name. The clerks of court of the several counties of this State shall record and index such applications in the manner required by the Administrative Office of the Courts. (1979, c. 768; 1981, c. 564, s. 2; 1993 (Reg. Sess., 1994), c. 565, s. 2.)

Chapter 102.

Official Survey Base.

Sec.
102-1. Name and description.
102-1.1. Name and description in relation to 1983 North American Datum.
102-2. Physical control.
102-3. Use of name.
102-4. Damaging, defacing, or destroying monuments.
102-5. [Repealed.]
102-6. Legality of use in descriptions.
102-7. Use not compulsory.
Sec.
102-8. Administrative agency.
102-9. Duties and powers of the agency.
102-10. Prior work.
102-11. Vertical control.
102-12. Control system map.
102-13, 102-14. [Repealed.]
102-15. Improvement of land records.
102-16. Board of county commissioners to apply for assistance.
102-17. County projects eligible for assistance.

§ 102-1. Name and description.

The official survey base for the State of North Carolina shall be a system of plane coordinates to be known as the "North Carolina Coordinate System," said system being defined as a Lambert conformal projection of Clarke's spheroid of 1866, having a central meridian of 79° — 00′ west from Greenwich and standard parallels of latitude of 34° — 20′ and 36° — 10′ north of the equator, along which parallels the scale shall be exact. All coordinates of the system are expressed in feet, the x coordinate being measured easterly along the grid and the y coordinate being measured northerly along the grid. The origin of the coordinates is hereby established on the meridian 79° — 00′ west from Greenwich at the intersection of the parallels 33° — 45′ north latitude, such origin being given the coordinates x = 2,000,000 feet, y = 0 feet. The precise position of said system shall be as marked on the ground by triangulation or traverse stations or monuments established in conformity with the standards adopted by the United States Coast and Geodetic Survey for first- and second-order work, whose geodetic positions have been rigidly on the North American datum of 1927, and whose plane coordinates have been computed on the system defined. (1939, c. 163, s. 1.)

Legal Periodicals. — For article on rules, ethics and reform in connection with transferring North Carolina real estate, see 49 N.C.L. Rev. 593 (1971).

§ 102-1.1. Name and description in relation to 1983 North American Datum.

From and after the date and time the North Carolina Geodetic Survey Section in the Division of Land Resources of the Department of Environment and Natural Resources receives from the National Geodetic Survey, official notice of a complete, published definition of the North American Datum of 1983 including the State plane coordinate constants applicable to North Carolina, the official survey base for North Carolina shall be a system of plane coordinates to be known as the "North Carolina Coordinate System of 1983," said system being defined as a Lambert conformal projection of the "Geodetic Reference System (GRS 80 Ellipsoid)" having a central meridian of 79° — 00′ west from Greenwich and standard parallels of latitude of 34° — 20′ and 36° — 10′ north of the equator, along which parallels the scale shall be exact. All coordinates of the system are expressed in metres, the x coordinate being measured easterly along the grid and the y coordinate being measured northerly along the grid. The U.S. Survey Foot, 1 meter = 39.37 inches or 3.2808333333 feet, shall be used as a conversion factor. The origin of the coordinates is hereby established on the meridian 79° — 00′ west from Greenwich at the intersection of the parallels 33° — 45′ north latitude, such origin being given the coordinates x = 609,601.22 metres, y = 0 metres. The precise position of said system shall be as marked on the ground by triangulation or traverse stations or monuments established in conformity with the standards adopted by the National Geodetic Survey for first- and second-order work, whose geodetic positions have been rigidly adjusted on the North American Datum of 1983, and whose plane coordinates have been computed on the system defined. Whenever plane coordinates are used in the description or identification of surface area or location within this State, the coordinates shall be identified as "NAD 83", indicating North American Datum of 1983, or as "NAD 27", indicating North American Datum of 1927. (1979, c. 4; 1987, c. 148; 1989, c. 727, s. 218(33); 1997-443, s. 11A.119(a); 2005-386, s. 1.2.)

§ 102-2. Physical control.

Any triangulation or traverse station or monument established as described in G.S. 102-1 may be used in establishing a connection between any survey and the above-mentioned system of rectangular coordinates. (1939, c. 163, s. 2.)

§ 102-3. Use of name.

The use of the term "North Carolina Coordinate System" on any map, report, or survey, or other document, shall be limited to coordinates based on the North Carolina Coordinate System as defined in this Chapter. (1939, c. 163, s. 3.)

§ 102-4. Damaging, defacing, or destroying monuments.

If any person shall willfully damage, deface, destroy, or otherwise injure a station, monument or permanent mark of the North Carolina Coordinate System, or shall oppose any obstacles to the proper, reasonable, and legal use of any such station or monument, such person shall be guilty of a Class 1 misdemeanor. (1939, c. 163, s. 4; 1993, c. 539, s. 683; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 102-5: Repealed by Session Laws 1963, c. 783.

§ 102-6. Legality of use in descriptions.

For the purpose of describing the location of any survey station or land boundary corner in the State of North Carolina, it shall be considered a complete, legal, and satisfactory description to define the location of such point or points by means of coordinates of the North Carolina Coordinate System as described herein. (1963, c. 163, s. 6; c. 783.)

§ 102-7. Use not compulsory.

Nothing contained in this Chapter shall be interpreted as requiring any purchaser or mortgagee to rely wholly on a description based upon the North Carolina Coordinate System. (1939, c. 163, s. 7.)

§ 102-8. Administrative agency.

The administrative agency of the North Carolina Coordinate System shall be the Department of Environment and Natural Resources through its appropriate division hereinafter called the "agency." (1939, c. 163, s. 8; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218(34); 1997-443, s. 11A.119(a).)

§ 102-9. Duties and powers of the agency.

It shall be the duty of the agency to make or cause to be made from time to time such surveys and computations as are necessary to further or complete the North Carolina Coordinate System. The agency shall endeavor to carry to completion as soon as practicable the field monumentation and office computations of the coordinate system. For the purpose of this work the agency shall have the power to accept grants for the specific purpose of carrying on the work; to coordinate, organize, and direct any federal or other assistance which may be offered to further the work; to cooperate with any individual, firm, company, public or private agency, State or federal agencies, in the prosecution of the work; to enter into contracts or cooperative agreements with other state or federal agencies in promoting the work of the coordinating system. The agency shall further have the power to adopt necessary rules, regulations, and specifications relating to the establishment and use of the coordinate system as defined in this Chapter, consistent with the standards and practice of the United States Coast and Geodetic Survey. (1939, c. 163, s. 9; 1997-443, s. 11A.119(a).)

Editor's Note. — Session Laws 1997-443, s. 11A.119(a), provided that the phrase "Environment, Health, and Natural Resources" was to be deleted and replaced by the phrase "Environment and Natural Resources" in this section. However, this section does not contain that phrase.

§ 102-10. Prior work.

The system of stations, monuments, traverses, computations, and other work which has been done or is under way in North Carolina by the so-called North Carolina Geodetic Survey, under the supervision of the United States Coast and Geodetic Survey, is, where consistent with the provisions of this Chapter, hereby made a part of the North Carolina Coordinate System. The surveys, notes, computations, monuments, stations, and all other work relating to the coordinate system, which has been done by said North Carolina Geodetic Survey, under the supervision of and in cooperation with the United States Coast and Geodetic Survey and federal relief agencies, hereby are placed under the direction of, and shall become the property of, the administrative agency. All persons or agencies having in their possession any surveys, notes, computations, or other data pertaining to the aforementioned coordinate system, shall turn over to the Department of Environment and Natural Resources such data upon request. (1939, c. 163, s. 10; 1959, c. 1315, s. 1; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218(35); 1997-443, s. 11A.119(a).)

§ 102-11. Vertical control.

Whereas the foregoing provisions of this Chapter heretofore are related to horizontal control only, the administrative agency may adopt standards for vertical control or levying surveys consistent with those recommended by and used by the United States Coast and Geodetic Survey, and make or cause to be made such surveys as are necessary to complete the vertical control of North Carolina, in accordance with the provisions for horizontal control surveys as defined in this Chapter. (1939, c. 163, s. 11.)

§ 102-12. Control system map.

The agency shall prepare for publication and cause to be published before July 1, 1962, a map or maps setting forth the location of monuments for both horizontal and vertical control, together with such other pertinent data as the agency may direct for implementation of the North Carolina Coordinate System. The agency shall furnish such map or maps to any person or may make such charge as will defray the expense of printing and distribution. It shall be the responsibility of the agency to maintain this map, make revisions as often as necessary to provide up-to-date information and furnish up-to-date copies to the register of deeds of each county in the State. (1959, c. 1315, s. 2.)

§ 102-13: Repealed by Session Laws 1975, c. 183, s. 1.

§ 102-14: Repealed by Session Laws 1973, c. 1262, s. 86.

§ 102-15. Improvement of land records.

There is hereby established a statewide program for improvement of county land records to be administered by the Secretary of State (hereafter called the Secretary). First emphasis shall be given to the completion of countywide base maps. Counties with a base map system prepared to acceptable standards will be encouraged to undertake subsequent logical improvements in their respective land records systems. Work undertaken by any county under this program will be eligible for financial assistance out of funds appropriated for this purpose to the Department of the Secretary of State. The amount allotted to each project is to be determined by the Secretary, but in no case shall such allotments exceed one dollar for every dollar of local tax funds expended on the project by the county. Federal or other State funds available to the project will not be eligible as matching money under the State program. (1977, c. 1099, s. 1; 1985, c. 479, s. 165(b); 1989, c. 727, s. 218(36); 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1997-443, s. 11A.119(a); 1999-119, s. 1.)

§ 102-16. Board of county commissioners to apply for assistance.

The board of county commissioners of each county may apply to the Secretary, upon forms provided by him and in accordance with directives and requirements outlined in G.S. 102-17, for assistance in completing one or more projects. Such project or projects shall constitute one or more phases of a plan for the improvement of the county's land records. The work to be undertaken shall be described in relation to the county's revaluation schedule, and it shall be shown to be a part of a larger undertaking for achieving ultimate long-term improvements in the land records maintained by the county register of deeds, the county tax supervisor, or other county office. (1977, c. 1099, s. 1.)

§ 102-17. County projects eligible for assistance.

All projects funded under this assistance program shall be described as conforming to one or more of the project outlines defined herein. All projects shall achieve a substantial measure of conformity with the objectives set forth in these project outlines such that a greater degree of statewide standardization of land records will result. The Secretary shall prepare and make available to all counties administrative regulations designed to assist the counties in preparing project plans and applications for assistance, and to assure compliance with the objectives and other requirements of G.S. 102-15, 102-16, and this section. County projects shall be eligible for assistance subject to availability of funds, compliance with administrative regulations, and conformity with one or more of the project outlines as follows:

(1) Base Maps. — Preparation of accurate planimetric or orthophoto maps with countywide coverage at one or more scale ratios suitable as a base for the development and maintenance of current cadastral maps. These maps shall have additional information included where appropriate to increase their utility for other purposes. The formulation of technical standards and detailed specifications and the coordination of all such mapping projects with other State mapping programs shall be the responsibility of the Department of the Secretary of State. Insofar as possible mapping projects funded under this assistance program shall utilize existing photography, geodetic control surveys, and previously mapped information, and be coordinated or combined with adjacent or related mapping projects to achieve the best efficiency and economy consistent with the maintenance of high quality map production.

(2) Cadastral Maps. — Preparation of accurate maps of all property boundaries together with other supporting information and based on up-to-date planimetric or orthophoto maps conforming to the specifications for base maps outlined in subdivision (1) of this section. The formulation of specifications and standards for these cadastral maps shall be the responsibility of the Department of the Secretary of State. These specifications and standards shall be designed to conform to the best acceptable practice for county land records in North Carolina. The cadastral maps shall be scheduled as nearly as possible to be completed and made available for the next revaluation cycle to be undertaken by each county and the maps shall include references to subdivision plat numbers, property codes, and other related information considered useful to the appraisal process or to the public generally.

(3) Standardized Parcel Identifiers. — Adoption of a system of parcel identifiers which will serve to provide unique identification of each parcel of land, a permanent historical record of change and the chain of title, and any necessary cross-reference to other preexisting parcel identifiers. The proposed system of parcel identifiers shall conform to such minimum specifications and standards as may be promulgated by the Secretary for the purpose of achieving consistency and compatibility among all counties throughout the State. Said minimum specifications and standards for parcel identifier systems shall be adopted and administered by the Secretary only after consultation with the recommendation from an advisory committee on land records with a membership representative of professional organizations concerned with public land records and map making.

(4) Automated Processing of Land Parcel Records. — Preparation and implementation of a system of automated record keeping and processing which will expedite the maintenance of accurate up-to-date files, improve the appraisal process, and facilitate analytical operations needed to respond to requirements for current information. Technical standards and minimum specifications shall be the joint responsibility of the Department of the Secretary of State, the Department of Revenue, and the Department of Cultural Resources. (1977, c. 771, s. 4; c. 1099, s. 1; 1985, c. 479, s. 165(c); 1989, c. 727, s. 218(37); 1997-443, s. 11A.119(a); 1999-119, s. 2.)

Chapter 103.

Sundays, Holidays and Special Days.

Sec.
103-1. [Repealed.]
103-2. Hunting on Sunday.
103-3. Execution of process on Sunday.
103-4. Dates of public holidays.
103-5. Acts to be done on Sunday or holidays.
103-6. Arbor Week.
103-7. American Family Day.
103-8. Indian solidarity week.
103-9. Prisoner of War Day.
103-10. Pearl Harbor Remembrance Day.
103-11. Disability History and Awareness Month.

§ 103-1: Repealed by Session Laws 1951, c. 73.

§ 103-2. Hunting on Sunday.

If any person shall, except in defense of his own property, hunt on Sunday, having with him a shotgun, rifle, or pistol, he shall be guilty of a Class 3 misdemeanor. Provided, that the provisions hereof shall not be applicable to military reservations, the jurisdiction of which is exclusively in the federal government, or to field trials authorized by the Wildlife Resources Commission. Wildlife protectors are granted authority to enforce the provisions of this section. (1868-9, c. 18, ss. 1, 2; Code, s. 3783; Rev., s. 3842; C.S., s. 3956; 1945, c. 1047; 1967, c. 1003; 1979, c. 830, s. 13; 1989, c. 642, s. 3; 1993, c. 539, s. 684; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — Perquimans: 1935, c. 145.

CASE NOTES

Indictment Must State That Act Was Committed on Sunday. — An indictment for an act which is criminal when committed on a Sunday must state that the act in question was committed on a Sunday; but if it does so, no exception can be taken to it for reference to the same day by a wrong day of the month. State v. Drake, 64 N.C. 589 (1870).

Sufficiency of Indictment. — Under the former reading of the section, a conviction was sustainable under an indictment charging the defendant with being "found off his premises on the Sabbath day, having with him a shotgun, contrary to the form of the statute," etc. State v. Howard, 67 N.C. 24 (1872).

Reference to "Sabbath" in Indictment. — It was immaterial that the indictment used the expression "the Sabbath" instead of "Sunday." State v. Drake, 64 N.C. 589 (1870).

§ 103-3. Execution of process on Sunday.

It shall be lawful for any sheriff or other lawful officer to execute any summons, capias, or other process on Sunday. (1957, c. 1052; 1973, c. 108, s. 47.)

CASE NOTES

Sunday is not a judicial day; hence an adjournment of the court from Saturday night to Monday morning during the progress of a trial for murder is not violative of the act requiring the adjournment to be "from day to day." State v. Howard, 82 N.C. 623 (1880).

When Court May Sit on Sunday. — There have been some instances in the judicial proceedings in this State where the courts have held their sessions on Sunday, but the cases are rare, and whenever it has been done, exception has generally been taken to the course of the court, upon the ground that it could not legally sit on that day. But the Supreme Court has held that in special cases ex necessitate the court might sit on Sunday. State v. Ricketts, 74 N.C. 187 (1876); State v. McGimsey, 80 N.C. 377 (1879); State v. Howard, 82 N.C. 623 (1880).

Term of Court Embraces Sunday. — When a term of court is set by statute to begin on a certain Monday, and to last for "one week" (or two or three weeks, as the case may be), it embraces the Sunday of each week (unless sooner adjourned), and the term expires by limitation at midnight of that day. Taylor v. Ervin, 119 N.C. 274, 25 S.E. 875 (1896).

Verdict of Jury and Judgment. — The rendition by the jury of a verdict on Sunday is not invalid for that cause. Tuttle v. Tuttle, 146 N.C. 484, 59 S.E. 1008 (1907).

A verdict entered on the Sunday of a week set for the duration of a court, in the absence of an earlier adjournment, is legally entered. Taylor v. Ervin, 119 N.C. 274, 25 S.E. 875 (1896).

There being no inhibition of a verdict rendered on Sunday, either at common law or by statute, a judgment entered on that day (by virtue of the statute, that it shall be entered up at once on the verdict) is valid. Taylor v. Ervin, 119 N.C. 274, 25 S.E. 875 (1896).

§ 103-4. Dates of public holidays.

(a) The following are declared to be legal public holidays:
(1) New Year's Day, January 1.
(1a) Martin Luther King, Jr.'s, Birthday, the third Monday in January.
(2) Robert E. Lee's Birthday, January 19.
(3) Washington's Birthday, the third Monday in February.
(3a) Greek Independence Day, March 25.
(4) Anniversary of signing of Halifax Resolves, April 12.
(5) Confederate Memorial Day, May 10.
(6) Anniversary of Mecklenburg Declaration of Independence, May 20.
(7) Memorial Day, the last Monday in May.
(8) Good Friday.
(9) Independence Day, July 4.
(10) Labor Day, the first Monday in September.
(11) Columbus Day, the second Monday in October.
(11a) Yom Kippur.
(12) Veterans Day, November 11.
(13) Tuesday after the first Monday in November in years in which a general election is to be held.
(14) Thanksgiving Day, the fourth Thursday in November.
(15) Christmas Day, December 25.

(b) Whenever any public holiday shall fall upon Sunday, the Monday following shall be a public holiday. (1881, c. 294; Code, s. 3784; 1891, c. 58; 1899, c. 410; 1901, c. 25; Rev., s. 2838; 1907, c. 996; 1909, c. 888; 1919, c. 287; C.S., s. 2959; 1935, c. 212; 1959, c. 1011; 1969, c. 521; 1973, c. 53; 1979, c. 84; 1981, c. 135; 1983, c. 1; 1987, c. 25, s. 1; c. 851, ss. 1, 2; c. 853, s. 2.)

Editor's Note. — Session Laws 2007-450, provides in the preamble: "Whereas, June 19, 1865, is considered the date when the last enslaved Americans were notified of their new legal status by General Gordon Granger, who arrived in Galveston, Texas, and issued General Order Number Three almost two and one-half years after President Lincoln had issued the Emancipation Proclamation; and

"Whereas, former slaves in Texas began to observe June 19 as the anniversary of their emancipation and coined the term 'Juneteenth'; and

"Whereas, Juneteenth is the oldest nationally celebrated commemoration of the ending of slavery in the United States and is also known as 'Juneteenth National Freedom Day,' 'Emancipation Day,' 'Emancipation Celebration,' 'Freedom Day,' 'Jun-Jun,' 'Juneteenth Independence Day'; and

"Whereas, Juneteenth commemorates the survival, due to God-given strength and determination, of African-Americans through extreme adversity, hardship, and triumph; and

"Whereas, Americans of all colors, creeds, cultures, religions, and countries of origin share in a common love of and respect for freedom, as well as the determination to protect their right to freedom through the democratic institutions by which the tenets of freedom are guaranteed and protected; and

"Whereas, the nineteenth of June, along with the fourth of July, completes the cycle of freedom for Americans' Independence Day observance; and

"Whereas, Juneteenth is recognized as a

state holiday or state holiday observance in many states, including Texas, Oklahoma, Florida, Delaware, Idaho, Alaska, Iowa, California, Wyoming, Missouri, Connecticut, Illinois, Louisiana, New Jersey, New York, Colorado, Arkansas, Oregon, Kentucky, Michigan, New Mexico, Virginia, Washington, and Tennessee; Now, therefore, "

Session Laws 2007-450, s. 1, provides: "When Juneteenth National Freedom Day or a substantially similar holiday becomes a nationally recognized holiday, the General Assembly shall recognize the nineteenth day of June each year as Juneteenth National Freedom Day, to commemorate the end of slavery in the United States and to demonstrate racial reconciliation and healing from the legacy of slavery."

CASE NOTES

This section relates to statewide public holidays. Hardbarger v. Deal, 258 N.C. 31, 127 S.E.2d 771 (1962).

Effect of Legal Holiday Generally. — The statute declaring certain days public holidays does not prohibit the pursuit of the usual avocations of citizens, nor keep public officers or the courts from exercising their respective functions on those days. While it might be that the attendance of jurors, witnesses and suitors will not be enforced, and the courts will not sue out or enforce process on such days, yet the courts may lawfully proceed with the business before them. State v. Moore, 104 N.C. 743, 10 S.E. 183 (1889).

The section simply declares that certain days therein specified, in each year, shall be public holidays, and the following section prescribes when papers coming due on such days, or on Sunday, shall be payable. It does not purport, in terms or effect, to prohibit persons from pursuing their usual avocations on such days, nor is there any inhibition upon public officers to exercise their offices, respectively, or upon the courts to sit on such days and exercise their functions and authority. There is no such statutory inhibition; nor, indeed, is there any, except such as may arise in the application of general principles of law. It has never been understood to be the law in this State that a public holiday is dies non juridicus, except perhaps to a limited extent; it is very certainly not wholly so. The courts, particularly the superior courts, very frequently sit on such days and hear and try causes and dispatch the business that ordinarily comes before them, especially when there is no objection. State v. Moore, 104 N.C. 743, 10 S.E. 183 (1889).

Closing of County Clerk's Office on Easter Monday. — Where a county clerk's office was closed on Easter Monday, pursuant to resolution by the board of county commissioners in which Easter Monday was designated a holiday, a plaintiff, if otherwise entitled to commence an action on Easter Monday was entitled to commence the action on the next day the courthouse was open for business. Hardbarger v. Deal, 258 N.C. 31, 127 S.E.2d 771 (1962).

Judicial Notice That Certain Days Were Sundays or Public Holidays. — The court would take judicial notice of the fact that September 2, 1962, the last day of the two-year period beginning with the death of the plaintiff's intestate, was Sunday and that the following day was the first Monday in September, a public holiday. The action was instituted on September 4, 1962, by the issuance of summons and, therefore, was instituted within the time allowed by law. Kinlaw v. Norfolk S. Ry., 269 N.C. 110, 152 S.E.2d 329 (1967).

Deposition Opened on Holiday. — A legal holiday has not the same status in respect to legal proceedings as a Sunday; and while depositions opened on the latter day are void, they are not so when they are opened on a legal holiday. Latta v. Catawba Elec. Co., 146 N.C. 285, 59 S.E. 1028 (1907).

Effect on Foreclosure Upset Period and Filing of Bankruptcy. — Bankruptcy court found that because March 25 was Greek Independence Day and was a holiday under G.S. 103-4(3a), the 10-day upset period had not expired under G.S. 45-21.27(a) when the debtor filed bankruptcy after the close of business on March 25, which would otherwise have been the 10th day; thus, the bankruptcy court vacated its prior order granting the creditors relief from the automatic stay. In re Country Lake Enters., Inc., 284 Bankr. 223, 2002 Bankr. LEXIS 1161 (Bankr. E.D.N.C. 2002).

Cited in Robbins v. Borman, 9 N.C. App. 416, 176 S.E.2d 346 (1970); Kirby v. GE, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 3289 (W.D.N.C. Feb. 9, 2000).

§ 103-5. Acts to be done on Sunday or holidays.

(a) Except as otherwise provided by law, when the day or the last day for doing any act required or permitted by law to be performed in a public office or courthouse falls on a Saturday, Sunday, or legal holiday when the public office or courthouse is closed for transactions, the act may be performed on the next day that the public office or courthouse is open for transactions.

(b) This section does not apply where the act required or permitted by law to be done is prescribed by Section 22 of Article II, or Section 5(11) of Article III, of the Constitution of North Carolina. (Code, ss. 3784, 3785, 3786; 1899, c. 733, s. 194; Rev., s. 2839; C.S., s. 3960; 1951, c. 1176, s. 1; 1995, c. 20, s. 16; 2003-337, s. 1.)

Cross References. — As to computing time when last day falls on Sunday, see G.S. 1-593 and G.S. 1A-1, Rule 6(a). As to closing county clerk's office on Easter Monday, see note to G.S. 103-4.

Editor's Note. — Session Laws 1995, c. 20, s. 16, became effective with respect to bills and joint resolutions passed in either house of the General Assembly on or after January 1, 1997, if constitutional amendments proposed by Session Laws 1995, c. 5, ss. 1 and 2 were approved. These amendments were approved.

CASE NOTES

The institution of a suit is an act "required or permitted to be done in the courthouse" within the meaning of this section. Hardbarger v. Deal, 258 N.C. 31, 127 S.E.2d 771 (1962).

Cited in Asheville Showcase & Fixture Co. v. Restaurant Assocs., 3 N.C. App. 74, 164 S.E.2d 63 (1968); Pearson v. Nationwide Mut. Ins. Co., 325 N.C. 246, 382 S.E.2d 745 (1989).

§ 103-6. Arbor Week.

The week in March of each year containing March 15 is hereby designated as Arbor Week in North Carolina. (1967, c. 39.)

§ 103-7. American Family Day.

The first Sunday in August of each year is designated as American Family Day in North Carolina. (1979, c. 457.)

§ 103-8. Indian solidarity week.

The last full week in September of each year is designated as Indian solidarity week in North Carolina. (1981, c. 769.)

§ 103-9. Prisoner of War Day.

The ninth of April of each year is designated as Prisoner of War Recognition Day. (1989, c. 428, s. 1.)

§ 103-10. Pearl Harbor Remembrance Day.

The seventh of December of each year is designated as Pearl Harbor Remembrance Day in North Carolina. (1991, c. 175, s. 1.)

§ 103-11. Disability History and Awareness Month.

The month of October of each year is designated as Disability History and Awareness Month in North Carolina. (2007-274, s. 1.)

Editor's Note. — Session Laws 2007-274, s. 5, made this section effective July 27, 2007.

Session Laws 2007-274 provides in the preamble: "Whereas, the Americans with Disabilities Act of 1990 was founded on four principles: inclusion, full participation, economic self-sufficiency, and equality of opportunity for all people with disabilities; and

"Whereas, the United States Census Bureau reported in 2000 that there were 1,117,577 people with disabilities in the State of North Carolina out of a total population of 8,046,485; and

"Whereas, most families are likely to become affected by someone with some kind of disability; and

"Whereas, the National Center for Education Statistics reported that during the 2003-2004 school year, North Carolina served 193,956 students with disabilities under the Individuals with Disabilities Education Act; and

"Whereas, research has shown that students with disabilities encounter more difficulty fitting in with their peers, making friends, and becoming involved in school and community-based activities and clubs than their nondisabled peers; and

"Whereas, in order to ensure the full inclusion of people with disabilities into society, it is necessary to expand the public's knowledge, awareness, and understanding of the history of disabilities and the disability rights movement; and

"Whereas, October is recognized nationally as Disability Employment Awareness Month; and

"Whereas, designating Disability History and Awareness Month in North Carolina will increase public awareness and respect for people with disabilities who comprise a substantial percentage of North Carolina's population, teach future generations that people with disabilities have a rich history and have made valuable contributions throughout North Carolina and the United States, and ensure future generations understand that disability is a natural part of life and that people with disabilities have a right to be treated as individuals above all else; Now, therefore,"

Session Laws 2007-274, s. 3, provides that the constituent institutions of The University of North Carolina are encouraged to conduct and promote activities that provide education, awareness, and understanding of disability history, people with disabilities, and the disability rights movement.

Session Laws 2007-274, s. 4, provides that nothing in this act shall require the General Assembly to appropriate funds to implement it or require a local school administrative unit to spend additional funds to implement it. The provisions of this act are not intended to create a burden, financial or otherwise for public schools, teachers, or State institutions of higher learning.

Chapter 104.

United States Lands.

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ARTICLE 1.

Authority for Acquisition.

§ 104-1. Acquisition of lands for specified purposes authorized; concurrent jurisdiction reserved.

The United States is authorized, by purchase or otherwise, to acquire title to any tract or parcel of land in the State of North Carolina, not exceeding 25 acres, for the purpose of erecting thereon any customhouse, courthouse, post office, or other building, including lighthouses, lightkeepers' dwellings, lifesaving stations, buoys and local depots and buildings connected therewith, or for the establishment of a fish-cultural station and the erection thereon of such buildings and improvements as may be necessary for the successful operations of such fish-cultural station. The consent to acquisition by the United States is upon the express condition that the State of North Carolina shall so far retain a concurrent jurisdiction with the United States over such lands as that all civil and criminal process issued from the courts of the State of North Carolina may be executed thereon in like manner as if this authority had not been given, and that the State of North Carolina also retains authority to punish all violations of its criminal laws committed on any such tract of land. (1870-1, c. 44, s. 5; Code, ss. 3080, 3083; 1887, c. 136; 1899, c. 10; Rev., s. 5426; C.S., s. 8053.)

Legal Periodicals. — As to note on jurisdiction relative to lands acquired by the federal government, see 23 N.C.L. Rev. 258 (1945).

CASE NOTES

Exclusive Jurisdiction. — Jurisdiction of the United States is exclusive over property in this State acquired in 1899 with the State's legislative consent, and such exclusive jurisdiction is not affected by the restrictive provisions of this section and G.S. 104-7 subsequently enacted, which are prospective only. State v. DeBerry, 224 N.C. 834, 32 S.E.2d 617 (1945).

Cited in State v. Burell, 256 N.C. 288, 123 S.E.2d 795 (1962).

§ 104-2. Unused lands to revert to State.

The consent given in G.S. 104-1 is upon consideration of the United States building lighthouses, lighthouse keepers' dwellings, lifesaving stations, buoys, coal depots, fish stations, post offices, customhouses, and other buildings connected therewith, on the tracts or parcels of land so purchased, or that may be purchased; and that the title to land so conveyed to the United States shall revert to the State unless the construction of the aforementioned buildings be completed thereon within 10 years from the date of the conveyance from the grantor. (1870-1, c. 44, s. 5; Code, ss. 3080, 3083; 1887, c. 136; 1899, c. 10; Rev., s. 5426; C.S., s. 8054.)

§ 104-3. Exemption of such lands from taxation.

The lots, parcels, or tracts of land acquired under this Chapter, together with the tenements and appurtenances for the purpose mentioned in this Chapter, shall be exempt from taxation. (1870-1, c. 44, s. 3; Code, s. 3082; Rev., s. 5428; C.S., s. 8055.)

CASE NOTES

When Exemption Begins. — A contract to convey lands to the United States government reservation, under the federal statute, does not vest the title in the government until survey is made, acreage is determined, purchase price is paid, or conveyance is made and title is approved by the Attorney General, and until then the land is subject to state taxes under the state statutes. Caldwell Land & Lumber Co. v. Commissioners of Caldwell County, 174 N.C. 634, 94 S.E. 406 (1917).

§ 104-4. Conveyances of such lands to be recorded.

All deeds, conveyances, or other title papers for the same shall be recorded, as in other cases, in the office of the register of deeds of the county in which the lands so conveyed may lie, in the same manner and under the same regulations as other deeds and conveyances are now recorded, and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or legal division of any public land belonging to the United States, which may be set apart by the general government for the purpose before mentioned, by an order, patent, or other official document or paper so describing such land. (1870-1, c. 44, s. 2; 1872-3, c. 201; Code, s. 3081; Rev., s. 5429; C.S., s. 8056.)

§ 104-5. Forest reserve in North Carolina authorized; powers conferred.

The United States is authorized to acquire by purchase, or by condemnation with adequate compensation, except as hereinafter provided, such lands in North Carolina as in the opinion of the federal government may be needed for the establishment of a national forest reserve in that region. This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this consent had not been given. Power is hereby conferred upon the Congress of the United States to pass such laws as it may deem necessary to the acquisition as hereinbefore provided, for incorporation in such national forest reserve such forest-covered lands lying in North Carolina as in the opinion of the federal government may be needed for this purpose, but as much as 200 acres of any tract of land occupied as a home by bona fide residents in this State on the eighteenth day of January, 1901, shall be exempt from the provisions of this section. Power is hereby conferred upon Congress to pass such laws and to make or provide for the making of such rules and regulations, of both civil and criminal nature, and to provide punishment therefor, as in its judgment may be necessary for the management, control, and protection of such lands as may be from time to time acquired by the United States under the provisions of this section. (1901, c. 17; Rev., s. 5430; C.S., s. 8057; 1929, c. 67, s. 1.)

CASE NOTES

Concurrent Jurisdiction. — This section and 16 U.S.C. § 551 grant the United States concurrent jurisdiction over national forest lands located within North Carolina. United States v. Raffield, 82 F.3d 611 (4th Cir. 1996), cert. denied, 519 U.S. 933, 117 S. Ct. 306, 136 L. Ed. 2d 223 (1996).

Where defendant was pulled over inside Pisgah National Forest, North Carolina, United States had jurisdiction to prosecute defendant for driving under the influence of intoxicating beverage and refusing to submit to a chemical breath analysis under the Assimilative Crimes Act; state crimes become federal offenses when committed on federal lands within the state. United States v. Raffield, 82 F.3d 611 (4th Cir. 1996), cert. denied, 519 U.S. 933, 117 S. Ct. 306, 136 L. Ed. 2d 223 (1996).

§ 104-6. Acquisition of lands for river and harbor improvement; reservation of right to serve process.

The consent of the legislature of the State is hereby given to the acquisition by the United States of any tracts, pieces, or parcels of land within the limits of the State, by purchase or condemnation, for use as sites for locks and dams, or for any other purpose in connection with the improvement of rivers and harbors within and on the borders of the State. The consent hereby given is in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of Congress in such cases made and provided; and this State retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this section, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired, or the buildings or structures thereon erected. (1907, c. 681; C.S., s. 8058.)

§ 104-7. Acquisition of lands by the United States for customhouses, courthouses, post offices, forts, arsenals, or armories; cession of jurisdiction; exemption from taxation.

(a) The consent of the State is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in the State that either is:

(1) Required for customhouses, courthouses, post offices, forts, arsenals, or armories; provided that the total land to be acquired for a particular facility does not exceed 25 acres; or

(2) To be added to Fort Bragg, Pope Air Force Base, Camp Lejeune, New River Marine Corps Air Station, Seymour Johnson Air Force Base, Cherry Point Marine Corps Air Station, Military Ocean Terminal at Sunny Point, or the United States Coast Guard Air Station at Elizabeth City. Any of the land to be added to a military base named in this subdivision shall be contiguous to and within a 25-mile radius of the military base for which the property is acquired.

(b) Exclusive jurisdiction in and over any land acquired by the United States with the consent of the State under subsection (a) of this section is hereby ceded to the United States for all purposes for which the United States requests cession of jurisdiction except that jurisdiction in and over these lands with respect to: (i) the service of all civil and criminal process of the courts of this State, (ii) the concurrent power to enforce the criminal law, (iii) the power to enforce State laws for the protection of public health and the environment and for the conservation of natural resources, and (iv) the entire legislative jurisdiction of the State with respect to marriage, divorce, annulment, adoption, commitment of the mentally incompetent, and descent and distribution of property is reserved to the State. Cession of jurisdiction shall continue only so long as the United States owns the land.

(c) The jurisdiction ceded shall not vest until the United States has acquired title to the land by purchase, condemnation, or otherwise; accepted the cession of jurisdiction in writing; and filed a certified copy of the acceptance in the office of the register of deeds in the county or counties in which the land is located. The acceptance of jurisdiction shall be made by an authorized official of the United States and shall include a precise description of the land involved and a statement of the extent to which cession of jurisdiction is accepted. The register of deeds shall record the acceptance of jurisdiction and index it in both the grantor and the grantee index under the name of the United States and, if title to the land over which jurisdiction is ceded is vested in any entity other than the United States, then the register of deeds shall also index the acceptance of jurisdiction in both the grantor and the grantee index under the name of that entity.

(d) So long as land acquired with the consent of the State under subsection (a) of this section remains the property of the United States, and no longer, the land shall be exempt and exonerated from all State, county, and municipal taxation, assessment, or other charges that may be levied or imposed under the authority of this State.

(e) Persons residing on lands in the State for which any jurisdiction has been ceded under this section shall not be deprived of any civil or political rights, including the right of suffrage, by reason of the cession of jurisdiction to the United States. (1907, c. 25; C.S., s. 8059; 2005-69, s. 1.)

Legal Periodicals. — As to note on jurisdiction relative to lands acquired by federal government, see 23 N.C.L. Rev. 258 (1945).

For case law survey on jurisdiction over federal enclave, see 41 N.C.L. Rev. 451 (1963).

CASE NOTES

Jurisdiction Is a Federal Question. — Whether the United States has acquired jurisdiction over land it owns is a federal question. State v. Smith, 328 N.C. 161, 400 S.E.2d 405, cert. denied, 502 U.S. 956, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991).

Legislative Intent. — General assembly's inclusion of the first catch-all phrase, "or other public buildings whatever," as well as the second, "or for any other purposes of the government," both speak to this uncertainty, and imply that the legislature intended its consent and cession statute to reach the farthest limits of the enclave clause, whatever they might be. Atl. Marine Corps Cmtys., LLC v. Onslow County, 497 F. Supp. 2d 743, 2007 U.S. Dist. LEXIS 55771 (E.D.N.C. 2007).

No reasonable reading was seen of G.S. 104-7 in light of the phrase "or for any other purposes of the government," other than the one adopted in State v. Smith, 328 N.C. 161, 400 S.E.2d 405 (N.C. 1991); i.e., the state ceded all jurisdiction that it could except for the service of process, and this was what the United States accepted. Atl. Marine Corps Cmtys., LLC v. Onslow County, 497 F. Supp. 2d 743, 2007 U.S. Dist. LEXIS 55771 (E.D.N.C. 2007).

Words of G.S. 104-7 and the context in which those words are used leave no ambiguity as to the proper construction, and in such a situation the plain meaning rule is the first and last canon in a court's analysis and judicial inquiry is complete; the state ceded all jurisdiction that it could except for the service of process. Atl. Marine Corps Cmtys., LLC v. Onslow County, 497 F. Supp. 2d 743, 2007 U.S. Dist. LEXIS 55771 (E.D.N.C. 2007).

Construction. — Counties' assertion that G.S. 104-7 must be strictly construed under applicable precedent was rejected; the "unmistakability" doctrine was a special rule of contract interpretation that applied to contracts with the government, not a rule of construction applicable to consent and cession statutes, and the doctrine was not applicable. Atl. Marine Corps Cmtys., LLC v. Onslow County, 497 F. Supp. 2d 743, 2007 U.S. Dist. LEXIS 55771 (E.D.N.C. 2007).

Federal Acquisition of Jurisdiction Over Territory. — The federal government must acquire state land by condemnation or otherwise. If the state in which the land is situated cedes jurisdiction to the federal government, and if the government accepts jurisdiction, the state no longer has jurisdiction over this territory. State v. Smith, 328 N.C. 161, 400 S.E.2d 405, cert. denied, 502 U.S. 956, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991).

Necessity for Acceptance of Jurisdiction by United States. — This section cedes exclusive jurisdiction to the United States over the land acquired, but this section and the State of North Carolina cannot compel the United States to accept such jurisdiction over an area. State v. Burell, 256 N.C. 288, 123 S.E.2d 795, cert. denied, 370 U.S. 961, 82 S. Ct. 1621, 8 L. Ed. 2d 827 (1962).

When the United States government has not accepted the exclusive jurisdiction over the area ceded by the section, this section is not applicable and the State retains its territorial jurisdiction over the area in question so far as its exercise involves no interference with the carrying out of the federal project. The trial, conviction and judgment imposed upon a defendant by the state court for the felony of assault with intent to commit rape committed in the ceded area is not such interference. State v. Burell, 256 N.C. 288, 123 S.E.2d 795, cert. denied, 370 U.S. 961, 82 S. Ct. 1621, 8 L. Ed. 2d 827 (1962).

Jurisdiction on Camp Lejeune Reservation. — It appears that the State ceded all jurisdiction on the Camp Lejeune reservation that it could, except for the service of process. State v. Smith, 328 N.C. 161, 400 S.E.2d 405, cert. denied, 502 U.S. 956, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991), decided prior to 2005 amendments.

North Carolina lacked jurisdiction to try a person as an adult for murders he allegedly committed as a juvenile on the Camp Lejeune military reservation. State v. Smith, 328 N.C. 161, 400 S.E.2d 405, cert. denied, 502 U.S. 956, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991), decided prior to 2005 amendments.

Marine Corps Lands. — North Carolina general assembly consented to the acquisition of the Marine Corps Lands at issue (Marine Corps Air Station New River, Marine Corps

Base Camp Lejeune, and Marine Corps Air Station Cherry Point) for the purposes for which they were later acquired, through passage of G.S. 104-7, in full compliance with the enclave clause. Atl. Marine Corps Cmtys., LLC v. Onslow County, 497 F. Supp. 2d 743, 2007 U.S. Dist. LEXIS 55771 (E.D.N.C. 2007).

Question presented was whether a public/private partnership of the type entered into by plaintiff and the federal government brought about a relinquishment of exclusive federal jurisdiction; the court found that the project did not trigger the springing reversion clause in G.S. 104-7, that the Marine Corps lands at issue presently remained the property of the United States, and that the government held the lands subject to its primary jurisdiction and control, and as such the lands and all real and personal property located thereon remained beyond the taxing authority of the counties. Atl. Marine Corps Cmtys., LLC v. Onslow County, 497 F. Supp. 2d 743, 2007 U.S. Dist. LEXIS 55771 (E.D.N.C. 2007).

Fixtures and improvements placed upon lands in a military reservation leased from the federal government, as well as the value of the leasehold estate, are subject to taxation in this State, Congress having waived any immunity of such property from taxation. Bragg Inv. Co. v. Cumberland County, 245 N.C. 492, 96 S.E.2d 341 (1957).

Applied in State v. Graham, 47 N.C. App. 303, 267 S.E.2d 56 (1980).

OPINIONS OF ATTORNEY GENERAL

Federal Jurisdiction over Federal Lands Located within North Carolina. — The United States Constitution precludes the enactment of state legislation which seeks to override lawful uses under federal law of property acquired by the federal government. See opinion of Attorney General to The Honorable Marc Basnight, Senate President Pro Tempore, North Carolina General Assembly, 2004 N.C.A.G. 1 (1/28/04).

Penalties for Issuance of Marriage Licenses to Individuals of Same Gender. — A register of deeds would violate North Carolina law in issuing a marriage license to persons of the same gender and if, in issuing such a license, the register of deeds operates in bad faith he may subject himself to the penalties provided in G.S. 161-27. See opinion of Attorney General to Mr. Willie L. Covington, Register of Deeds, Durham County Courthouse, 2004 N.C.A.G. 2 (3/29/04).

§ 104-8. Further authorization of acquisition of land.

The United States is hereby authorized to acquire lands by condemnation or otherwise in this State for the purpose of preserving the navigability of navigable streams and for holding and administering such lands for national park purposes: Provided, that this section and G.S. 104-9 shall in nowise affect the authority conferred upon the United States and reserved to the State in G.S. 104-5 and 104-6. (1925, c. 152, s. 1.)

§ 104-9. Condition of consent granted in preceding section.

This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime, without or within said jurisdiction, may be executed thereon in like manner as if this consent had not been given. (1925, c. 152, s. 2.)

§ 104-10. Migratory bird sanctuaries or other wildlife refuges.

The United States is authorized to acquire by purchase, or by condemnation with adequate compensation, such lands in North Carolina as in the opinion of the federal government may be needed for the establishment of one or more migratory bird sanctuaries or other wildlife refuges. This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime without or within said jurisdiction, may be executed therein in like manner as if this consent had not been given. Power is hereby conferred upon the Congress of the United States to pass such laws as it may deem necessary to the acquisition as hereinbefore provided, for incorporation in such sanctuaries or refuges such lands lying in North Carolina as in the opinion of the federal government may be suitable and needed for this purpose. Power is hereby conferred upon Congress to pass such laws and to make or provide for the making of such rules and regulations, of both civil and criminal nature, and to provide punishment therefor, as in its judgment may be necessary for the management, control and protection of such lands as may be from time to time acquired by the United States under the provisions of this section. (1929, c. 163, s. 1.)

§ 104-11. Utilities Commission to secure rights-of-way, etc., for waterway improvements by use of federal funds.

Hereafter whenever any waterway improvement in North Carolina by the use of federal funds is provided for upon condition that the State or locality shall furnish rights-of-way, permits for the dumping of dredged material, or furnish or do any other thing in connection with the proposed waterway improvement, the Utilities Commission is authorized and empowered to represent the State or locality in such matter of securing the rights-of-way, permits for the dumping of dredged material, or other things so required in connection with such waterway improvement; and in prosecuting such undertaking, the Utilities Commission may follow the same procedure provided in Article 2 for the acquisition of rights-of-way for the intercoastal waterway from the Cape Fear River to the South Carolina line: Provided, however, that said Utilities Commission is not hereby authorized to enter into obligation or contract for the payment of any money or proceeds through condemnation or otherwise without the express approval of the Governor and Council of State. (1935, c. 240; 1937, c. 434.)

§ 104-11.1. Governor may accept a retrocession of jurisdiction over federal areas.

Whenever a duly authorized official or agent of the United States, acting pursuant to authority conferred by the Congress, notifies the Governor or any other State official, department or agency, that the United States desires or is willing to relinquish to the State the jurisdiction, or a portion thereof, held by the United States over the lands designated in such notice, the Governor may, in his discretion, accept such relinquishment. Such acceptance may be made by sending a notice of acceptance to the official or agent designated by the United States to receive such notice of acceptance. The Governor shall send a signed copy of the notice of acceptance, together with the notice of relinquishment received from the United States, to the Secretary of State, who shall maintain a permanent file of said notices.

Upon the sending of said notice of acceptance to the designated official or agent of the United States, the State shall immediately have such jurisdiction over the lands designated in the notice of relinquishment as said notice shall specify.

The provisions of this section shall apply to the relinquishment of jurisdiction acquired by the United States under the provisions of this Chapter or any other provision of law. (1957, c. 1202.)

ARTICLE 2.

Inland Waterways.

§ 104-12. Acquisition of land for inland waterway from Cape Fear River; grant of State lands.

For the purpose of aiding in the construction of the proposed inland waterway by the United States from the Cape Fear River at Southport to the North Carolina-South Carolina State line, the Secretary of State is hereby authorized to issue to the United States of America a grant to the land located within said inland waterway, right-of-way, which is to be 1,000 feet to 1,750 feet wide insofar as such land is subject to grant by the State of North Carolina, the said grant to issue upon a certificate furnished to the Secretary of State by the Secretary of War, or by any authorized officer of the corps of engineers of the United States army, or by any other authorized official, exercising control over the construction of the said waterway. Whenever in the construction of such inland waterway within this State, lands theretofore submerged shall be raised above the water by the deposit of excavated material, the land so formed shall become the property of the United States if within the limits of said inland waterway, right-of-way, herein set out 1,000 feet to 1,750 feet and the Secretary of State is hereby authorized to issue to the United States a grant to the land so formed within the limits above specified, the grant to issue upon a certificate furnished to the Secretary of State by some authorized official of the United States, as above provided. If said lands so required for the inland waterway right-of-way shall be marshlands, or sound lands, the title to which has heretofore been vested in the State Board of Education, the Governor of the State, as President thereof, and the Superintendent of Public Instruction as Secretary, are hereby authorized and required to execute proper conveyance to the United States of America for said marshlands or sound lands, free of cost, both to the State and to the United States government, upon a certificate furnished to said Board of Education by the Secretary of War, or by any authorized officer of the corps of engineers of the United States army, or by any other authorized official exercising control over the construction of the said inland waterway. (1931, c. 2, s. 1.)

§ 104-13. Utilities Commission to secure right-of-way over private lands; condemnation by United States.

If the title to any part of the lands acquired by the United States government for the construction of such inland waterway from the Cape Fear River at Southport to the North Carolina-South Carolina State line shall be in any private person, company or corporation, railroad company, street railway company, telephone or telegraph company, or other public service corporation or shall have been donated or condemned or any public use by any political subdivision of the State, or if it may be necessary, for the purpose of obtaining the proper title to any lands, the title to which has heretofore been vested in the State Board of Education, then the Utilities Commission, in the name of the State of North Carolina, is hereby authorized and empowered, acting for and in behalf of the State of North Carolina, to secure a right-of-way 1,000 to 1,750 feet wide for said inland waterway across and through such lands or any part thereof, by purchase, donation or otherwise, through agreement with the owner or owners where possible, and when any such property is thus acquired, the Governor and Secretary of State shall execute a deed for the same to the United States; and if for any reason the said Commission shall be unable to secure such right-of-way across any such property by voluntary donation by and/or with the owner or owners, the said Commission acting for and in behalf of the State of North Carolina is hereby vested with the power to condemn the same, and in so doing, the ways, means, methods and procedure of the Chapter of the General Statutes of North Carolina, entitled "Eminent Domain," shall be used by it as near as the same is suitable for the purposes of this Article, and in all instances, the general and special benefits to the owner thereof shall be assessed as offsets against the damages to such property or lands.

As such condemnation proceedings might result in delay in the acquiring of title to all parts of the right-of-way and in the construction of the said inland waterway by the United States, said Utilities Commission is authorized to enter any of said lands and property and take possession of the same at the time hereinafter provided as needed for this use in behalf of the State or the United States government for the purposes herein set out, prior to the bringing of the proceeding for condemnation and prior to the payment of the money for such land or property under any judgment in condemnation. In the event the owner or owners shall appeal from the report of the commissioners appointed in any condemnation proceeding hereunder, it shall not be necessary for said Commission, acting in behalf of the State of North Carolina, or the United States government, to deposit the money assessed by said commissioners with the clerk.

Whenever proceedings in condemnation are instituted in pursuance of the provisions of this section, the said Commission upon the filing of the petition or petitions in such proceedings, shall have the right to take immediate possession, on behalf of the State, of such lands or property to the extent of the interest to be acquired and the order of the clerk of the superior court of the county where the action is instituted, shall be sufficient to vest the title and possession in the State through the Utilities Commission. The Governor and Secretary of State shall, upon vesting of the title and possession, execute a deed to the United States and said lands or property may then be appropriated and used by the United States for the purposes aforesaid: Provided, that in every case the proceedings in condemnation shall be diligently prosecuted to final judgment in order that the just compensation, if any, to which the owners of the property are entitled may be ascertained and when so ascertained and determined, such compensation, if any, shall be promptly paid as hereinafter in this Article provided.

If the United States government shall so determine, it is hereby authorized to condemn and use all lands and property which may be needed for the purposes herein set out and which is specifically described and set out in the paragraph next preceding, under the authority of said United States government, and according to the provisions existing in the federal statutes for condemning lands and property for the use of the United States government. In case the United States government shall so condemn said land and property, the said Utilities Commission is hereby authorized to pay all expenses of the condemnation proceedings and any award that may be made thereunder, out of the money which may be appropriated for said purposes.

All sums which may be agreed upon between the said Utilities Commission and the owner of any property needed by the United States government for said inland waterway and all sums which may be assessed in favor of the owner of any property condemned hereunder, shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full, but the order of the clerk when entered in any condemnation proceeding shall divest the owner of the land condemned of all right, title, interest and possession in and to such land and property. (1931, c. 2, s. 2; 1937, c. 434.)

Legal Periodicals. — For an article urging revision and recodification of North Carolina's eminent domain laws (prior to the enactment of Chapter 40A), see 45 N.C.L. Rev. 587 (1967).

§ 104-14. Use declared paramount public purpose.

In such condemnation proceedings the uses for which such land or property is condemned are hereby declared to be for a purpose paramount to all other public uses, and the fact that any portion of it has heretofore been condemned by a railroad company, a street railway company, telephone or telegraph company, or other public service corporation, or by any political subdivision of the State of North Carolina, for public uses, or has been conveyed by any person or corporation for any such public uses, or vested in the State Board of Education, or by any other act dedicated to any public use, shall in no way affect the right of the State of North Carolina, or the United States government, to proceed and condemn such land and property as hereinbefore provided. (1931, c. 2, s. 3.)

§ 104-15. Method of payment of expenses and awards.

Whenever said Commission has agreed with the owner of any such land or property as to the purchase price thereof, or the damage for the construction of the inland waterway has finally been determined in any condemnation proceeding necessary to secure such land or property, the said Commission is hereby authorized and directed to pay all of said sums and other expenses incident thereto by proper warrant upon the sum which may be appropriated for said purpose, and all such sums shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full. (1931, c. 2, s. 4.)

§ 104-16. State and United States may enter upon lands for survey, etc.

For the purpose of determining the lands necessary for the uses herein set out, the Utilities Commission or the United States government, or the agents of either, shall have the right to enter upon any lands along the general line of the right-of-way in this Article specified, and make such surveys, and do such other acts as in their judgment may be necessary for the purpose of definitely locating the specific lines of said right-of-way and the lands required for said purposes, and there shall be no claim against the State of North Carolina or the United States for such acts as may be done in making said surveys. (1931, c. 2, s. 5; 1937, c. 434.)

§ 104-17. Construction, maintenance, etc., of bridges over waterway.

The Board of Transportation or the road governing body of any political subdivision of the State of North Carolina is hereby authorized and directed to construct, maintain and operate in perpetuity, all bridges over the waterway without cost to the United States. (1931, c. 2, s. 7; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5.)

§ 104-18. Concurrent jurisdiction over waterway.

The State of North Carolina retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this Chapter, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired for such inland waterway, or for the buildings or constructions thereon erected for the purposes of such inland waterway. (1931, c. 2, s. 8.)

§ 104-19. Acquisition of land for inland waterway from Beaufort Inlet; grant of State lands.

For the purpose of aiding in the construction of the proposed inland waterway by the United States from Beaufort Inlet in the State of North Carolina to the Cape Fear River, the Secretary of State is hereby authorized to issue to the United States of America a grant to the land located within said inland waterway, right-of-way, which is to be 1,000 feet wide, insofar as such land is subject to grant by the State of North Carolina, the said grant to issue upon a certificate furnished to the Secretary of State by the Secretary of War, or by any authorized officer of the corps of engineers of the United States army, or by any other authorized official, exercising control over the construction of the said waterway. Whenever in the construction of such inland waterway within this State, lands theretofore submerged shall be raised above the water by the deposit of excavated material, the land so formed shall become the property of the United States if within the limits of said inland waterway, right-of-way, herein set out 1,000 feet, and the Secretary of State is hereby authorized to issue to the United States a grant to the land so formed within the limits above specified, the grant to issue upon a certificate furnished to the Secretary of State by some authorized official of the United States, as above provided. If said lands so required for the inland waterway right-of-way shall be marshlands, the title to which has heretofore been vested in the State Board of Education, the Governor of the State, as President thereof, and the Superintendent of Public Instruction as Secretary, are hereby authorized and required to execute a proper conveyance to the United States of America for said marshlands, free of cost, both to the State and to the United States government, upon a certificate furnished, to said Board of Education by the Secretary of War, or by any authorized officer of the corps of engineers of the United States army, or by any other authorized official exercising control over the construction of the said inland waterway. (1927, c. 44, s. 1.)

§ 104-20. Utilities Commission to secure right-of-way; condemnation by United States.

If the title to any part of the lands required by the United States government for the construction of an inland waterway from Beaufort Inlet to the Cape Fear River is owned by a private person, company or corporation, railroad company, street railway company, telephone or telegraph company, or other public service corporation, or has been donated or condemned for any public use by any political subdivision of the State or if it may be necessary, for the purpose of obtaining the proper title to any lands, the title to which has heretofore been vested in the State Board of Education, then the Utilities Commission, in the name of the State of North Carolina, may secure a right-of-way 1,000 feet wide for the inland waterway across and through the lands or any part thereof, if possible by purchase, donation or otherwise, through agreement with the owner or owners, and when any property is thus acquired, the Governor and Secretary of State shall execute a deed for the same to the United States; and if for any reason the Commission is unable to secure a right-of-way across the property by voluntary agreement with the owner or owners as aforesaid, the Commission acting for and in behalf of the State of North Carolina, is hereby vested with the power to condemn the same, and in so doing, the ways, means, methods and procedure of Chapter 40A of the General Statutes of North Carolina, entitled "Eminent Domain," shall be used by it as near as the same is suitable for the purposes of this law, and in all instances, the general and the special benefits to the owner thereof shall be assessed as offsets against the damages to the property or lands.

As condemnation proceedings might result in delay in the acquiring of title to all parts of the right-of-way and in the construction of the inland waterway by the United States, the Utilities Commission is authorized to enter any of the lands and property and take possession of the same at the time hereinafter provided as needed for this use in behalf of the State or the United States government for the purposes herein set out prior to the bringing of the proceeding for condemnation and prior to the payment of the money for the land or property under any judgment in condemnation. In the event the owner or owners shall appeal from the report of the commissioners appointed in the condemnation proceeding it shall not be necessary for the Commission, acting in behalf of the State of North Carolina, the State of North Carolina, or the United States government, to deposit the money assessed by the commissioners with the clerk.

Whenever proceedings in condemnation are instituted under the provisions of this section, the Commission upon the filing of the petition or petitions in the proceedings, may take immediate possession on behalf of the State of the lands or property to the extent of the interest to be acquired and the Governor and Secretary of State shall thereupon execute a deed to the United States and the lands or property may then be appropriated and used by the United States for the purposes described in this section. Provided, that in every case the proceedings in condemnation shall be diligently prosecuted to final judgment in order that the just compensation to which the owners of the property are entitled may be ascertained and when so ascertained and determined the compensation shall be promptly paid as hereinafter in this law provided.

If the United States government shall so determine, it is hereby authorized to condemn and use all lands and property that may be needed for the purposes herein set out and which is specifically described and set out in the preceding paragraphs, under the authority of the United States government, and according to the provisions existing in the federal statutes for condemning lands and property for the use of the United States government. In case the United States government shall so condemn the land and property, the Utilities Commission is hereby authorized to pay all expenses of the condemnation proceedings and any award that may be made thereunder, out of the money that may be appropriated for these purposes. (1927, c. 44, s. 2; 1929, c. 4; c. 7, s. 1; 1937, c. 434; 2001-487, s. 38(d).)

§ 104-21. Use declared paramount public purpose.

In such condemnation proceedings the uses for which such land or property is condemned are hereby declared to be for a purpose paramount to all other public uses, and the fact that any portion of it has heretofore been condemned by a railroad company, street railway company, telephone or telegraph company, or other public service corporation, or by any political subdivision of the State of North Carolina, for public uses, or has been conveyed by any person or corporation for any such public uses, or vested in the State Board of Education, shall in no way affect the right of the State of North Carolina, or the United States government, to proceed and condemn such land and property as hereinbefore provided. (1927, c. 44, s. 3.)

§ 104-22. Method of payment of expenses and awards.

Whenever said Commission has agreed with the owner of any such land or property as to the purchase price thereof, or the damage for the construction of the inland waterway has finally been determined in any condemnation proceeding necessary to secure such land or property, the said Commission is hereby authorized and directed to pay all of said sum and other expenses incident thereto by proper warrant upon the sum which may be appropriated for said purpose, and all such sums shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full. (1927, c. 44, s. 4.)

§ 104-23. Maintenance and operation of bridges over waterway.

The Board of Transportation or the road governing body of any political subdivision of the State of North Carolina is hereby authorized and directed to take over and maintain and operate in perpetuity, by contract with the United States government, if necessary, or otherwise, any bridge or bridges which may be subject to their respective control and which the United States government may construct across said inland waterway. (1927, c. 44, s. 6; 1929, c. 4; c. 7, s. 2; 1957, c. 65, s. 11; 1973, c. 507, s. 5.)

§ 104-24. Concurrent jurisdiction over waterway.

The State of North Carolina retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this Chapter, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired for such inland waterway, or for the buildings or constructions thereon erected for the purposes of such inland waterway. (1927, c. 44, s. 7.)

§ 104-25. Lands conveyed to United States for inland waterway.

For the purpose of aiding in the construction of a proposed inland waterway by the United States from the City of Norfolk, in the State of Virginia, to Beaufort Inlet, in the State of North Carolina, the Secretary of State is hereby authorized to issue to the United States of America a grant to the land located within a distance of 1,000 feet on either side of the center of the said inland waterway, insofar as such land is subject to grant by the State of North Carolina, the said grant to issue upon a certificate furnished to the Secretary of State by the Secretary of War, or by any authorized officer of the corps of engineers of the United States army, or by any other authorized official, exercising control of the construction of the said waterway.

Wherever, in the construction of the said inland waterway, lands theretofore submerged shall be raised above the water by deposit of excavated material, the lands so formed shall become the property of the United States for a distance of 1,000 feet on either side of the center of such canal or channel, and the Secretary of State is hereby authorized to issue to the United States a grant to the land so formed within the distance above mentioned, the grant to issue upon a certificate furnished to the Secretary of State by some authorized official of the United States as above provided. (1913, c. 197; C.S., s. 7583; 1937, c. 445.)

§§ 104-26 through 104-30: Reserved for future codification purposes.

ARTICLE 3.

Jurisdiction over National Park System Lands.

§ 104-31. Governor authorized to cede jurisdiction.

(a) Whenever the United States shall desire to acquire legislative jurisdiction over any lands of the national park system within this State and shall make application for that purpose, the Governor is authorized to cede to the United States such measure of jurisdiction, not exceeding that requested by the United States, as he may deem proper over all or any part of such lands as to which a cession of legislative jurisdiction is requested, reserving to the State such concurrent or partial jurisdiction as he may deem proper.

(b) Said application on behalf of the United States shall state in particular the measure of jurisdiction desired and shall be accompanied by an accurate description of the lands of the national park system over which such jurisdiction is desired and information as to which of such lands are then owned or leased by the United States.

(c) Said cession of jurisdiction shall become effective when it is accepted on behalf of the United States, which acceptance shall be indicated, in writing upon the instrument of cession, by an authorized official of the United States and admitting it to record in the appropriate land records of the county in which lands are situated. (1979, c. 560, s. 1.)

§ 104-32. Jurisdiction reserved.

Notwithstanding any other provision of law, there are reserved over any lands as to which any legislative jurisdiction may be ceded to the United States pursuant to this Article, the State's entire legislative jurisdiction with respect to taxation and that of each State agency, county, city, political subdivision, and public district of the State; the State's entire legislative jurisdiction with respect to marriage, divorce, annulment, adoption, commitment of the mentally incompetent, and descent and distribution of property; concurrent power to enforce the criminal law; and the power to execute any process, civil or criminal, issued under the authority of the State; nor shall any persons residing on such lands be deprived of any civil or political rights, including the right of suffrage, by reason of the cession of such jurisdiction to the United States. (1979, c. 560, s. 1.)

CASE NOTES

Murder Prosecution. — Even assuming that discovery of the murder victim's corpse on federal lands was determinative on the issue of the location where her murder was effected, the state court nevertheless retained criminal jurisdiction over the murder trial. State v. Rice, 129 N.C. App. 715, 501 S.E.2d 665 (1998), cert. denied, 349 N.C. 374, 525 S.E.2d 189 (1998).

§ 104-33. Applicability of Article.

The provisions of this Article shall not apply to any lands owned by the United States and held in trust for the Eastern Band of Cherokee Indians, located in Jackson, Swain, Graham, or Cherokee Counties. (1979, c. 560, s. 2.)

Chapter 104A.

Degrees of Kinship.

Sec.
104A-1. Degrees of kinship; how computed.

§ 104A-1. Degrees of kinship; how computed.

In all cases where degrees of kinship are to be computed, the same shall be computed in accordance with the civil law rule, as follows:

(1) The degrees of lineal kinship of two persons is computed by counting one degree for each person in the line of ascent or descent, exclusive of the person from whom the computing begins; and

(2) The degree of collateral kinship of two persons is computed by commencing with one of the persons and ascending from him to a common ancestor, descending from that ancestor to the other person, and counting one degree for each person in the line of ascent and in the line of descent, exclusive of the person from whom the computation begins, the total to represent the degree of such kinship. (1951, c. 315; 1953, c. 1077, s. 2.)

Cross References. — As to meaning of "next of kin," see G.S. 41-6.1.

Legal Periodicals. — For comment on this Chapter, see 29 N.C.L. Rev. 351 (1951).

For brief comment on the 1953 amendment to this section, see 31 N.C.L. Rev. 375 (1953).

CASE NOTES

Applied in Pritchett v. Thompson, 28 N.C. App. 458, 221 S.E.2d 757 (1976); Conaway v. Polk, 453 F.3d 567, 2006 U.S. App. LEXIS 17304 (4th Cir. 2006).

Cited in State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

Chapter 104B.

Hurricanes or Other Acts of Nature.

Article 1.
In General.

Sec.
104B-1. Removal of property deposited by hurricane or other act of nature.

Article 2.
Zoning of Potential Flood Areas.

104B-2. [Repealed.]

Article 3.
Protection of Sand Dunes along Outer Banks.

Sec.
104B-3 through 104B-16. [Repealed.]

ARTICLE 1.

In General.

§ 104B-1. Removal of property deposited by hurricane or other act of nature.

Whenever the house, garage, building, or any part thereof, or other property of a person, firm or corporation shall be deposited on the land of another by any hurricane, tornado, tidal wave, flood or other act of nature and is not removed from said land within 30 days after the deposit, the owner of such land may notify in writing the owner of the house, garage, building, or other property of such deposit and may require owner to remove the property so deposited within 60 days after receipt of the notice. If the owner of the deposited property fails to remove it within 60 days after receipt of the notice, the owner of the land may remove the deposited property and destroy it or may use it as he sees fit without incurring liability to the owner of the deposited property, or may sell it and retain the proceeds for his own use; provided, the amount by which the proceeds of any such sale exceed the cost of removal and sale shall be paid to the owner of the deposited property or held for his account.

If the owner of the land is unable to notify the owner of the deposited property and, after diligent search, the owner of the deposited property cannot be located and notified, the owner of the land may, at any time after the expiration of 120 days from the date of the deposit of the property on his land, remove, use, or sell the deposited property in the same manner and under the same restrictions as provided above for removal, use, or sale after notice.

Sales made under this section may be either public or private sales. (1955, c. 643.)

ARTICLE 2.

Zoning of Potential Flood Areas.

§ 104B-2: Repealed by Session Laws 1965, c. 431, s. 1.

ARTICLE 3.

Protection of Sand Dunes along Outer Banks.

§§ 104B-3 through 104B-16: Repealed by Session Laws 1979, c. 141, s. 1.

Chapter 104C.

Atomic Energy, Radioactivity and Ionizing Radiation [Repealed and Recodified.].

Sec.
104C-1 through 104C-3. [Repealed.]
104C-4, 104C-5. [Recodified.]

§§ 104C-1 through 104C-3: Repealed by Session Laws 1971, c. 882, s. 6.

§§ 104C-4, 104C-5: Recodified as §§ 104E-1 to 104E-23.

Editor's Note. — This Chapter was rewritten by Session Laws 1975, c. 718, s. 1, effective July 1, 1975, and has been recodified as Chapter 104E. Session Laws 1975, c. 718, s. 8, had provided that s. 1 of the act would expire June 30, 1981. However, Session Laws 1975, c. 718, s. 8, was amended by Session Laws 1981, c. 393, so as to delete the provision for expiration of the act.

Chapter 104D.

Southern States Energy Compact.

Sec.
104D-1. Compact entered into; form of compact.
104D-2. Appointment of North Carolina members and alternate members of Southern States Energy Board.
104D-3. Submission of budgets of Board.
104D-4. Supplementary agreements ineffective until funds appropriated.
104D-5. Cooperation with Board.
104D-6. [Repealed.]

§ 104D-1. Compact entered into; form of compact.

The Southern States Energy Compact is hereby enacted into law and entered into with all other jurisdictions legally joining therein in the form substantially as follows:

SOUTHERN STATES ENERGY COMPACT

ARTICLE I. Policy and Purpose. The party states recognize that the proper employment and conservation of energy and employment of energy-related facilities, materials, and products, within the context of a responsible regard for the environment, can assist substantially in the industrialization of the South and the development of a balanced economy for the region. They also recognize that optimum benefit from and acquisition of energy resources and facilities require systematic encouragement, guidance, and assistance from the party states on a cooperative basis. It is the policy of the party states to undertake such cooperation on a continuing basis; it is the purpose of this compact to provide the instruments and framework for such a cooperative effort to improve the economy of the South and contribute to the individual and community well-being of the region's people.

ARTICLE II. The Board. (a) There is hereby created an agency of the party states to be known as the "Southern States Energy Board" (hereinafter called the Board). The Board shall be composed of three members from each party state, one of whom shall be appointed or designated in each state to represent the Governor, the State Senate and the State House of Representatives, respectively. Each member shall be designated or appointed in accordance with the law of the state which he represents and shall serve and be subject to removal in accordance with such law. Any member of the Board may provide for the discharge of his duties and the performance of his functions thereon, either for the duration of his membership or for any lesser period of time, by a deputy or assistant, if the laws of his state make specific provision therefor. The federal government may be represented without vote if provision is made by federal law for such representation.

(b) Each party state shall be entitled to one vote on the Board, to be determined by majority vote of each member or member's representative from the party state present and voting on any question. No action of the Board shall be binding unless taken at a meeting at which a majority of all party states are represented and unless a majority of the total number of votes on the Board are cast in favor thereof.

(c) The Board shall have a seal.

(d) The Board shall elect annually, from among its members, a chairman, a vice-chairman, and a treasurer. The Board shall appoint an Executive Director who shall serve at its pleasure and who shall also act as secretary, and who, together with the treasurer, shall be bonded in such amounts as the Board may require.

(e) The Executive Director, with the approval of the Board, shall appoint and remove or discharge such personnel as may be necessary for the performance of the Board's functions irrespective of the civil service, personnel or other merit system laws of any of the party states.

(f) The Board may establish and maintain, independently or in conjunction with any one or more of the party states, a suitable retirement system for its full-time employees. Employees of the Board shall be eligible for social security coverage in respect of old age and survivors insurance provided that the Board takes such steps as may be necessary pursuant to federal law to participate in such program of insurance as a governmental agency or unit. The Board may establish and maintain or participate in such additional programs of employee benefits as may be appropriate.

(g) The Board may borrow, accept or contract for the services of personnel from any state or the United States or any subdivision or agency thereof, from any interstate agency, or from any institution, person, firm or corporation.

(h) The Board may accept for any of its purposes and functions under this compact any and all donations, and grants of money, equipment, supplies, materials, and services (conditional or otherwise) from any state or the United States or any subdivision or agency thereof, or interstate agency, or from any institution, person, firm or corporation, and may receive, utilize, and dispose of the same.

(i) The Board may establish and maintain such facilities as may be necessary for the transaction of its business. The Board may acquire, hold, and convey real and personal property and any interest therein.

(j) The Board shall adopt bylaws, rules and regulations for the conduct of its business, and shall have the power to amend and rescind these bylaws, rules, and regulations. The Board shall publish its bylaws, rules, and regulations in convenient form and shall file a copy thereof, and shall also file a copy of any amendment thereto, with the appropriate agency or officer in each of the party states.

(k) The Board annually shall make to the Governor of each party state, a report covering the activities of the Board for the preceding year, and embodying such recommendations as may have been adopted by the Board, which report shall be transmitted to the legislature of said state. The Board may issue such additional reports as it may deem desirable.

ARTICLE III. Finances. (a) The Board shall submit to the executive head or designated officer or officers of each party state a budget of its estimated expenditures for such period as may be required by the laws of that jurisdiction for presentation to the legislature thereof.

(b) Each of the Board's budgets of estimated expenditures shall contain specific recommendations of the amount or amounts to be appropriated by each of the party states. One-half of the total amount of each budget of estimated expenditures shall be apportioned among the party states in equal shares; one quarter of each such budget shall be apportioned among the party states in accordance with the ratio of their populations to the total population of the entire group of party states based on the last decennial federal census; and one quarter of each such budget shall be apportioned among the party states on the basis of the relative average per capita income of the inhabitants in each of the party states based on the latest computations published by the federal census-taking agency. Subject to appropriations by their respective legislatures, the Board shall be provided with such funds by each of the party states as are necessary to provide the means of establishing and maintaining facilities, a staff of personnel, and such activities as may be necessary to fulfill the powers and duties imposed upon and entrusted to the Board.

(c) The Board may meet any of its obligations in whole or in part with funds available to it under Article II(h) of this Compact, provided that the Board takes specific action setting aside such funds prior to the incurring of any obligation to be met in whole or in part in this manner. Except where the Board makes use of funds available to it under Article II(h) hereof, the Board shall not incur any obligation prior to the allotment of funds by the party jurisdictions adequate to meet the same.

(d) The Board shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Board shall be subject to the audit and accounting procedures established under its bylaws. However, all receipts and disbursements of funds handled by the Board shall be audited yearly by a qualified public accountant and the report of the audit shall be included in and become a part of the annual report of the Board.

(e) The accounts of the Board shall be open at any reasonable time for inspection.

ARTICLE IV. Advisory Committees. The Board may establish such advisory and technical committees as it may deem necessary, membership on which to include but not be limited to private citizens, expert and lay personnel, representatives of industry, labor, commerce, agriculture, civic associations, medicine, education, voluntary health agencies, and officials of local, state and federal government, and may cooperate with and use the services of any such committees and the organizations which they represent in furthering any of its activities under this Compact.

ARTICLE V. Powers. The Board shall have the power to:

(1) Ascertain and analyze on a continuing basis the position of the South with respect to energy, energy-related industries, and environmental concerns.

(2) Encourage the development, conservation and responsible use of energy and energy-related facilities, installations, and products as part of a balanced economy and healthy environment.

(3) Collect, correlate, and disseminate information relating to civilian uses of energy and energy-related materials and products.

(4) Conduct, or cooperate in conducting, programs of training for state and local personnel engaged in any aspect of:

   a. Energy, environment, and application of energy, environmental, and related concerns to industry, medicine, or education or the promotion or regulation thereof.

   b. The formulation or administration of measures designed to promote safety in any matter related to the development, use or disposal of energy and energy-related materials, products, installations, or wastes.

(5) Organize and conduct, or assist and cooperate in organizing and conducting, demonstrations of energy product, material, or equipment use and disposal and of proper techniques or processes for the application of energy resources to the civilian economy or general welfare.

(6) Undertake such nonregulatory functions with respect to sources of radiation as may promote the economic development and general welfare of the region.

(7) Study industrial, health, safety, and other standards, laws, codes, rules, regulations, and administrative practices in or related to energy and environmental fields.

(8) Recommend such changes in, or amendments or additions to, the laws, codes, rules, regulations, administrative procedures and practices or ordinances of the party states in any of the fields of its interest and competence as in its judgment may be appropriate. Any such recommendation shall be made through the appropriate state agency with

due consideration of the desirability of uniformity but shall also give appropriate weight to any special circumstances which may justify variations to meet local conditions.

(9) Prepare, publish and distribute, with or without charge, such reports, bulletins, newsletters or other material as it deems appropriate.

(10) Cooperate with the United States Department of Energy or any agency successor thereto, any other officer or agency of the United States, and any other governmental unit or agency or officer thereof, and with any private persons or agencies in any of the fields of its interests.

(11) Act as licensee of the United States Government or any party state with respect to the conduct of any research activity requiring such license and operate such research facility or undertake any program pursuant thereto.

(12)a. Ascertain from time to time such methods, practices, circumstances, and conditions as may bring about the prevention and control of energy and environmental incidents in the area comprising the party states, to coordinate the environmental and other energy-related incident prevention and control plans and the work relating thereto of the appropriate agencies of the party states and to facilitate the rendering of aid by the party states to each other in coping with energy and environmental incidents.

b. The Board may formulate and, in accordance with need from time to time, revise a regional plan or regional plans for coping with energy and environmental incidents within the territory of the party states as a whole or within any subregion or subregions of the geographic area covered by this Compact.

ARTICLE VI. Supplementary Agreements. (a) To the extent that the Board has not undertaken an activity or project which would be within its power under the provisions of Article V of this Compact, any two or more of the party states (acting by their duly constituted administrative officials) may enter into supplementary agreements for the undertaking and continuance of such an activity or project. Any such agreement shall specify its purpose or purposes; its duration and the procedure for termination thereof or withdrawal therefrom; the method of financing and allocating the costs of the activity or project; and such other matters as may be necessary or appropriate. No such supplementary agreement entered into pursuant to this Article shall become effective prior to its submission to and approval by the Board. The Board shall give such approval unless it finds that the supplementary agreement or the activity or project contemplated thereby is inconsistent with the provisions of this Compact or a program or activity conducted by or participated in by the Board.

(b) Unless all of the party states participate in a supplementary agreement, any cost or costs thereof shall be borne separately by the states party thereto. However, the Board may administer or otherwise assist in the operation of any supplementary agreement.

(c) No party to a supplementary agreement entered into pursuant to this Article shall be relieved thereby of any obligation or duty assumed by said party state under or pursuant to this Compact, except that timely and proper performance of such obligation or duty by means of the supplementary agreement may be offered as performance pursuant to the Compact.

ARTICLE VII. Other Laws and Relationships. Nothing in this Compact shall be construed to:

(1) Permit or require any person or other entity to avoid or refuse compliance with any law, rule, regulation, order or ordinance of a party state or subdivision thereof now or hereafter made, enacted or in force.

(2) Limit, diminish or otherwise impair jurisdiction exercised by the United States Department of Energy, any agency successor thereto, or any other federal department, agency or officer pursuant to and in conformity with any valid and operative act of Congress.

(3) Alter the relations between and respective internal responsibilities of the government of a party state and its subdivisions.

(4) Permit or authorize the Board to exercise any regulatory authority or to own or operate any nuclear reactor for the generation of electric energy; nor shall the Board own or operate any facility or installation for industrial or commercial purposes.

ARTICLE VIII. Eligible Parties, Entry into Force and Withdrawal. (a) Any or all of the states of Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia, the Commonwealth of Puerto Rico, and the United States Virgin Islands shall be eligible to become party to this Compact.

(b) As to any eligible party state, this Compact shall become effective when its legislature shall have enacted the same into law: Provided that it shall not become initially effective until enacted into law by seven states.

(c) Any party state may withdraw from this Compact by enacting a statute repealing the same, but no such withdrawal shall become effective until the Governor of the withdrawing state shall have sent formal notice in writing to the Governor of each other party state informing said Governors of the action of the legislature in repealing the Compact and declaring an intention to withdraw.

ARTICLE IX. Severability and Construction. The provisions of this Compact and of any supplementary agreement entered into hereunder shall be (severable) and if any phrase, clause, sentence or provision of this Compact or such supplementary agreement is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this Compact or such supplementary agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this Compact or any supplementary agreement entered into hereunder shall be held contrary to the constitution of any state participating therein, the Compact or such supplementary agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. The provisions of this Compact and of any supplementary agreement entered into pursuant thereto shall be liberally construed to effectuate the purposes thereof. (1965, c. 858, s. 1; 1983, c. 282, s. 1.)

State Government Reorganization. — The administration of the Southern Interstate Nuclear Compact (see now the Southern States Energy Compact) was transferred to the Department of Administration by former G.S. 143A-95, enacted by Session Laws 1971, c. 864. See also former G.S. 143B-370, enacted by Session Laws 1975, c. 879, s. 6.

§ 104D-2. Appointment of North Carolina members and alternate members of Southern States Energy Board.

(a) North Carolina members of the Southern States Energy Board shall be appointed as follows:

(1) One member to be appointed by the Governor.

(2) One member of the House of Representatives to be appointed by the Speaker of the House of Representatives.

(3) One member of the Senate to be appointed by the President Pro Tempore of the Senate.

(b) Members shall serve at the pleasure of the original appointing authority and until their successors are appointed.

(c) Each appointing authority is authorized to appoint an alternate member who may serve at and for such time as the regular member shall designate and shall have the same power and authority as the regular member when so serving. (1965, c. 858, s. 2; 1983, c. 282, s. 2; 1991, c. 739, s. 9.)

§ 104D-3. Submission of budgets of Board.

Pursuant to Article III(a) of the compact, the Board shall submit its budgets of estimated expenditures to the Director of the Budget for presentation to the General Assembly. (1965, c. 858, s. 3.)

§ 104D-4. Supplementary agreements ineffective until funds appropriated.

Any supplementary agreement entered into pursuant to Article VI of the compact and requiring the expenditure of funds or the assumption of an obligation to expend funds in addition to those already appropriated shall not become effective as to this State until the required funds therefor are appropriated by the General Assembly. (1965, c. 858, s. 4.)

§ 104D-5. Cooperation with Board.

The departments, institutions and agencies of this State and its subdivisions are hereby authorized to cooperate with the Board in the furtherance of any of its activities pursuant to the Compact. (1965, c. 858, s. 5.)

§ 104D-6: Repealed by Session Laws 1983, c. 282, s. 3.

Chapter 104E.

North Carolina Radiation Protection Act.

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§ 104E-1. Title.

This Chapter shall be known and may be cited as the "North Carolina Radiation Protection Act." (1975, c. 718, s. 1.)

Editor's Note. — This Chapter is Chapter 104C as rewritten by Session Laws 1975, c. 718, s. 1, effective July 1, 1975, and recodified. Session Laws 1975, c. 718, s. 8, provided that s. 1 of the act would expire June 30, 1981. Session Laws 1975, c. 718, s. 8, was amended by Session Laws 1981, c. 393, so as to delete the provision for expiration of the act.

The provision of Session Laws 1977, c. 712, as amended, tentatively repealing this Chapter effective July 1, 1983, was itself repealed by Session Laws 1981, c. 932, s. 1.

Session Laws 1987, c. 850, which amended many of the sections of this Chapter, provided in s. 27(a) that c. 850 would not be construed as a revenue bill within the meaning of N.C. Const., Art. II, § 23. However, Session Laws 1987 (Reg. Sess., 1988), c. 993, s. 23, repealed Session Laws 1987, c. 850, s. 27(a).

§ 104E-2. Scope.

Except as otherwise specifically provided, this Chapter applies to all persons who receive, possess, use, transfer, own or acquire any source of radiation within the State of North Carolina; provided, however, that nothing in this Chapter shall apply to any person to the extent such person is subject to regulation by the United States Nuclear Regulatory Commission or its successors. (1975, c. 718, s. 1.)

§ 104E-3. Declaration of policy.

It is the policy of the State of North Carolina in furtherance of its responsibility to protect the public health and safety:

(1) To institute and maintain a program to permit development and utilization of sources of radiation for purposes consistent with the health and safety of the public; and

(2) To prevent any associated harmful effects of radiation upon the public through the institution and maintenance of a regulatory program for all sources of radiation, providing for:
  a. A single, effective system of regulation within the State;
  b. A system consonant insofar as possible with those of other states; and
  c. Compatibility with the standards and regulatory programs of the federal government for by-product, source and special nuclear materials. (1975, c. 718, s. 1.)

§ 104E-4. Purpose.

It is the purpose of this Chapter to effectuate the policies set forth in G.S. 104E-3 by providing for:

(1) A program of effective regulation of sources of radiation for the protection of the occupational and public health and safety;

(2) A program to promote an orderly regulatory pattern within the State, among the states and between the federal government and the State and facilitate intergovernmental cooperation with respect to use and regulation of sources of radiation to the end that duplication of regulation may be minimized; and

(3) A program to establish procedures for assumption and performance of certain regulatory responsibilities with respect to sources of radiation. (1975, c. 718, s. 1.)

§ 104E-5. Definitions.

Unless a different meaning is required by the context, the following terms as used in this Chapter shall have the meanings hereinafter respectively ascribed to them:

(1) "Agreement materials" means those materials licensed by the State under agreement with the United States Nuclear Regulatory Commission and which include by-product, source or special nuclear materials in a quantity not sufficient to form a critical mass, as defined by the Atomic Energy Act of 1954 as amended.

(2) "Agreement state" means any state which has consummated an agreement with the United States Nuclear Regulatory Commission under the authority of section 274 of the Atomic Energy Act of 1954 as amended, as authorized by compatible state legislation providing for acceptance by that state of licensing authority for agreement materials and the discontinuance of such licensing activities by the United States Nuclear Regulatory Commission.

(3) "Atomic energy" means all forms of energy released in the course of nuclear fission or nuclear fusion or other atomic transformations.

(4) "By-product material" means any radioactive material, except special nuclear material, yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material.

(5) "Commission" means the Radiation Protection Commission.

(6) "Department" means the State Department of Environment and Natural Resources.

(7) "Emergency" means any condition existing outside the bounds of nuclear operating sites owned or licensed by a federal agency, and further any condition existing within or outside of the jurisdictional confines of a facility licensed by the Department and arising from the presence of by-product material, source material, special nuclear materials, or other radioactive materials, which is endangering or could reasonably be expected to endanger the health and safety of the public, or to contaminate the environment.

(7a) "Engineered barrier" means a man-made structure or device that is intended to improve a disposal facility's ability to meet (i) the performance objectives of Subpart C, Title 10, Code of Federal Regulations Part 61 in effect on 1 January 1987, (ii) other requirements set out in G.S. 104E-25, and (iii) requirements of rules adopted by the Commission under this Chapter.

(8) "General license" means a license effective pursuant to regulations promulgated under the provisions of this Chapter without the filing of an application to transfer, acquire, own, possess, or use quantities of, or devices or equipment utilizing by-product, source, special nuclear materials, or other radioactive materials occurring naturally or produced artificially.

(9) "Ionizing radiation" means gamma rays and x-rays, alpha and beta particles, high speed electrons, protons, neutrons, and other nuclear particles; but not sound or radio waves, or visible, infrared, or ultraviolet light.

(9a) "Low-level radioactive waste" means low-level radioactive waste as defined in the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240, 99 Stat. 1842, 42 U.S.C. 2021b et seq. and other waste, including waste containing naturally occurring and accelerator produced radioactive material, which is not regulated by the United States Nuclear Regulatory Commission or other agency of the federal government and which is determined to be low-level radioactive waste by the North Carolina Radiation Protection Commission.

(9b) "Low-level radioactive waste facility" means a facility for the storage, collection, processing, treatment, recycling, recovery, or disposal of low-level radioactive waste.

(9c) "Low-level radioactive waste disposal facility" means any low-level radioactive waste facility or any portion of such facility, including land, buildings, and equipment, which is used or intended to be used for the disposal of low-level radioactive waste on or in land in accordance with rules promulgated under this Chapter.

(10) "Nonionizing radiation" means radiation in any portion of the electromagnetic spectrum not defined as ionizing radiation, including, but not limited to, such sources as laser, maser or microwave devices.

(11) "Person" means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, agency, political subdivision of this State, any other state or political subdivision or agency thereof, and any legal successor, representative, agent, or agency of the foregoing, other than the United States Nuclear Regulatory Commission, or any successor thereto, and other

than federal government agencies licensed by the United States Nuclear Regulatory Commission, or any successor thereto.

(12) "Radiation" means gamma rays and x-rays, alpha and beta particles, high speed electrons, protons, neutrons, and other nuclear particles, and electromagnetic radiation consisting of associated and interacting electric and magnetic waves including those with frequencies between three times 10 to the eighth power cycles per second and three times 10 to the twenty-fourth power cycles per second and wavelengths between one times 10 to the minus fourteenth power centimeters and 100 centimeters.

(13) "Radiation machine" means any device designed to produce or which produces radiation or nuclear particles when the associated control devices of the machine are operated.

(14) "Radioactive material" means any solid, liquid, or gas which emits ionizing radiation spontaneously.

(14a) "Shallow land burial" means disposal of low-level radioactive waste in subsurface trenches without the additional confinement of the waste as described in G.S. 104E-25.

(14b) "Secretary" means the Secretary of Environment and Natural Resources.

(15) "Source material" means (i) uranium, thorium, or any other material which the Department declares to be source material after the United States Nuclear Regulatory Commission, or any successor thereto has determined the material to be such; or (ii) ores containing one or more of the foregoing materials, in such concentration as the Department declares to be source material after the United States Nuclear Regulatory Commission, or any successor thereto, has determined the material in such concentration to be source material.

(16) "Special nuclear material" means (i) plutonium, uranium 233, uranium 235, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Department declares to be special nuclear material after the United States Nuclear Regulatory Commission, or any successor thereto, has determined the material to be such, but does not include source material; or (ii) any material artificially enriched by any of the foregoing, but does not include source material.

(17) "Specific license" means a license, issued after application, to use, manufacture, produce, transfer, receive, acquire, own or process quantities of, or devices or equipment utilizing by-product, source, special nuclear materials, or other radioactive materials occurring naturally or produced artificially. Nothing in this Chapter shall require the licensing of individual natural persons involved in the use of radiation machines or radioactive materials for medical diagnosis or treatment.

(18) Repealed by Session Laws 1987, c. 850, s. 3. (1975, c. 718, s. 1; 1981, c. 704, s. 8; 1987, c. 633, ss. 1-4; c. 850, s. 3; 1989, c. 727, s. 219(16); 1993, c. 501, s. 2.1; 1995, c. 504, s. 4; 1997-443, s. 11A.119(a).)

CASE NOTES

Cited in Twitty v. State, 85 N.C. App. 42, 354 S.E.2d 296 (1987).

§ 104E-6. Designation of State radiation protection agency.

The Department is hereby designated the State agency to administer a statewide radiation protection program consistent with the provisions of this Chapter. (1975, c. 718, s. 1.)

§ 104E-6.1. Conveyance of land used for low-level radioactive waste disposal facility to State.

(a) No land may be used as a low-level radioactive waste disposal facility until fee simple title to the land has been conveyed to the State of North Carolina. In consideration for such conveyance, the State shall enter into a lease agreement with the grantor for a term equal to the estimated life of the facility in which the State will be the lessor and the grantor the lessee. Such lease agreement shall specify that for an annual rent of fifty dollars ($50.00), the lessee shall be allowed to use the land for the development and operation of a low-level radioactive waste disposal facility. Such lease agreement shall provide that the lessor or any person authorized by the lessor shall have at all times the right to enter without a search warrant or permission of the lessee upon any and all parts of the premises for monitoring, inspection and all other purposes necessary to carry out the provisions of Chapter 104E. The lessee shall remain fully liable for all damages, losses, personal injury or property damage which may result or arise out of the lessee's operation of the facility, and for compliance with regulatory requirements concerning insurance, bonding for closure and post-closure costs, monitoring and other financial or health and safety requirements as required by applicable law and regulations. The State, as lessor, shall be immune from liability except as otherwise provided by statute. The lease shall be transferrable with the written consent of the lessor, which consent will not be unreasonably withheld. In the case of such a transfer of the lease, the transferee shall be subject to all terms and conditions that the State deems necessary to ensure compliance with applicable laws and regulations. If the lessee or any successor in interest fails in any material respect to comply with any applicable law, regulation, or license condition, or with any term or condition of the lease, the State may terminate the lease after giving the lessee written notice specifically describing the failure to comply and upon providing the lessee a reasonable time to comply. If the lessee does not effect compliance within the reasonable time allowed, the State may reenter and take possession of the premises.

(b) Notwithstanding the termination of the lease by either the lessee or the lessor for any reason, the lessee shall remain liable for, and be obligated to perform all acts necessary or required by law, regulation, license conditions or the lease for the permanent closure of the site until the site has either been permanently closed or until a substitute operator has been secured and assumed the obligations of the lessee.

(c) In the event of changes in laws or regulations applicable to the facility which make continued operation by the lessee impossible or economically infeasible, the lessee shall have the right to terminate the lease upon giving the State reasonable notice of not less than six months, in which case the lessor shall have the right to secure a substitute lessee and operator.

(d) In the event of termination of the lease by the lessor as provided in subsection (a) of this section, or by the lessee as provided in subsection (c) of this section, the lessee shall be paid the fair market value of any improvements made to the leased premises less the costs to the lessor resulting from termination of the lease and securing a substituted lessee and operator; provided, that the lessor shall have no obligation to secure a substitute lessee or operator and may require the lessee to permanently close the facility. (1981, c. 704, s. 9; 1987, c. 633, s. 5; 1989 (Reg. Sess., 1990), c. 1004, s. 5; 2007-495, s. 9.)

Effect of Amendments. — Session Laws 2007-495, s. 9, effective August 30, 2007, substituted "license" for "permit" preceding "condition(s)" in subsections (a) and (b).

§ 104E-6.2. Local ordinances prohibiting low-level radioactive waste facilities invalid; petition to preempt local ordinance.

(a) It is the intent of the General Assembly to maintain a uniform system for the management of low-level radioactive waste and to place limitations upon the exercise by all units of local government in North Carolina of the power to regulate the management of low-level radioactive waste by means of special, local, or private acts or resolutions, ordinances, property restrictions, zoning regulations, or otherwise. Notwithstanding any authority granted to counties, municipalities, or other local authorities to adopt local ordinances, including but not limited to those imposing taxes, fees, or charges or regulating health, environment, or land use, any local ordinance that prohibits or has the effect of prohibiting the establishment or operation of a low-level radioactive waste facility that the Secretary has preempted pursuant to subsections (b) through (f) of this section, shall be invalid to the extent necessary to effectuate the purposes of this Chapter. To this end, all provisions of special, local, or private acts or resolutions are repealed that:

(1) Prohibit the transportation, treatment, storage, or disposal of low-level radioactive waste within any county, city, or other political subdivision.

(2) Prohibit the siting of a low-level radioactive waste facility within any county, city, or other political subdivision.

(3) Place any restriction or condition not placed by this Chapter upon the transportation, treatment, storage, or disposal of low-level radioactive waste, or upon the siting of a low-level radioactive waste facility within any county, city, or other political subdivision.

(4) In any manner are in conflict or inconsistent with the provisions of this Chapter.

(a1) No special, local, or private acts or resolutions enacted or taking effect hereafter may be construed to modify, amend, or repeal any portion of this Chapter unless it expressly provides for such by specific references to the appropriate section of this Chapter. Further to this end, all provisions of local ordinances, including those regulating land use, adopted by counties, municipalities, or other local authorities that prohibit or have the effect of prohibiting the establishment or operation of a low-level radioactive waste facility are invalidated to the extent preempted by the Secretary pursuant to this Section.

(b) When a low-level radioactive waste facility would be prevented from construction or operation by a county, municipal, or other local ordinance, the operator of the proposed facility may petition the Secretary to review the matter. After receipt of a petition, the Secretary shall hold a hearing in accordance with the procedures in subsection (c) of this section and shall determine whether or to what extent to preempt the local ordinance to allow for the establishment and operation of the facility.

(c) When a petition described in subsection (b) of this section has been filed with the Secretary, the Secretary shall hold a public hearing to consider the petition. The public hearing shall be held in the affected locality within 60 days after receipt of the petition by the Secretary. The Secretary shall give notice of the public hearing by:

(1) Publication in a newspaper or newspapers having general circulation in the county or counties where the facility is or is to be located or operated, once a week for three consecutive weeks, the first notice appearing at least 30 days prior to the scheduled date of the hearing; and

(2) First class mail to persons who have requested notice. The Secretary shall maintain a mailing list of persons who request notice in advance of the hearing pursuant to this section. Notice by mail shall be complete upon deposit of a copy of the notice in a post-paid wrapper addressed to the person to be notified at the address that appears on the mailing list maintained by the Secretary, in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(c1) Any interested person may appear before the Secretary at the hearing to offer testimony. In addition to testimony before the Secretary, any interested person may submit written evidence to the Secretary for the Secretary's consideration. At least 20 days shall be allowed for receipt of written comment following the hearing.

(d) The Secretary shall determine whether or to what extent to preempt local ordinances so as to allow the establishment and operation of the facility no later than 60 days after conclusion of the hearing. The Secretary shall preempt a local ordinance only if the Secretary makes all five of the following findings:

(1) That there is a local ordinance that would prohibit or have the effect of prohibiting the establishment or operation of a low-level radioactive waste facility.

(2) That the proposed facility is needed in order to establish adequate capability to meet the current or projected low-level radioactive waste management needs of this State or to comply with the terms of any interstate agreement for the management of low-level radioactive waste to which the State is a party and therefore serves the interests of the citizens of the State as a whole.

(3) That all legally required State and federal permits or approvals have been issued by the appropriate State and federal agencies or that all State and federal permit requirements have been satisfied and that the permits or approvals have been denied or withheld only because of the local ordinance.

(4) That local citizens and elected officials have had adequate opportunity to participate in the siting process.

(5) That the construction and operation of the facility will not pose an unreasonable health or environmental risk to the surrounding locality and that the facility operator has taken or consented to take reasonable measures to avoid or manage foreseeable risks and to comply to the maximum feasible extent with applicable local ordinances.

(d1) If the Secretary does not make all five findings set out above, the Secretary shall not preempt the challenged local ordinance. The Secretary's decision shall be in writing and shall identify the evidence submitted to the Secretary plus any additional evidence used in arriving at the decision.

(e) The decision of the Secretary shall be final unless a party to the action files a written appeal under Article 4 of Chapter 150B of the General Statutes, as modified by G.S. 7A-29 and this section, within 30 days of the date of the decision. The record on appeal shall consist of all materials and information submitted to or considered by the Secretary, the Secretary's written decision, a complete transcript of the hearing, all written material presented to the Secretary regarding the location of the facility, the specific findings required by subsection (d) of this section, and any minority positions on the specific findings required by subsection (d) of this section. The scope of judicial review shall be that the court may affirm the decision of the Secretary, or may remand the matter for further proceedings, or may reverse or modify the decision if the substantial rights of the parties may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;
(2) In excess of the statutory authority or jurisdiction of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a) or G.S. 150B-30 in view of the entire record as submitted; or
(6) Arbitrary or capricious.

(e1) If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become part of the record, the reasons for the reversal or modification.

(f) In computing any period of time prescribed or allowed by this procedure, the provisions of Rule 6(a) of the Rules of Civil Procedure, G.S. 1A-1, shall apply. (1981, c. 704, s. 9; 1987, c. 633, s. 6; c. 850, s. 4; 1987 (Reg. Sess., 1988), c. 993, s. 24; c. 1082, s. 10; c. 1100, s. 40.5; 1989, c. 168, s. 14; 1993, c. 501, s. 3; 2001-474, s. 16.)

§ 104E-7. Radiation Protection Commission — Creation and powers.

(a) There is hereby created the North Carolina Radiation Protection Commission of the Department of Environment and Natural Resources with the power to promulgate rules and regulations to be followed in the administration of a radiation protection program. All rules and regulations for radiation protection that were adopted by the Commission for Public Health and are not inconsistent with the provisions of this Chapter shall remain in full force and effect unless and until repealed or superseded by action of the Radiation Protection Commission. The Radiation Protection Commission is authorized:

(1) To advise the Department in the development of comprehensive policies and programs for the evaluation, determination, and reduction of hazards associated with the use of radiation;
(2) To adopt, promulgate, amend and repeal such rules, regulations and standards relating to the manufacture, production, transportation, use, handling, servicing, installation, storage, sale, lease, or other disposition of radioactive material and radiation machines as may be necessary to carry out the policy, purpose and provisions of this Chapter. To this end, the Commission is authorized to require licensing or registration of all persons who manufacture, produce, transport, use, handle, service, install, store, sell, lease, or otherwise dispose of radioactive material and radiation machines, as the Commission deems necessary to provide an adequate protection and supervisory program: provided, that prior to adoption of any regulation or standard, or amendment or repeal thereof, the Commission shall afford interested parties the opportunity, at a public hearing, as provided in G.S. 104E-13, to submit data or views orally or in writing. The recommendations of nationally recognized bodies in the field of radiation protection shall be taken into consideration in such standards relative to permissible dosage of radiation;
(3) To require all sources of ionizing radiation to be shielded, transported, handled, used, stored, or disposed of in such a manner to provide compliance with the provisions of this Chapter and rules, regulations and standards adopted hereunder;

(4) To require, on prescribed forms furnished by the Department, registration, periodic reregistration, licensing, or periodic relicensing of persons to use, manufacture, produce, transport, transfer, install, service, receive, acquire, own, or possess radiation machines and other sources of radiation;

(5) To exempt certain sources of radiation or kinds of uses or users from the licensing or registration requirements set forth in this Chapter when the Commission determines that the exemption of such sources of radiation or kinds of uses or users will not constitute a significant risk to the health and safety of the public;

(6) To promulgate rules and regulations pursuant to this Chapter which may provide for recognition of other state and federal licenses as the Commission shall deem desirable, subject to such registration requirements as it may prescribe; and exercise all incidental powers necessary to carry out the provisions of this Chapter;

(7) To provide by rule and regulation for an electronic product safety program to protect the public health and safety, which program may authorize regulation and inspection of sources of nonionizing radiation throughout the State. The product safety program may include the establishment of minimum qualifications for the operators of these products or sources.

(8) To adopt, amend, repeal or promulgate such rules, regulations, and standards relating to the nonradioactive, toxic and hazardous aspects of radioactive waste disposal, as may be necessary to protect the public health and safety.

(9) To adopt regulations establishing financial responsibility requirements for maintenance, operation and long-term care of low-level radioactive waste facilities, including insurance during the operation of the facility and adequate assurance of availability of funds for facility closure and post-closure monitoring and corrective measures.

(10) To adopt rules which exempt a generator of low-level radioactive waste who operates a low-level radioactive waste facility solely for the management of wastes he produces, from any requirement, made applicable by this Chapter or rules adopted pursuant to this Chapter to low-level radioactive waste facilities generally where, because of the low volume or activity of the wastes involved, such exemption would not endanger the public health or safety, or the environment.

(b) No license for a low-level radioactive waste facility that would accept low-level radioactive waste from the public, or from another person for a fee, shall be issued other than for a facility authorized by the General Assembly. (1975, c. 718, s. 1; 1979, c. 694, s. 3; 1981, c. 704, s. 10; 1987, c. 850, s. 5; 1989, c. 727, s. 219(17); 1991, c. 735, s. 3; 1997-443, s. 11A.119(a); 2001-474, s. 2; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in subsection (a).

§ 104E-8. Radiation Protection Commission — Members; selections; removal; compensation; quorum; services.

(a) The Commission shall consist of 11 voting public members and 10 nonvoting ex officio members. The 11 voting public members of the Commission shall be appointed by the Governor as follows:

(1) One member who shall be actively involved in the field of environmental protection;

(2) One member who shall be an employee of one of the licensed public utilities involved in the generation of power by atomic energy;
(3) One member who shall have experience in the field of atomic energy other than power generation;
(4) One member who shall be a scientist or engineer from the faculty of one of the institutions of higher learning in the State;
(5) One member who shall have recognized knowledge in the field of radiation and its biological effects from the North Carolina Medical Society;
(6) One member who shall have recognized knowledge in the field of radiation and its biological effects from the North Carolina Dental Society;
(7) One member who shall have recognized knowledge in the field of radiation and its biological effects from the State at large;
(8) One member who shall have recognized knowledge in the field of radiation and its biological effects and who shall be a practicing hospital administrator from the North Carolina Hospital Association;
(9) One member who shall have recognized knowledge in the field of radiation and its biological effects from the North Carolina Chiropractic Association;
(10) One member who shall have recognized knowledge in the clinical application of radiation, shall be a practicing radiologic technologist from the North Carolina Society of Radiologic Technologists, and shall be certified by the American Registry of Radiologic Technologists;
(11) One member who shall have recognized knowledge in the clinical application of radiation and shall be a practicing podiatrist licensed by the North Carolina State Board of Podiatry Examiners.

(b) Public members so appointed shall serve terms of office of four years. Four of the initial members shall be appointed for two years, three members for three years, and three members for four years. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death or disability of a public member shall be for the balance of the unexpired term. At the expiration of each public member's term, the Governor shall reappoint or replace the member with a member of like qualifications. At its first meeting on or after July first of each year, the Commission shall designate by election one of its public members as chairman and one of its public members as vice-chairman to serve through June thirtieth of the following year.

(c) The 10 ex officio members shall be appointed by the Governor, shall be members or employees of the following State agencies or their successors, and shall serve at the Governor's pleasure:
(1) The Utilities Commission.
(2) The Commission for Public Health.
(3) The Environmental Management Commission.
(4) The Board of Transportation.
(5) The Division of Emergency Management of the Department of Crime Control and Public Safety.
(6) The Division of Environmental Health of the Department.
(7) The Department of Labor.
(8) The Industrial Commission.
(9) The Department of Insurance.
(10) The Medical Care Commission.

(d) The Governor shall have the power to remove any member from the Commission for misfeasance, malfeasance, or nonfeasance in accordance with G.S. 143B-13.

(e) The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(f) A majority of the public members of the Commission shall constitute a quorum for the transaction of business.

(g) All clerical and other services required by the Commission shall be supplied by the Secretary. (1975, c. 718, s. 1; 1989, c. 727, s. 219(18); 1989 (Reg. Sess., 1990), c. 1004, ss. 19(b), 41; 1991, c. 342, ss. 2, 3; 2002-70, s. 2; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in subdivision (c)(2).

§ 104E-9. Powers and functions of Department of Environment and Natural Resources.

(a) The Department of Environment and Natural Resources is authorized:

(1) To advise, consult and cooperate with other public agencies and with affected groups and industries.

(2) To encourage, participate in, or conduct studies, investigations, public hearings, training, research, and demonstrations relating to the control of sources of radiation, the measurement of radiation, the effect upon public health and safety of exposure to radiation and related problems.

(3) To require the submission of plans, specifications, and reports for new construction and material alterations on (i) the design and protective shielding of installations for radioactive material and radiation machines and (ii) systems for the disposal of radioactive waste materials, for the determination of any radiation hazard and may render opinions, approve or disapprove such plans and specifications.

(4) To collect and disseminate information relating to the sources of radiation, including but not limited to: (i) maintenance of a record of all license applications, issuances, denials, amendments, transfers, renewals, modifications, suspensions, and revocations; and (ii) maintenance of a record of registrants and licensees possessing sources of radiation requiring registration or licensure under the provisions of this Chapter, and regulations hereunder, and any administrative or judicial action pertaining thereto; and to develop and implement a responsible data management program for the purpose of collecting and analyzing statistical information necessary to protect the public health and safety. The Department may refuse to make public dissemination of information relating to the source of radiation within this State after the Department first determines that the disclosure of such information will contravene the stated policy and purposes of this Chapter and such disclosure would be against the health, welfare and safety of the public.

(5) To respond to any emergency which involves possible or actual release of radioactive material; and to perform or supervise decontamination and otherwise protect the public health and safety in any manner deemed necessary. This section does not in any way alter or change the provisions of Chapter 166 of the North Carolina General Statutes concerning response during an emergency by the Department of Military and Veterans Affairs or its successor.

(6) To develop and maintain a statewide environmental radiation program for monitoring the radioactivity levels in air, water, soil, vegetation, animal life, milk, and food as necessary to ensure protection of the public and the environment from radiation hazards.

(7) To implement the provisions of this Chapter and the regulations duly promulgated under the Chapter.

(8) To establish annual fees for activities under this Chapter based on actual administrative costs to be applied to training, enforcement, and inspection pursuant to the provisions of this Chapter and to charge and collect fees from operators and users of low-level radioactive waste facilities pursuant to the provisions of this Chapter.

(9) To enter upon any lands and structures upon lands to make surveys, borings, soundings, and examinations as may be necessary to determine the suitability of a site for a low-level radioactive waste facility or low-level radioactive disposal facility. The Department shall give 30 days' notice of the intended entry authorized by this section in the manner prescribed for service of process by G.S. 1A-1, Rule 4. Entry under this section shall not be deemed a trespass or taking; provided, however, that the Department shall make reimbursement for any damage to such land or structures caused by such activities.

(10) To encourage research and development and disseminate information on state-of-the-art means of handling and disposing of low-level radioactive waste.

(11) To promote public education and public involvement in the decision-making process for the siting and permitting of proposed low-level radioactive waste facilities. The Department shall assist localities in which facilities are proposed in collecting and receiving information relating to the suitability of the proposed site. At the request of a local government in which facilities are proposed, the Department shall direct the appropriate agencies of State government to develop such relevant data as that locality shall reasonably request.

(b) The Division of Environmental Health of the Department shall develop a training program for tanning equipment operators that meets the training rules adopted by the Commission. If the training program is provided by the Department, the Department may charge each person trained a reasonable fee to recover the actual cost of the training program. (1975, c. 718, s. 1; 1979, c. 694, s. 4; 1981, c. 704, s. 10.1; 1987, c. 633, s. 7; 1987 (Reg. Sess., 1988), c. 993, s. 25; 1989, c. 727, s. 219(19); 1991, c. 735, s. 2; 1993, c. 501, s. 4; 1995, c. 509, s. 49; 1997-443, s. 11A.119(a); 2001-474, s. 3; 2002-70, s. 3.)

Editor's Note. — Chapter 166, referred to in subdivision (a)(5), was repealed by Session Laws 1977, c. 848, s. 1. See now G.S. 166A-1 et seq.

The text of this section, as it read subsequent to its amendment by Session Laws 1989, c. 727, s. 219(19), was designated as subsection (a), and the first and last sentences of Session Laws 1991, c. 735, s. 2 were codified as subsection (b), at the direction of the Revisor of Statutes.

§ 104E-9.1. Restrictions on use and operation of tanning equipment.

(a) Operators of tanning equipment and owners of tanning facilities subject to rules adopted pursuant to this Chapter shall comply with or ensure compliance with the following:

(1) The operator shall provide to each consumer a warning statement that defines the potential hazards and consequences of exposure to ultraviolet radiation. Before allowing the consumer's initial use of the tanning equipment, the operator shall obtain the signature of the consumer on the warning statement acknowledging receipt of the warning.

(2) The operator shall not allow a person 13 years and younger to use tanning equipment without a written prescription from the person's medical physician specifying the nature of the medical condition requiring the treatment, the number of visits, and the time of exposure for each visit.

(3) Neither an operator nor an owner shall claim or distribute promotional materials that claim that using tanning equipment is safe or free from risk or that using tanning equipment will result in medical or health benefits.

(b) The Commission may adopt, and the Department shall enforce, rules to implement this section. The requirements of this section are in addition to other rules adopted pursuant to this Chapter that are applicable to tanning facilities and do not conflict with this section.

(c) As used in this section, unless the context requires otherwise, the term:

(1) "Consumer" means any individual who is provided access to a tanning facility that is subject to registration and regulation under this Chapter.

(2) "Tanning equipment" means ultraviolet or other lamps and equipment containing such lamps intended to induce skin tanning through the irradiation of any part of the living human body with ultraviolet radiation.

(3) "Tanning facility" means any location, place, area, structure, or business that provides consumers access to tanning equipment. For the purpose of this definition, tanning equipment registered to different persons at the same location and tanning equipment registered to the same person, but at separate locations, shall constitute separate tanning facilities. (2004-157, s. 1.)

Editor's Note. — Session Laws 2004-157, s. 2, made this section effective October 1, 2004.

§ 104E-10. Licensing of by-product, source, and special nuclear materials and other sources of ionizing radiation.

(a) The Governor, on behalf of this State, is authorized to enter into agreements with the federal government providing for discontinuance of certain of the responsibilities of the federal government with respect to sources of ionizing radiation and the assumption thereof by this State.

(b) Upon the signing of an agreement with the Nuclear Regulatory Commission or its successor as provided in subsection (a) above, the Commission shall provide by rule or regulation for general or specific licensing of persons to use, manufacture, produce, transport, transfer, receive, acquire, own, or possess by-product, source, or special nuclear materials or devices, installations, or equipment utilizing such materials. Such rule or regulation shall provide for amendment, suspension, renewal or revocation of licenses. Each application for a specific license shall be in writing on forms prescribed by the Commission and furnished by the Department and shall state, and be accompanied by, such information or documents, including, but not limited to plans, specifications and reports for new construction or material alterations as the Commission may determine to be reasonable and necessary to decide the qualifications of the applicant to protect the public health and safety. The Commission may require all applications or statements to be made under oath or affirmation. Each license shall be in such form and contain such terms and conditions as the Commission may deem necessary. No license issued under the authority of this Chapter and no right to possess or utilize sources of radiation granted by any license shall be assigned or in any manner disposed of; and the terms and conditions of all licenses shall be subject to amendment, revision, or modification by rules, regulations, or orders issued in accordance with the provisions of this Chapter.

(c) Any person who, on the effective date of an agreement under subsection (a) above, possesses a license issued by the federal government shall be deemed to possess the same pursuant to a license issued under this Chapter, which shall expire either 90 days after receipt from the Department of a notice of expiration of such license, or on the date of expiration specified in the federal license, whichever is earlier.

(d) Repealed by Session Laws 1987, c. 850, s. 6. (1975, c. 718, s. 1; 1979, c. 694, s. 1; 1981, c. 704, s. 11.1; 1987, c. 850, s. 6.)

§ 104E-10.1. Additional requirements for low-level radioactive waste facilities.

(a) An applicant for a license for a low-level radioactive facility shall satisfy the Department that:

(1) Any low-level radioactive waste facility heretofore constructed or operated by the applicant (or any parent or subsidiary corporation if the applicant is a corporation) has been operated in accordance with sound waste management practices and in substantial compliance with federal and state laws and regulations; and

(2) The applicant (or any parent or subsidiary corporation if the applicant is a corporation) is financially qualified to operate the subject low-level radioactive waste facility.

(a1) The approval of a license shall be contingent upon the applicant first satisfying the Department that the applicant has met the above two requirements. In order to continue to hold a license under this Chapter, a licensee must remain financially qualified, and must provide any information requested by the Department to show that the licensee continues to be financially qualified.

(b) Each license applicant or license holder or any parent or subsidiary corporation if the license applicant or license holder is a corporation, as a condition of receiving or holding a license, shall have an independent annual audit by a firm of duly licensed certified public accountants carrying a minimum of five million dollars ($5,000,000) professional liability insurance coverage, proof of which coverage shall be provided with the issuance of the audit report. Each license applicant or license holder referred to above shall also provide the Department with a copy of the report and shall submit a copy of the report to the State Auditor for approval regarding its adequacy and completeness. As a minimum, the required report shall include the financial statements prepared in accordance with generally accepted accounting principles, all disclosures in the public interest required by law, and the auditor's opinion and comments relating to the financial statements. The audit shall be performed in conformity with generally accepted auditing standards.

(c) Within 10 days of receiving an application for a license or an amendment to a license to operate a low-level radioactive waste facility, the Department shall notify the clerk of the board of commissioners of the county or counties in which the facility is proposed to be located or is located, and, if the facility is to be located or is located within a city, the clerk of the governing board of the city, that the application has been filed, and shall file a copy of the application with the clerk. Prior to issuing a license or an amendment to an existing license the Secretary or the Secretary's designee shall conduct a public hearing in the county, or in one of the counties, in which a person proposes to operate a low-level radioactive waste facility or to enlarge an existing facility. The Secretary shall give notice of the hearing at least 30 days prior to the date thereof by:

(1) Publication in a newspaper or newspapers having general circulation in the county or counties where the facility is to be located for three

consecutive weeks beginning 30 days prior to the scheduled date of the hearing; and

(2) First class mail to persons who have requested such notice. The Department shall maintain a mailing list of persons who request notice pursuant to this subsection. (1981, c. 704, s. 11; 1985, c. 529; 1987, c. 24, ss. 1-3; c. 850, ss. 7, 8; 1989, c. 727, s. 219(20); 1997-443, s. 11A.119(a); 2007-495, s. 10.)

Effect of Amendments. — Session Laws 2007-495, s. 10, effective August 30, 2007, substituted "license" for "permit" throughout the section; deleted "of Environment and Natural Resources" following "above shall also provide the Department" in the second sentence of subsection (b); in subsection (c), deleted "of the Department" following "an existing license the Secretary" and substituted "the Secretary's" for "his" in the second sentence; and made minor stylistic changes.

§ 104E-10.2. Conveyance of property used for radioactive material disposal.

A license to dispose of radioactive waste materials on land shall include a legal description of the disposal site that would be sufficient as a description in an instrument of conveyance. The license to dispose of radioactive waste materials shall not be effective unless the owner of the disposal site files a certified copy of the license in the register of deeds' office in the county or counties in which the site is located. The register of deeds shall record the certified copy of the license and index it in the grantor index under the name of the owner of the land. When any such site is sold, leased, conveyed or transferred in any manner, the deed or other instrument of transfer shall contain in the description section in no smaller type than that used in the body of the deed or instrument a statement that the property has been used as a disposal site for radioactive waste materials and a reference by book and page to the recordation of the license. (1981, c. 480, s. 1.)

§ 104E-10.3. Low-level radioactive waste facility access licenses.

The Commission shall provide by regulation for the licensing of access to any low-level radioactive waste facility located in the State. No person shall send waste to a low-level radioactive waste facility unless licensed or otherwise authorized to do so by the Department. No low-level radioactive waste facility shall receive waste from any source not licensed by the Department except as may be otherwise specifically authorized by the Department. Such regulations shall provide, at a minimum, for amendment, suspension, or revocation of licenses, and for authorization for access to a low-level radioactive waste facility by the Department on a temporary or emergency basis. Each application for a license or amendment shall be in writing and shall include such information as may be required by regulation, and such additional information as the Department deems necessary. The application for a license shall set forth the manner in which the applicant plans to comply with the requirements of this Chapter and regulations promulgated thereunder. Upon receipt of an application under this section the Department shall review the application and shall issue a license only if it finds that the applicant is fully qualified under all applicable laws and regulation. (1987, c. 850, s. 9.)

§ 104E-11. Inspections, agreements, and educational programs.

(a) Authorized representatives of the Department shall have the authority to enter upon any public or private property, other than a private dwelling, at all reasonable times for the purpose of determining compliance with the provisions of this Chapter and rules, regulations and standards adopted hereunder.

(b) After approval by the Commission, the Governor is authorized to enter into agreements with the federal government, other states, or interstate agencies, whereby this State will perform on a cooperative basis with the federal government, other states, or interstate agencies, inspections, emergency response to radiation accidents, and other functions related to the control of radiation.

(c) The Department is authorized to institute educational programs for the purpose of training or educating persons who may possess, use, handle, transport, or service radioactive materials or radiation machines. (1975, c. 718, s. 1.)

§ 104E-12. Records.

(a) The Commission is authorized to require each person who possesses or uses a source of radiation:

(1) To maintain appropriate records relating to its receipt, storage, use, transfer, or disposal and maintain such other records as the Commission may require, subject to such exemptions as may be provided by the rules and regulations promulgated by the Commission; and

(2) To maintain appropriate records showing the radiation exposure of all individuals for whom personnel monitoring may be required by the Commission, subject to such exemptions as may be provided by the rules and regulations promulgated by the Commission.

Copies of all records required to be kept by this subsection shall be submitted to the Department or its duly authorized agents upon request.

(b) The Commission is authorized to require that any person possessing or using a source of radiation furnish to each employee for whom personnel monitoring is required a copy of such employee's personal exposure record upon the request of such employee, at any time such employee has received radiation exposure in excess of limits established in the rules and regulations promulgated by the Commission, and upon termination of employment. (1975, c. 718, s. 1.)

§ 104E-13. Administrative procedures and judicial review.

(a) The Department may refuse to grant a license as provided in G.S. 104E-7 or 104E-10 to any applicant who does not possess the requirements or qualifications which the Commission may prescribe in rules and regulations. The Department may suspend, revoke, or amend any license in the event that the person to whom such license was granted violates any of the rules and regulations of the Commission, or ceases, or fails to have the reasonable facilities prescribed by the Commission: Provided, that before any order is entered denying an application for a license or suspending, revoking, or amending a license previously granted, the applicant or person to whom such license was granted shall be given notice and granted a hearing as provided in Chapter 150B of the North Carolina General Statutes.

(b) Whenever the Department in its opinion determines that an emergency exists requiring immediate action to protect the public health and safety the Department may, without notice or hearing, issue an order reciting the existence of such emergency and requiring that such action be taken as is necessary to meet the emergency. Notwithstanding any provision of this Chapter, such order shall be effective immediately. Any person to whom such order is directed shall comply therewith immediately, and on application to the

Department shall be afforded a hearing within 10 days. On the basis of such hearing, the emergency order shall be continued, modified, or revoked within 30 days after such hearing, as the Department may deem appropriate under the evidence.

(c) Any applicant or person to whom a license was granted who shall be aggrieved by any order of the Department or its duly authorized agent denying such application or suspending, revoking, or amending such license may appeal directly to the superior court as provided in Chapter 150B of the North Carolina General Statutes. (1975, c. 718, s. 1; 1987, c. 850, s. 10.)

§ 104E-14. Impounding of materials.

(a) Authorized representatives of the Department shall have the authority in the event of an emergency to impound or order the impounding of sources of radiation in the possession of any person who is not equipped to observe or fails to observe the provisions of this Chapter or any rules or regulations promulgated by the Commission.

(b) The Department may release such sources of radiation to the owner thereof upon terms and conditions in accordance with the provisions of this Chapter and rules and regulations adopted hereunder or may bring an action in the appropriate superior court for an order condemning such sources of radiation and providing for the destruction or other disposition so as to protect the public health and safety. (1975, c. 718, s. 1.)

§ 104E-15. Transportation of radioactive materials.

(a) The Radiation Protection Commission is authorized to adopt, promulgate, amend, and repeal rules and regulations governing the transportation of radioactive materials in North Carolina, which, in the judgment of the Commission, shall promote the public health, safety, or welfare and protect the environment.

(1) Such rules and regulations may include, but shall not be limited to, provisions for the use of signs designating radioactive material cargo; for the packing, marking, loading, and handling of radioactive materials, and the precautions necessary to determine whether the material when offered is in proper condition for transport, and may include designation of routes in this State which are to be used for the transportation of radioactive materials.

(2) Such rules and regulations shall not include the carrier vehicle or its equipment, the licensing of packages, nor shall they apply to the handling or transportation of radioactive material within the confines of a facility licensed by or owned by a federal agency.

(3) The Commission is authorized to adopt by reference, in whole or in part, such federal rules and regulations governing the transportation of radioactive material which are established by the United States Nuclear Regulatory Commission, the United States Department of Transportation, or the United States Postal Service (or any federal agency which is a successor to any of the foregoing agencies), as such federal rules may be amended from time to time.

(b) The Department is authorized to enter into agreements with the respective federal agencies designed to avoid duplication of effort and/or conflict in enforcement and inspection activities so that:

(1) Rules and regulations adopted by the Commission pursuant to this section of this Chapter may be enforced, within their respective jurisdictions, by any authorized representatives of the Department of Environment and Natural Resources and the Department of Trans-

portation, according to mutual understandings between such departments of their respective responsibilities and authorities.

(2) The Department, through any authorized representative, is authorized to inspect any records of persons engaged in the transportation of radioactive materials during the hours of business operation when such records reasonably relate to the method or contents of packing, marking, loading, handling, or shipping of radioactive materials within the State.

(3) The Department, through any authorized representative, may enter upon and inspect the premises or vehicles of any person engaged in the transportation of radioactive materials during hours of business operation, with or without a warrant, for the purpose of determining compliance with the provisions of this Chapter and the rules and regulations promulgated by the Commission.

(c) Upon a determination by the Department that any provision of this section, or the rules and regulations promulgated by the Commission are being violated or that any practice in the transportation of radioactive materials constitutes a clear and imminent danger to the public health, property, or safety, it shall issue an order requiring correction as provided in G.S. 104E-13(b). (1975, c. 716, s. 7; c. 718, s. 1; 1989, c. 727, s. 219(22); 1997-443, s. 11A.119(a).)

§ 104E-16. Nonreverting Radiation Protection Fund.

(a) There is hereby established under the control and direction of the Department a Nonreverting Radiation Protection Fund which shall be used to defray the expenses of any project or activity for:

(1) Emergency response to and decontamination of radiation accidents as provided in G.S. 104E-9(a)(5), or

(2) Perpetual maintenance and custody of radioactive materials as the Department may undertake.

In addition to any moneys that shall be appropriated or otherwise made available to it, the Fund may be maintained by fees, charges, or other moneys paid to or recovered by or on behalf of the Department under the provisions of this Chapter, except for the clear proceeds of penalties. Any moneys paid to or recovered by or on behalf of the Department as fees, charges, or other payments authorized by this Chapter, except for the clear proceeds of penalties, shall be paid to the Radiation Protection Fund in an amount equal to the sum expended for the projects or activities in subdivisions (1) and (2) above.

(b) Repealed by Session Laws 1987, c. 850, s. 11. (1975, c. 718, s. 1; 1981, c. 704, s. 11.2; 1987, c. 633, s. 8; c. 850, s. 11; 1998-215, s. 47(b).)

§ 104E-17. Payments to State and local agencies.

Upon completion of any project or activity stated in G.S. 104E-16(a)(1), and from time to time during any project or activity stated in G.S. 104E-16(a)(2), each State and local agency that has participated by furnishing personnel, equipment or material shall deliver to the Department a record of the expenses incurred by the agency. The amount of incurred expenses shall be disbursed by the Secretary of Environment and Natural Resources to each such agency from the Radiation Protection Fund. Upon completion of any project or activity stated in G.S. 104E-16(a)(1), and from time to time during any project or activity stated in G.S. 104E-16(a)(2), the Secretary of Environment and Natural Resources shall prepare a statement of all expenses and costs of the project or activity expended by the State and shall make demand for payment upon the person having control over the radioactive materials or the release thereof which necessitated said project or activity. Any person having control over the radioactive materials or the release thereof and any other person causing or contributing to an incident necessitating any project or activity stated in G.S. 104E-16 shall be directly liable to the State for the necessary expenses incurred thereby and the State shall have a cause of action to recover from any or all such persons. If the person having control over the radioactive materials or the release thereof shall fail or refuse to pay the sum expended by the State, the Secretary of Environment and Natural Resources shall refer the matter to the Attorney General of North Carolina, who shall institute an action in the name of the State in the Superior Court of Wake County, or in his discretion, in the superior court of the county in which the project or activity was undertaken by the State, to recover such cost and expenses.

In any action instituted by the Attorney General under this section, a verified and itemized statement of the expenses incurred by the State in any project or activity stated in G.S. 104E-16 shall be filed with the complaint and shall constitute prima facie the amount due the State; and any judgment for the State thereon shall be for such amount in the absence of allegation and proof on the part of the defendant or defendants that the statement of expenses incurred by and the amount due the State is not correct because of an error in:

(1) Calculating the amount due, or

(2) Not properly crediting the account with any cash payment or payments or other satisfaction which may have been made thereon. (1975, c. 718, s. 1; 1989, c. 727, s. 219(23); 1997-443, s. 11A.119(a).)

§ 104E-18. Security for emergency response and perpetual maintenance costs.

(a) No person shall use, manufacture, produce, transport, transfer, receive, acquire, own, possess or dispose of radioactive material until that person shall have procured and filed with the Department such bond, insurance or other security as the Commission may by regulation require. Such bond, insurance or other security shall:

(1) Run in favor of the Radiation Protection Fund in the amount of the estimated total cost as established by the Commission that may be incurred by the State in any project or activity stated in G.S. 104E-16, and

(2) Have as indemnitor on such bond or insurance an insurance company licensed to do business in the State of North Carolina.

(b) The Commission may from time to time:

(1) Cause an audit to be made of any person that insures itself by means of other security as provided for in subsection (a) above;

(2) Amend or modify the estimated total cost for security established pursuant to this section; and

(3) Provide by regulation for the discontinuance of indemnification by one insurer and the assumption thereof by another insurer, as the Commission deems necessary to carry out the provisions of this Chapter and rules and regulations adopted and promulgated hereunder.

(c) Repealed by Session Laws 2001-474, s. 4, effective November 29, 2001. (1975, c. 718, s. 1; 1981, c. 704, s. 12; 1987, c. 850, s. 12; 1987 (Reg. Sess., 1988), c. 1082, s. 11; 2001-474, s. 4.)

§ 104E-19. Fees.

(a) In order to meet the anticipated costs of administering the educational and training programs in G.S. 104E-11(c), of enforcing and carrying out the inspection provisions in G.S. 104E-7(a)(7) and G.S. 104E-11(a), and of administering the licensing program in G.S. 104E-10.3, the Department is authorized to charge and collect such reasonable fees as it may by rule establish.

(b) Repealed by Session Laws 1987, c. 850, s. 13. (1975, c. 718, s. 1; 1981, c. 704, s. 13; 1987, c. 633, s. 9; c. 850, s. 13; 1987 (Reg. Sess., 1988), c. 993, s. 26; 2001-474, s. 5.)

§ 104E-20. Prohibited uses and facilities.

(a) It shall be unlawful for any person to use, manufacture, produce, transport, transfer, receive, acquire, own or possess any source of radiation unless licensed, registered or exempted by the Department in accordance with the provisions of this Chapter and the rules and regulations adopted and promulgated hereunder.

(b) Shallow land burial is prohibited. (1975, c. 718, s. 1; 1987, c. 633, s. 10.)

§ 104E-21. Conflicting laws.

(a) Ordinances, resolutions or regulations, now or hereafter in effect, of the governing body of a municipality or county or board of health relating to by-product, source and special nuclear materials shall not be superseded by this Chapter. Provided, that such ordinances or regulations are and continue to be consistent and compatible with the provisions of this Chapter, as amended, and rules and regulations promulgated by the Commission.

(b) It is the intent of the General Assembly to prescribe a uniform system for the management of low-level radioactive waste and to place limitations upon the exercise by all units of local government in North Carolina of the power to regulate the management of low-level radioactive waste by special, local or private acts or resolutions as provided in G.S. 143B-285.10(b). (1975, c. 718, s. 1; 1981, c. 704, s. 25.)

Editor's Note. — Section 143B-285.10, referred to in subsection (b), was repealed by Session Laws 1993, c. 501, s. 1, effective July 23, 1993.

§ 104E-22. Tort claims against persons rendering emergency assistance.

Any and all tort claims against any person which arise while that person is rendering assistance during an emergency (i) at the request of any authorized representative of the State of North Carolina or (ii) pursuant to a mutual radiological assistance agreement as provided for in G.S. 104E-11(b), shall constitute claims against this State; and the disposition thereof shall be governed by the provisions of Article 31 of Chapter 143 of the General Statutes. In any civil action brought against said person, the provisions of Article 31A of Chapter 143 of the General Statutes shall apply as if such person were an employee of this State. (1975, c. 718, s. 1.)

§ 104E-23. Penalties; injunctive relief.

(a) Any person who violates the provisions of G.S. 104E-15 or 104E-20, or who hinders, obstructs, or otherwise interferes with any authorized representative of the Department in the discharge of his official duties in making inspections as provided in G.S. 104E-11, or in impounding materials as provided in G.S. 104E-14, shall be guilty of a Class 1 misdemeanor and, upon conviction thereof, shall be punished as provided by law. Any person who willfully violates the provisions of G.S. 104E-10.2 shall be guilty of a Class 1 misdemeanor and, upon conviction, shall be punished as provided by law.

(b) The Secretary may, either before or after the institution of any other action or proceedings authorized by law, institute a civil action in the superior court of the county in which the defendant in said action resides for injunctive relief to prevent a threatened or continued violation of any provision of this Chapter or any order or regulation issued pursuant to this Chapter. (1975, c. 718, s. 1; 1979, c. 694, s. 5; 1981, c. 480, s. 2; 1993, c. 539, s. 685; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 104E-24. Administrative penalties.

(a) The Department may impose an administrative penalty on any person:

(1) Who fails to comply with this Chapter, any order issued hereunder, or any rules adopted pursuant to this Chapter;

(2) Who refuses to allow an authorized representative of the Radiation Protection Commission or the Department of Environment and Natural Resources a right of entry as provided for in G.S. 104E-11 or impounding materials as provided for in G.S. 104E-14.

(b) Each day of a continuing violation shall constitute a separate violation. Such penalty shall not exceed ten thousand dollars ($10,000) per day. In determining the amount of the penalty, the Department shall consider the degree and extent of the harm caused by the violation. Any person assessed a penalty shall be notified of the assessment by registered or certified mail, and the notice shall specify the reasons for the assessment.

(c) Any person wishing to contest a penalty or order issued under this section shall be entitled to an administrative hearing and judicial review in accordance with the procedures outlined in Articles 3, 3A, and 4 of Chapter 150B of the General Statutes.

(d) The Secretary may bring a civil action in the superior court of the county in which such violation is alleged to have occurred to recover the amount of administrative penalty whenever a person:

(1) Who has not requested an administrative hearing fails to pay the penalty within 60 days after being notified of such penalty, or

(2) Who has requested an administrative hearing fails to pay the penalty within 60 days after service of a written copy of the decision as provided in G.S. 150B-36.

(e) The clear proceeds of penalties imposed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1981, c. 704, s. 14; 1987, c. 850, s. 14; 1989, c. 727, s. 219(24); 1997-443, s. 11A.119(a); 1998-215, s. 47(a).)

Editor's Note. — This section was amended by Session Laws 1998-215, s. 47(a) in the coded bill drafting format provided by G.S. 120-20.1. The act added a new subsection (c), but failed to incorporate existing subsections (c) and (d). The new subsection has been renumbered as subsection (e) and existing subsections (c) and (d) have been set out in the form above at the direction of the Revisor of Statutes.

§ 104E-25. Performance objectives, technical requirements and design criteria applicable to low-level radioactive waste disposal facilities; engineered barriers.

(a) As used in this section, the term “Part 61” means Title 10, Code of Federal Regulations Part 61 in effect on 1 January 1987. Unless a different meaning is required by definitions generally applicable to this Chapter or by the context, terms defined or used in Part 61 shall have the same meaning in this section as in Part 61.

(b) The Commission shall adopt rules for low-level radioactive waste disposal facilities which incorporate and are consistent with the performance objectives and technical requirements set out in Subparts C and D of Part 61. In the event that Part 61 is amended, the Commission shall amend its rules at least to the extent necessary to maintain the State's status as an agreement state. The Commission may adopt rules which exceed the requirements of applicable federal statutes and regulations.

(c) Low-level radioactive waste disposal facilities shall incorporate engineered barriers for all waste classifications. The Commission shall specify minimum design criteria for engineered barriers. Different engineered barrier design criteria may be specified for different waste classifications. In the event that a single disposal unit is used for the disposal of wastes having more than one waste classification, the engineered barrier employed shall be that specified for the highest waste classification in the disposal unit.

(d) Engineered barriers shall be designed and constructed to complement and, where appropriate, improve the ability of the disposal facility to meet the performance objectives of this section. The site for a low-level radioactive waste disposal facility shall meet all hydrogeological and other criteria and standards applicable to disposal site suitability as though engineered barriers were not required. Engineered barriers shall not substitute for a suitable site or compensate for any deficiency in a site.

(e) Engineered barriers shall be designed and constructed of materials having physical and chemical properties so as to provide reasonable assurance that the barriers will maintain their functional integrity under all reasonably foreseeable conditions for at least the institutional control period. To the maximum extent possible, engineered barriers shall be chemically nonreactive with waste, waste containers and surrounding soil. Engineered barriers shall not detract from the ability of the disposal facility to meet the performance objectives adopted by the Commission under this Chapter. The Commission shall determine the appropriate design life of engineered barriers, which may exceed the institutional control period; however no reliance may be placed on engineered barriers beyond the end of the institutional control period.

(f) Disposal units and the incorporated engineered barriers shall be designed and constructed to meet the following objectives:

(1) Prevention of the migration of water into the disposal unit.
(2) Prevention of the migration of waste or waste contaminated water out of the disposal unit.
(3) Detection of water and other fluids in the disposal unit.
(4) Temporary collection and retention of water and other liquids for a time sufficient to allow for their detection and removal or other remedial measures without contamination of groundwater or surrounding soil.
(5) Facilitation of remedial measures without disturbing other disposal units.
(6) Facilitation of recovery of waste, other than Class A waste, in the packing or container in which the waste was placed for disposal.
(7) Reasonable assurance that waste will be isolated for at least the institutional control period.
(8) Prevention of contact between waste and the surrounding earth, except for earth that may be used as fill within the disposal unit.

(g) The term "container" means any portable device into which waste is placed for storage, transportation, treatment, disposal, or other handling and includes the first enclosure which encompasses the waste. All waste shall be packed in containers for disposal. The Commission shall adopt standards for the design and construction of containers for disposal which are consistent with applicable federal standards. Standards for containers may vary for different types and classifications of waste. The standards for disposal containers may supplement or duplicate any of the requirements for engineered barriers set out in this section; however the requirements for engineered barriers are separate and cumulative, and engineered barriers and containers may not substitute for or replace one another.

(h) Waste shall be converted into a form for disposal which is as chemically stable, nonreactive, and physically stable as can be reasonably achieved, as determined by the Commission, taking into consideration costs and available technology. All liquid waste shall be solidified prior to disposal.

(i) In adopting rules specifying performance objectives, technical requirements, and design criteria and standards for a low-level radioactive waste disposal facility, the Commission shall consider the possibility of unforeseen differences between expected and actual performance of the facility. The Commission shall consider best available technology and costs.

(j) The Commission shall require that the bottom of a low-level radioactive waste disposal facility shall be at least seven feet above the seasonal high water table. The Commission shall require additional separation wherever necessary to adequately protect the public health and the environment. (1987, c. 633, s. 11.)

§ 104E-26. Standards and criteria for licensing low-level radioactive waste facilities.

Standards and criteria for licensing low-level radioactive waste facilities shall be developed by the Commission. Such standards and criteria shall be developed with public participation and shall be incorporated into rules adopted by the Commission for the licensing of such facilities. Standards and criteria shall be consistent with all applicable federal and State law, including statutes, regulations and rules; shall be developed and revised in light of the best available scientific data; and shall be based on consideration of at least the following factors:

(1) Hydrological and geological factors, including flood plains, depth to water table, groundwater travel time, soil pH, soil cation exchange capacity, soil composition and permeability, cavernous bedrock, seismic activity, slope, mines, climate and earthquake faults;
(2) Environmental and public health factors, including air quality, quality of surface and groundwater, and proximity to public water supply watersheds;
(3) Natural and cultural resources, including wetlands, gamelands, endangered species habitats, proximity to parks, forests, wilderness areas, nature preserves, and historic sites;
(4) Local land uses;
(5) Transportation factors, including proximity to waste generators, route safety, and method of transportation;
(6) Aesthetic factors, including the visibility, appearance, and noise level of the facility. (1987, c. 850, s. 15.)

§ 104E-27. Volume reduction required.

(a) The Commission shall develop and adopt rules that require generators of low-level radioactive waste to implement best management practices, including prevention, minimization, reduction, segregation, and hold-for-decay storage, as a condition of access to any low-level radioactive waste disposal facility located in this State.

(b) Repealed by Session Laws 2001-474, s. 6, effective November 29, 2001.

(c) The Department shall periodically review the State's comprehensive low-level radioactive waste management system and make recommendations to the Governor, cognizant State agencies, and the General Assembly on ways to improve waste management; reduce the amount of waste generated; and minimize the amount of low-level radioactive waste that must be disposed of. (1987, c. 850, s. 15.1; 1993, c. 501, s. 5; 2001-474, s. 6.)

§ 104E-28. Limited liability for volunteers in low-level radioactive waste abatement.

Part 5 of Article 21A of Chapter 143 of the General Statutes shall apply to civil liability and penalties pursuant to this Chapter. (1987, c. 269, s. 4.)

§ 104E-29. Confidential information protected.

(a) The following information received or prepared by the Department in the course of carrying out its duties and responsibilities under this Chapter is confidential information and shall not be subject to disclosure under G.S. 132-6:

(1) Information which the Secretary determines is entitled to confidential treatment pursuant to G.S. 132-1.2. If the Secretary determines that information received by the Department is not entitled to confidential treatment, the Secretary shall inform the person who provided the information of that determination at the time such determination is made. The Secretary may refuse to accept or may return any information that is claimed to be confidential that the Secretary determines is not entitled to confidential treatment.

(2) Information that is confidential under any provision of federal or state law.

(3) Information compiled in anticipation of enforcement or criminal proceedings, but only to the extent disclosure could reasonably be expected to interfere with the institution of such proceedings.

(b) Confidential information may be disclosed to officers, employees, or authorized representatives of federal or state agencies if such disclosure is necessary to carry out a proper function of the Department or the requesting agency or when relevant in any proceeding under this Chapter.

(c) Except as provided in subsection (b) of this section or as otherwise provided by law, any officer or employee of the State who knowingly discloses information designated as confidential under this section shall be guilty of a Class 1 misdemeanor and shall be removed from office or discharged from employment. (1991, c. 745, s. 1; 1993, c. 539, s. 686; 1994, Ex. Sess., c. 24, s. 14(c).)

Chapter 104F.

Southeast Interstate Low-Level Radioactive Waste Management Compact.

Sec.
104F-1 through 104F-5. [Repealed.]

§§ 104F-1 through 104F-5: Repealed by Session Laws 1999-357, s. 2.

Editor's Note. — Session Laws 1987, c. 850, s. 26, had provided for withdrawal of North Carolina from the Compact unless every party state to the Southeast Interstate Low-Level Radioactive Waste Management Compact (Compact) had enacted legislation to amend the Compact Law in force in that state in substantially the manner set out in s. 25 of the act by December 31, 1988, and unless the Congress of the United States had amended the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986), so as to consent to the amendments to the Compact required to be made by s. 26 on or before December 31, 1992. Section 26 of c. 850 had also provided that the North Carolina Compact Commissioners would certify to the Governor, the President of the Senate, the Speaker of the House of Representatives, the Attorney General, and the Secretary of State that the requirements of the section had or had not been met, and that in the event that the party states to the Compact had not enacted legislation to amend the Compact as required by the section by December 31, 1988, Chapter 104F of the General Statutes would be repealed as of that date, and in the event that the Congress had not amended the Low-Level Radioactive Waste Policy Amendments Act so as to consent to the amendments required to be made by the section by December 31, 1992, Chapter 104F of the General Statutes would be repealed as of that date.

On December 22, 1988, the North Carolina Compact Commissioners certified that every party state had amended its compact law in substantially the same form as required by Session Laws 1987, c. 850, ss. 25 and 26.

On April 9, 1990, the North Carolina Compact Commissioners certified that the Congress of the United States had consented to the amendments in substantially the form required by North Carolina.

Session Laws 1999-357, s. 1 provides: "In accordance with the provisions of G.S. 104F-1, Article VII, Section (g) of the General Statutes, North Carolina hereby withdraws from membership as a party state in the Southeast Interstate Low-Level Radioactive Waste Management Compact."

Chapter 104G.

North Carolina Low-Level Radioactive Waste Management Authority Act of 1987.

Sec.
104G-1 through 104G-23. [Repealed.]

§§ 104G-1 through 104G-23: Repealed by Session Laws 1999-357, s. 4, effective July 1, 2000.

Chapter 105.

Taxation.

SUBCHAPTER I. LEVY OF TAXES.

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105-1. Title and purpose of Subchapter.
105-1.1. Supremacy of State Constitution.

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Inheritance Tax.

105-2 through 105-32. [Repealed.]

Article 1A.

Estate Taxes.

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105-32.2. Estate tax imposed in amount equal to federal state death tax credit.
105-32.3. Liability for estate tax.
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105-32.6. Estate tax is a lien on real property in the estate.
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Article 2.

Privilege Taxes.

105-33. Taxes under this Article.
105-33.1. Definitions.
105-34 through 105-37. [Repealed.]
105-37.1. Dances, athletic events, shows, exhibitions, and other entertainments.
105-37.2, 105-38. [Repealed.]
105-38.1. Motion picture shows.
105-39. [Repealed.]
105-40. Amusements — Certain exhibitions, performances, and entertainments exempt from tax.
105-41. Attorneys-at-law and other professionals.
105-41.1 through 105-82. [Repealed.]
105-83. Installment paper dealers.
105-84 through 105-87. [Repealed.]
105-88. Loan agencies.
105-89 through 105-102.2. [Repealed.]
105-102.3. Banks.
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105-102.6. Publishers of newsprint publications.
105-103. Unlawful to operate without license.
105-104. [Repealed.]
105-105. Persons, firms, and corporations engaged in more than one business to pay tax on each.
Sec.
105-106. Effect of change in name of firm.
105-107. [Repealed.]
105-108. Property used in a licensed business not exempt from taxation.
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105-109.1 through 105-113. [Repealed.]
105-113.1. [Deleted.]

Article 2A.

Tobacco Products Tax.

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105-113.2. Short title.
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105-113.4. Definitions.
105-113.4A. Licenses.
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Part 2. Cigarette Tax.

105-113.5. Tax on cigarettes.
105-113.6. Use tax levied.
105-113.7. Tax with respect to inventory on effective date of tax increase.
105-113.8. Federal Constitution and statutes.
105-113.9. Out-of-state shipments.
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105-113.11. Licenses required.
105-113.12. Distributor must obtain license.
105-113.13. Secretary may investigate applicant for distributor's license and require a bond.
105-113.14 through 105-113.16. [Repealed.]
105-113.17. Identification of dispensers.
105-113.18. Payment of tax; reports.
105-113.19, 105-113.20. [Repealed.]
105-113.21. Discount; refund.
105-113.22, 105-113.23. [Repealed.]
105-113.24. Out-of-State distributors to register and remit tax.
105-113.25. [Repealed.]
105-113.26. Records to be kept.
105-113.27. Non-tax-paid cigarettes.
105-113.28. [Repealed.]
105-113.29. Unlicensed place of business.
105-113.30. Records and reports.
105-113.31. Possession and transportation of non-tax-paid cigarettes; seizure and confiscation of vehicle or vessel.
105-113.32. Non-tax-paid cigarettes subject to confiscation.
105-113.33. Criminal penalties.

Sec.
105-113.34. [Repealed.]

Part 3. Tax on Other Tobacco Products.

105-113.35. Tax on tobacco products other than cigarettes; use of proceeds.
105-113.36. Wholesale dealer and retail dealer must obtain license.
105-113.37. Payment of tax.
105-113.38. Bond.
105-113.39. Discount; refund.
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Article 2B.

Soft Drink Tax.

105-113.41 through 105-113.67. [Repealed.]

Article 2C.

Alcoholic Beverage License And Excise Taxes.

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105-113.68. Definitions; scope.
105-113.69. License tax; effect of license.
105-113.70. Issuance, duration, transfer of license.
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105-113.72. [Repealed.]
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Part 2. State Licenses.

105-113.74 through 105-113.76. [Repealed.]

Part 3. Local Licenses.

105-113.77. City beer and wine retail licenses.
105-113.78. County beer and wine retail licenses.
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Part 4. Excise Taxes, Distribution of Tax Revenue.

105-113.80. Excise taxes on beer, wine, and liquor.
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105-113.81A. Distribution of part of wine taxes attributable to North Carolina wine.
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Part 5. Administration.

105-113.83. Payment of excise taxes.
105-113.84. Report of resident brewery, resident winery, nonresident vendor, or wine shipper permittee.
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105-113.87. Refund for excise tax paid on sacramental wine.
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Article 2D.

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105-113.105. Purpose.
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105-113.110A. Administration.
105-113.111. Assessments.
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Article 3.

Franchise Tax.

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105-114.1. Limited liability companies.
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105-116. Franchise or privilege tax on electric power, water, and sewerage companies.
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105-117 through 105-120.1. [Repealed.]
105-120.2. Franchise or privilege tax on holding companies.
105-121. [Repealed.]
105-121.1. Mutual burial associations.
105-122. Franchise or privilege tax on domestic and foreign corporations.
105-122.1. Credit for additional annual report fees paid by limited liability companies subject to franchise tax.
105-123, 105-124. [Repealed.]
105-125. Exempt corporations.
105-126. [Repealed.]
105-127. When franchise or privilege taxes payable.
105-128. Power of attorney.
105-129. Extension of time for filing returns.
105-129.1. [Repealed.]

Article 3A.

Tax Incentives for New and Expanding Businesses

[See note for repeal of this Article.]

105-129.2. (See note for repeal) Definitions.
105-129.2A. Sunset; studies.
105-129.3. (See note for repeal) Enterprise tier designation.

Sec.
105-129.3A. (See note for repeal) Development zone designation.
105-129.3B. (See note for repeal) Agrarian growth zone designation.
105-129.4. (See note for repeal) Eligibility; forfeiture.
105-129.5. (See note for repeal) Tax election; cap; carryforwards; limitations.
105-129.6. (See note for repeal) Fees and reports.
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105-129.8. (See note for repeal) Credit for creating jobs.
105-129.9. (See note for repeal) Credit for investing in machinery and equipment.
105-129.9A. (See note for repeal) Technology commercialization credit.
105-129.10. (Repealed effective for taxable years beginning on or after January 1, 2006) Credit for research and development.
105-129.11. (See note for repeal) Credit for worker training.
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105-129.14. [Reserved.]

Article 3B.

Business And Energy Tax Credits.

105-129.15. Definitions.
105-129.15A, 105-129.16. [Repealed.]
105-129.16A. Credit for investing in renewable energy property.
105-129.16B. [Recodified.]
105-129.16C. (Repealed for taxable years beginning on or after January 1, 2006) Credit for investing in drycleaning equipment that does not use a hazardous substance.
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105-129.16E. (Effective for taxable years beginning on or after January 1, 2007, and expires for taxable years beginning on or after January 1, 2009) Credit for small business employee health benefits.
105-129.16F. (Effective for taxable years beginning on or after January 1, 2008, and repealed for taxable years beginning on or after January 1, 2010) Credit for biodiesel producers.
105-129.16G. Work Opportunity Tax Credit.
105-129.16H. (Effective for taxable years beginning on or after January 1, 2008) Credit for donating funds to a nonprofit organization to enable the nonprofit to acquire renewable energy property.
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105-129.18. Substantiation.
105-129.19. Reports.
105-129.20 through 105-129.24. [Reserved.]

Article 3C.

Tax Incentives For Recycling Facilities.

105-129.25. Definitions.
105-129.26. Qualification; forfeiture.
105-129.27. Credit for investing in large or major recycling facility.
105-129.28. (Repealed effective January 1, 2008. See note) Credit for reinvestment.
105-129.29 through 105-129.34. [Reserved.]

Article 3D.

Historic Rehabilitation Tax Credits.

105-129.35. Credit for rehabilitating income-producing historic structure.
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105-129.36A. Rules; fees.
105-129.37. Tax credited; credit limitations.
105-129.38. Reports.
105-129.39. [Reserved.]

Article 3E.

Low-Income Housing Tax Credits.

105-129.40. (See Editor's note for repeal) Scope and definitions.
105-129.41. (See note for repeal) Credit for low-income housing awarded a federal credit allocation before January 1, 2003.
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105-129.43. (See note for repeal) Substantiation.
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Article 3F.

Research and Development.

105-129.50. (See note for repeal) Definitions.
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105-129.52. (See notes) Tax election; cap.
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Article 3G.

Tax Incentives for Major Computer Manufacturing Facilities.

105-129.60. (For delayed repeal, see note) Legislative findings.
105-129.61. (For delayed repeal, see note) Definitions.
105-129.62. (For delayed repeal, see note) Eligibility.
105-129.63. (For delayed repeal, see note) Determination by the Secretary of Commerce.
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Mill Rehabilitation Tax Credit.

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105-129.71. (See note for repeal) Credit for income-producing rehabilitated mill property.
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105-129.75. Sunset.

Article 3I.

[Reserved.]

105-129.76 through 105-129.79. [Reserved.]

Article 3J.

Tax Credits for Growing Businesses.

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105-129.87. (See notes) Credit for creating jobs.
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Article 3K.

Tax Incentives for Railroad Intermodal Facilities.

105-129.95. (Repealed for taxable years beginning on or after January 1, 2038 — see note) Definitions.
105-129.96. (Repealed for taxable years beginning on or after January 1, 2038 — see note) Credit for constructing a railroad intermodal facility.
105-129.97. (Repealed for taxable years beginning on or after January 1, 2038 — see note) Substantiation.
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Article 4.

Income Tax.

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105-497. Limitations.
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105-501. (Effective October 1, 2009) Distribution of additional taxes.
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105-551. Tax on gross receipts authorized.
105-552. Collection and administration of gross receipts tax.
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105-554. Use of tax proceeds.
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SUBCHAPTER X. LOCAL OPTION COUNTY TAXES.

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SUBCHAPTER I. LEVY OF TAXES.

§ 105-1. Title and purpose of Subchapter.

The title of this Subchapter shall be "The Revenue Act." The purpose of this Subchapter shall be to raise and provide revenue for the necessary uses and purposes of the government and State of North Carolina during the next biennium and each biennium thereafter, and the provisions of this Subchapter shall be and remain in full force and effect until changed by law. It is the policy of this State that as many State taxes as possible be structured so that they are deductible for federal income tax purposes under the Internal Revenue Code. (1939, c. 158, ss. A, B; 1941, c. 50, s. 1; 1983 (Reg. Sess., 1984), c. 1097, s. 1.)

Cross References. — As to the Department of Revenue, see G.S. 143B-217 through 143B-220.

21st Century Revenue System Study Commission. — Session Laws 2004-161, ss. 46.1 through 46.6, establishes the commission to build on the recommendations of past commissions to design a realignment of the State and local revenue system in accordance with clear, consistent tax policy in light of modern economic, social and political conditions. The commission is to make its final report to the 2006 Regular Session of the 2005 General Assembly.

Section 46.6 of Session Laws 2004-161 specifies the following duties for the Commission:

"(1) Establish the principles of taxation upon which a sound State and local tax structure should be built for the 21st century.

"(2) Recommend changes in the State and local tax structure to align it with these benchmark tax principles.

"(3) Recommend changes to simplify and consolidate existing taxes to provide uniformity; to ease the administrative burden on the taxpayer; to provide low tax rates applied to broad tax bases; and to reduce the costs of collecting and administering taxes."

Session Laws 2004-161, s. 46.7, as amended by Session Laws 2006-248, s. 38, provides: "Report. — The Commission may make an interim report to the 2006 Regular Session of the 2005 General Assembly not later than its convening, and must make its final report to the 2007 General Assembly upon its convening. The Commission shall terminate the earlier of the filing of its final report or upon the convening of the 2007 General Assembly."

Session Laws 2001-491, ss. 29.1 to 29.13 and Session Laws 1999-395, ss. 3.1 to 3.13, contained similar provisions.

Session Laws 1999-395, ss. 3.1 to 3.13, contained similar provisions.

Legal Periodicals. — For article discussing this Subchapter, see 15 N.C.L. Rev. 387 (1937).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

For note surveying tax relief enacted by the 1985 General Assembly, see 64 N.C.L. Rev. 1508 (1986).

CASE NOTES

Taxing Power of General Assembly. — The General Assembly has an unlimited right to tax all persons domiciled within the State, and all property within the State, except so far as this right has been limited by the provisions of the Constitution, either expressly or by necessary implication. Pullen v. Commissioners of Wake County, 66 N.C. 361 (1872).

Uniformity Required. — Under N.C. Const., Art. V, § 2(1), (2) and (6), the same rule of uniformity applies to the taxing of "trades, professions, franchises and incomes" as to the other species of property therein named, and there must also be uniformity in the mode of assessment. Worth v. Petersburg R.R., 89 N.C. 301 (1883).

Uniformity, in its legal and proper sense, is inseparably incident to the power of taxation, whether applied to taxes on property or to those imposed on trades, professions, etc. State v. Moore, 113 N.C. 697, 18 S.E. 342 (1893), overruled on other grounds, State v. Hunt, 129 N.C. 686, 40 S.E. 216 (1901).

Statement of Object in Levying Taxes. — The N.C. Const., Art. V, § 5, requires that every act levying taxes shall state the objects to which they shall be appropriated. This provision, however, has no application to taxes levied by county authorities for county purposes. Parker v. Board of Comm'rs, 104 N.C. 166, 10 S.E. 137 (1889).

Abortion Funding as Necessary Use and Purpose. — The funding of elective abortions constitutes a "necessary use and purpose of government" within the meaning of this section, and the appropriation and expenditure of State tax moneys for elective abortions does not violate N.C. Const., Art. V, § 5. Stam v. State, 47 N.C. App. 209, 267 S.E.2d 335 (1980), aff'd, 302 N.C. 357, 275 S.E.2d 439 (1981).

Legislative Delegation of Power to Municipal Corporation. — The legislature may authorize a municipal corporation to lay taxes on the town property, the persons, and the subject of taxation incident to the persons, of those who have a business residence in town though they have a residence also out of town. Worth v. Commissioners of Fayetteville, 60 N.C. 617 (1864).

Applied in Great Am. Ins. Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792 (1961).

Cited in Robert E. Harris Evangelistic Ass'n v. Board of Tax Supervision, 3 N.C. App. 479, 165 S.E.2d 67 (1969); In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981); County of Lenoir v. Moore, 114 N.C. App. 110, 441 S.E.2d 589 (1994), aff'd, 340 N.C. 104, 455 S.E.2d 158 (1995); County of Carteret v. Long, 128 N.C. App. 477, 495 S.E.2d 391 (1998).

§ 105-1.1. Supremacy of State Constitution.

The State's power of taxation is vested in the General Assembly. Under Article V, Section 2(1), of the North Carolina Constitution, this power cannot be surrendered, suspended, or contracted away. In the exercise of this power, the General Assembly may amend or repeal any provision of this Subchapter in its discretion. No provision of this Subchapter constitutes a contract that the provision will remain in effect in future years, and any representation made to the contrary is of no effect. (2003-416, s. 12.)

Editor's Note. — Session Laws 2003-416, s. 30, made this section effective August 14, 2003.

Article 1.

Inheritance Tax.

§§ 105-2 through 105-32: Repealed by Session Laws 1998-212, s. 29A.2(a), effective January 1, 1999, and applicable to the estates of decedents dying on or after that date.

Cross References. — For Article 1A, providing for an estate tax, see now G.S. 105-32.1 et seq.

Article 1A.

Estate Taxes.

§ 105-32.1. Definitions.

The following definitions apply in this Article:

(1) Code. — Defined in G.S. 105-228.90.

(2) Personal representative. — The person appointed by the clerk of superior court under Chapter 28A of the General Statutes to administer the estate of a decedent or, if no one is appointed under that Chapter, the person required to file a federal estate tax return for the estate of the decedent.

(3) Secretary. — Defined in G.S. 105-228.90. (1998-212, s. 29A.2(b).)

Editor's Note. — Session Laws 1998-212, s. 29A(d), made this Article effective January 1, 1999, and applicable to the estates of decedents dying on or after that date.

CASE NOTES

I. General Consideration.
II. Transfer of Property.
III. Property Subject to Tax.
IV. Gifts to Minors.

I. GENERAL CONSIDERATION.

Editor's Note. — *The cases in the notes below were decided under the former Inheritance Tax provisions, repealed G.S. 105-2 to 105-32, and under previous corresponding provisions.*

Constitutionality. — For case upholding of former law relating to computation of tax on resident and nonresident decedents, see Rigby v. Clayton, 2 N.C. App. 57, 162 S.E.2d 682 (1968).

Constitutional Equality and Uniformity Provisions Inapplicable. — The equality and uniformity required by the State Constitution in property taxation does not apply to inheritance or succession taxation. Rigby v. Clayton, 274 N.C. 465, 164 S.E.2d 7 (1968).

Equal Protection Not Denied. — Former section which levied an inheritance tax upon the transfer of property within the State at a rate which considered decedent's entire estate wherever situated, even outside the State, was a valid exercise of legislative powers, the statute neither denying equal protection of laws, nor imposing an arbitrary and capricious classification. Rigby v. Clayton, 274 N.C. 465, 164 S.E.2d 7 (1968).

Broad power of state legislature to classify and thus to discriminate for purposes of inheritance taxation has been fully established. Rigby v. Clayton, 2 N.C. App. 57, 162 S.E.2d 682 (1968).

"Due process" provisions of federal or State Constitutions are not violated by use of the value of decedent's entire estate, wherever located, to determine the rate of inheritance tax to be applied to the transfer of property within the State. Rigby v. Clayton, 274 N.C. 465, 164 S.E.2d 7 (1968).

Tax Imposed on Privilege to Succeed to Property. — The North Carolina inheritance tax was not a tax upon property itself, but a tax imposed on the privilege to succeed to property upon the death of the former owner. Rigby v. Clayton, 2 N.C. App. 57, 162 S.E.2d 682 (1968).

North Carolina was not alone in imposing an inheritance tax upon succession to property within its borders but at a rate determined by reference to the decedent's entire estate wherever located. At least 10 other states use a similar taxing method. Rigby v. Clayton, 2 N.C. App. 57, 162 S.E.2d 682 (1968).

The purpose of the inheritance tax laws is to raise revenues for the operation of the State government by imposing a tax on the transfer of property when the transfer occurs by reason of death. In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981).

For history of inheritance tax statute, see State v. Scales, 172 N.C. 915, 90 S.E. 439 (1916).

History of Former Section Relating to Rate of Tax. — See Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

Liberal Construction. — A liberal construction will be given to inheritance tax statutes to the end that all property fairly and reasonably coming within their provisions may be taxed. State v. Scales, 172 N.C. 915, 90 S.E. 439 (1916). See also Norris v. Durfey, 168 N.C. 321, 84 S.E. 687 (1915); Reynolds v. Reynolds, 208 N.C. 578, 182 S.E. 341 (1935); Watkins v. Shaw, 234 N.C. 96, 65 S.E.2d 881 (1951).

Under this liberal construction in favor of the government, every transfer of property that could be reasonably brought within the purview of the law has been subjected to taxation. Norris v. Durfey, 168 N.C. 321, 84 S.E. 687 (1915).

A law imposing an inheritance tax is to be liberally construed to effectuate the intention of the legislature, and all property fairly and reasonably coming within the provision of such law may be taxed. Korschun v. Clayton, 13 N.C. App. 273, 185 S.E.2d 417 (1971).

Exemptions Are Strictly Construed. — Exemptions of property from taxation are to be strictly construed. Benson v. Johnston County, 209 N.C. 751, 185 S.E. 6 (1936).

Whole Revenue Act Construed in Pari Materia. — The whole Revenue Act of 1939 and all of its parts are to be considered in pari materia and construed accordingly. Valentine v. Gill, 223 N.C. 396, 27 S.E.2d 2 (1943).

Basis of Inheritance Tax. — The theory on which taxation on the devolution of estates is based and its legality upheld is clearly established and is founded upon two principles: (1) A succession tax is a tax on the right of succession to property, and not on the property itself; and (2) the right to take property by devise or descent is not one of the natural rights of man, but is the creature of the law. In re Morris Estate, 138 N.C. 259, 50 S.E. 682 (1905). See Waddell v. Doughton, 194 N.C. 537, 140 S.E. 160 (1927).

Revenue Act reflects the same philosophy which underlies the statutes of descent and distribution. It recognizes in the decedent the privilege of disposition of his property, and, if not the moral and social obligations which rest upon him with respect to its exercise, yet, indeed, the fitness of his provision for those more closely related to him by consanguinity or marital ties. This privilege may be exercised either by testamentary disposition or by leaving his property to be distributed under the law. Valentine v. Gill, 223 N.C. 396, 27 S.E.2d 2 (1943).

Interest Under Discretionary Control of Beneficiary's Mother Taxable. — The interest acquired by the child of testator is taxable and does not escape by reason of the fact that the testator placed it under the discretionary control and disposition of its mother. In re Inheritance Tax, 172 N.C. 170, 90 S.E. 203 (1916).

Testator May Treat Stepchildren and Natural Children Equally. — Former section expressly authorized a testator to accord his children equally whether they were stepchildren or natural children. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

The exemptions allowed Class A beneficiaries under former law were not intended to force a testator to draw a distinction between his children whether they were stepchildren or natural children. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

Stepgrandchildren as Class A Beneficiaries. — Stepgrandchildren of testatrix who were the daughters of testatrix' stepchildren who predeceased testatrix fell within Class A and not Class C as defined by former law for the purpose of determining the rate of tax to be paid on properties bequeathed them. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

Situs for Taxation. — The personal property of a decedent, whatever its character and wherever located, is subject to an inheritance tax in the state in which its owner was a resident at the time of his death. This position is upheld upon the principle that the situs of personal property, for the purpose of taxation, is said to be in the state where the owner resides and has his domicile. Rhode Island Hosp. Trust Co. v. Doughton, 187 N.C. 263, 121 S.E. 741 (1924), rev'd on other grounds, 270 U.S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A.L.R. 1374 (1926).

After legacy or distributive share has been received, it then becomes a part of the property of one of the citizens of the State, and then it may be taxed in common with any other property of the like kind. Rhode Island Hosp. Trust Co. v. Doughton, 187 N.C. 263, 121 S.E. 741 (1924), rev'd on other grounds, 270 U.S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A.L.R. 1374 (1926).

If testator or intestate had his domicile abroad and his personal estate also, no tax would be demanded of the legatee or next of kin, though they might be resident in the State. State v. Brim, 57 N.C. 300 (1858).

Source of Funds. — Trust for the benefit of decedent's wife was the proper source of funds for payment of the additional North Carolina estate tax due by reason of inclusion of the value of the trust in wife's federal taxable estate. Branch Banking & Trust Co. v. Staples, 120 N.C. App. 227, 461 S.E.2d 921 (1995).

Death of Beneficiary of Testamentary Trust. — Under the provisions of a will, the entire beneficial interest in the estate vested in testator's three sons upon testator's death with the right of full enjoyment postponed until the termination of the trust. One of the sons died during minority, prior to the termination of the trust, leaving his two brothers as his sole heirs at law. It was held that the surviving brothers took the deceased brother's interest under the laws of descent and distribution, and the estate so inherited was subject to the appropriate State and federal inheritance taxes and was encumbered by the lien for such taxes. Coddington v. Stone, 217 N.C. 714, 9 S.E.2d 420 (1940).

Secretary of Revenue is required to value assets of estate at same amount as for federal estate tax purposes. Stanback v. Coble, 30 N.C. App. 533, 227 S.E.2d 175 (1976).

Settlement of Taxes by Compromise. — The settlement of taxes by compromise, in a court of competent jurisdiction, in view of the bona fide controversies between the parties, and the facts and circumstances of the case, was affirmed on appeal, the matter being a legitimate subject of compromise and all parties affected being duly represented. Reynolds v. Reynolds, 208 N.C. 578, 182 S.E. 341 (1935).

No Assessment on Basis of Settlement or Compromise Agreements. — Former 105-2(1) made no provision for assessment of inheritance taxes on the basis of settlement or compromise agreements. Greene v. Lynch, 51 N.C. App. 665, 277 S.E.2d 454 (1981).

Consent Judgment Final for Purposes of Former 105-2(1). — A consent judgment entered in a caveat proceeding was, absent any evidence of collusion, a final judgment for purposes of former 105-2(1). Medford v. Lynch, 67 N.C. App. 543, 313 S.E.2d 593 (1984).

Former Law Applying to Nonresidents Invalid in Part. — Under the provisions of the prior law an inheritance or transfer tax was imposed upon the right of nonresident legatees or distributees to take by will or to receive, under the intestate laws of another state, from a nonresident testator or intestate, shares of stock in a foreign corporation having a stated proportion of its property located within this State and conducting its business here. This provision was held invalid upon the principle that the subject to be taxed must be within the jurisdiction of the state assessing and collecting the tax, and that this principle applies as well in the case of a transfer tax as in that of a property tax. Rhode Island Hosp. Trust Co. v. Doughton, 270 U.S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A.L.R. 1374 (1926), rev'g 187 N.C. 263, 121 S.E. 741 (1924), discussed in 3 N.C.L. Rev. 107 (1925). See Rotan v. State, 195 N.C. 291, 141 S.E. 733 (1928).

Lien Arises Against Beneficiary of Policy Includable in Taxable Estate. — Where proceeds of a life insurance policy were includable in a decedent's taxable estate by reason of former section, a lien for taxes arose against the beneficiary of such insurance policy. First Nat'l Bank v. Dixon, 38 N.C. App. 430, 248 S.E.2d 416 (1978).

And beneficiary was primarily liable for taxes so incurred. First Nat'l Bank v. Dixon, 38 N.C. App. 430, 248 S.E.2d 416 (1978).

Therefore personal representative of estate could proceed against beneficiary of such insurance policy, or could retain such assets in the estate as would otherwise pass to the beneficiary and proceed under former sections to obtain the ratable share of tax incurred by the estate by reason of the includable proceeds. First Nat'l Bank v. Dixon, 38 N.C. App. 430, 248 S.E.2d 416 (1978).

Separate Excise Tax Not Imposed on Beneficiary Under Former Statute. — Section 11, c. 127, Public Laws 1937, could not be construed to impose a separate and independent excise tax upon the receipt of the proceeds of life insurance policies when such policies were issued to the beneficiary, who retained all rights and liabilities thereunder, in addition to imposing an inheritance tax on the proceeds of policies when they were issued to the insured, or the insured retained the right to change the beneficiary or some other incidents of ownership, since that section had to be construed as a part of the whole act, and when so construed, no such intent appeared from its language. Wachovia Bank & Trust Co. v. Maxwell, 221 N.C. 528, 20 S.E.2d 840 (1942).

Where wife procured a policy of insurance upon the life of her husband, the policy being issued on her application and all rights and liabilities thereunder being retained by her, upon the husband's death the proceeds of the policy were not subject to a tax under the provisions of G.S. 11, c. 127, Public Laws 1937, as a gift inter vivos to take effect at or after death, even though the husband during his life voluntarily paid all premiums, since he did not procure the issuance of the policy and each payment of premium constituted a completed gift. Wachovia Bank & Trust Co. v. Maxwell, 221 N.C. 528, 20 S.E.2d 840 (1942).

Primary Liability of Devisees Not Affected by Compromise Agreement. — The primary liability of the devisees for the inheritance tax on the value of property devised to them under the will is not affected by any compromise agreement under which the ultimate disposition of the lands differs in whole or in part from that prescribed by the will. Pulliam v. Thrash, 245 N.C. 636, 97 S.E.2d 253 (1957).

Will devising certain lands to three devisees as tenants in common was established by verdict and judgment, and by compromise agreement a fourth person was let in as a tenant in common and the land sold for partition. An additional inheritance tax assessed was paid by the commissioner out of the proceeds of sale. It was held that the share of each of the three devisees was chargeable with one third of the tax, and no part thereof was chargeable against the share of the person let in by the compromise agreement or her transferee in the absence of an express or implied agreement to pay same. Pulliam v. Thrash, 245 N.C. 636, 97 S.E.2d 253 (1957).

Beneficiary of Insurance Policy Primarily Liable. — Where proceeds of a life insurance policy were includable in a decedent's taxable estate by reason of former section, a lien for taxes arose against the beneficiary of such insurance policy, and the beneficiary was primarily liable for the taxes so incurred as provided. Therefore, the personal representative of an estate could proceed against the beneficiary of such insurance policy, or could retain such assets in the estate as would otherwise pass to the beneficiary and proceed to obtain the ratable share of tax incurred by the estate by reason of the includable proceeds. First Nat'l Bank v. Dixon, 38 N.C. App. 430, 248 S.E.2d 416 (1978).

II. TRANSFER OF PROPERTY.

"Transfer" Construed. — The transfer of property, as that term was used in former 105-2, contemplated both the legal power to transmit property at death and the privilege of receiving property. Rigby v. Clayton, 274 N.C. 465, 164 S.E.2d 7 (1968).

Transfer Necessary. — The thing taxed is the privilege of transferring, and it is essential that there shall be a transfer, from decedent to the beneficiary by reason of death. There must be a transfer of something before there can be a tax upon its transfer, and where the decedent had no interest in or control over a life insurance policy which could be transferred by his death its proceeds would not be subject to the former inheritance tax. Wachovia Bank & Trust Co. v. Maxwell, 221 N.C. 528, 20 S.E.2d 840 (1942).

III. PROPERTY SUBJECT TO TAX.

Kind of Property Transferred Is Immaterial. — The right to impose an inheritance tax does not depend upon the kind of property transferred. In re Morris Estate, 138 N.C. 259, 50 S.E. 682 (1905).

As to Applicability of Former Law to Realty and Personalty see Norris v. Durfey, 168 N.C. 321, 84 S.E. 687 (1915).

United States savings bonds held subject to inheritance tax. See Watkins v. Shaw, 234 N.C. 96, 65 S.E.2d 881 (1951).

A widow's dower and year's allowance allotted to her upon her dissent from her husband's will was property passing by will or by intestate laws within the meaning of this statute. State v. Dunn, 174 N.C. 679, 94 S.E. 481 (1917), decided prior to abolition of dower.

Interest on Estate Tax Deficiency Not Part of Tax. — Although collected as part of the tax, interest paid on an estate or inheritance tax deficiency is not part of the tax, but something in addition to the tax. Holt v. Lynch, 307 N.C. 234, 297 S.E.2d 594 (1982).

Deduction of Interest on Estate Tax Deficiencies and Money Borrowed to Pay Tax. — Interest paid with respect to federal estate tax deficiencies and deferred installment of federal estate tax, state inheritance tax deficiencies, and moneys borrowed to pay estate and inheritance tax deficiencies was deductible as costs of administration under former section. Holt v. Lynch, 307 N.C. 234, 297 S.E.2d 594 (1982).

Life Insurance Proceeds Held Deductible as Decedent's Debt. — Where a separation agreement required the decedent to maintain in full force and effect a life insurance trust in the amount of at least $150,000 for the benefit of decedent's former wife and their children, the decedent's "debt" under the agreement was not the amount of money required to maintain the policies but was the $150,000 in life insurance proceeds required to fund the trust. Therefore, the life insurance proceeds were a "debt of decedent" deductible from decedent's estate for inheritance tax purposes pursuant to former section. In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981).

No Corresponding Deduction Where Amount of Federal Tax Increased. — It is proper for a state statute levying inheritance and transfer taxes to refer to a federal statute in allowing deductions for amounts paid the federal government in estate taxes and in excepting from deductible amounts additional taxes levied by the federal government under a federal act effective on a certain date. A taxpayer relying on the State statute for the right to make deductions may not complain that additional federal taxes not deductible were computed according to an amendment of the federal act changing the schedule of rates but depending upon the original act for the tax-levying provisions, although the amendment was enacted subsequent to the enactment of the State Revenue Act, since in such case the additional federal estate taxes are levied by the original federal act, although the amount thereof is computed under the amendment changing the schedule of rates. Harwood v. Maxwell, 213 N.C. 55, 195 S.E. 54 (1938).

IV. GIFTS TO MINORS.

Gift to Minor Is "Transfer". — A gift made under the provisions of the Uniform Gifts to Minors Act (see now the Uniform Transfers to Minors Act, G.S. 33A-1 et seq.) was a "transfer" within the meaning of former 105-2. Korschun v. Clayton, 13 N.C. App. 273, 185 S.E.2d 417 (1971).

Death of Donor Before Donee Reaches Age 21. — Where the donor makes the gift to himself as custodian under the Uniform Gifts to Minors Act (see now the Uniform Transfers to Minors Act, G.S. 33A-1 et seq.) and dies prior to the donee's reaching age 21, the important determinative factors requiring inclusion of the value of a gift in decedent donor's taxable estate are the rights reserved to the donor. Where these rights existed at the time of the transfer, and continued to be possessed by donor until the time of his death, it is of no consequence whether the rights ever exercised. Korschun v. Clayton, 13 N.C. App. 273, 185 S.E.2d 417 (1971).

The value of property which is the subject of a gift to the donor's unemancipated minor child under the Uniform Gifts to Minors Act (see now the Uniform Transfers to Minors Act, G.S. 33A-1 et seq.) is includable in the gross estate of the donor for State inheritance tax purposes where the donor appoints himself as custodian of the property and dies while serving in that capacity before the minor donee attains his majority. Korschun v. Clayton, 13 N.C. App. 273, 185 S.E.2d 417 (1971).

If a parent donor wishes to avoid inheritance tax on a transfer under the Uniform Gifts to Minors Act (see now the Uniform Transfers to Minors Act, G.S. 33A-1 et seq.) he need only choose as custodian one of those persons or corporations allowed by the act other than himself. Korschun v. Clayton, 13 N.C. App. 273, 185 S.E.2d 417 (1971).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — *The opinions below were rendered under prior statutory law.*

Gift taxes paid by executor and imposed upon transfer of assets found to be includible in decedent's estate are not deductions for inheritance tax purposes. See opinion of Attorney General to Mr. B.E. Rogers, Inheritance and Gift Tax Division, Department of Revenue, 42 N.C.A.G. 32 (1972).

Clerk of Superior Court May Not Delegate Duty to Be Present to Officer of Bank. — See opinion of Attorney General to Honorable Sion H. Kelly, Clerk of Superior Court of Lee County, 41 N.C.A.G. 44 (1970).

§ 105-32.2. Estate tax imposed in amount equal to federal state death tax credit.

(a) Tax. — An estate tax is imposed on the estate of a decedent when a federal estate tax is imposed on the estate under section 2001 of the Code and any of the following apply:

(1) The decedent was a resident of this State at death.

(2) The decedent was not a resident of this State at death and owned any of the following:
  a. Real property or tangible personal property that is located in this State.
  b. Intangible personal property that has a tax situs in this State.

(b) Amount. — The amount of the estate tax imposed by this section is the amount of the state death tax credit that, as of December 31, 2001, would have been allowed under section 2011 of the Code against the federal taxable estate. The tax may not exceed the amount of federal estate tax due under the Code. The federal taxable estate and the amount of the federal estate tax due are determined without taking into account the deduction for state death taxes allowed under Section 2058 of the Code and the credits allowed under sections 2011 through 2015 of the Code.

If any property in the estate is located in a state other than North Carolina, the amount of tax payable depends on whether the decedent was a resident of this State at death. If the decedent was a resident of this State at death, the amount of tax due under this section is reduced by the lesser of the amount of the death tax paid the other state or an amount computed by multiplying the credit by a fraction, the numerator of which is the gross value of the estate that has a tax situs in another state and the denominator of which is the value of the decedent's gross estate. If the decedent was not a resident of this State at death, the amount of tax due under this section is an amount computed by multiplying the credit by a fraction, the numerator of which is the gross value of real property that is located in North Carolina plus the gross value of any personal property that has a tax situs in North Carolina and the denominator of which is the value of the decedent's gross estate. For purposes of this section, the gross value of property is its gross value as finally determined in the federal estate tax proceedings. (1998-212, s. 29A.2(b); 2002-87, s. 9; 2002-126, ss. 30C.3(a), 30C.3(b); 2003-284, ss. 37A.4, 37A.5; 2003-416, s. 1; 2004-170, ss. 1, 4(a), (b); 2005-144, ss. 8.1, 8.2; 2006-162, s. 26.)

Editor's Note. — Session Laws 2002-126, s. 30C.3(b), as amended by Session Laws 2003-284, s. 37A.4, as amended by Session Laws 2004-170, s. 1, as amended by Session Laws 2005-144, s. 8.1, provide that the amendments by Session Laws 2002-126, s. 30C.3, are effective on and after January 1, 2002, and applicable to the estates of decedents dying on or after that date.

Session Laws 2005-144, s. 8.2, repealed Session Laws 2004-170, s. 4(b), which had provided that amendments to subsection (b) by the 2004 act were repealed effective for the estates of decedents dying on or after July 1, 2005.

Effect of Amendments. — Session Laws 2006-162, s. 26, effective July 24, 2006, and applicable to the estates of decedents dying on or after January 1, 2005, substituted the present first through fourth sentences for the former first sentence of subsection (b) which read: "The amount of the estate tax imposed by this section for estates of decedents dying on or after January 1, 2002, is the maximum credit for state death taxes allowed under section 2011 of the Code without regard to the phase-out and termination of that credit under subdivision (b)(2) and subsection (f) of that section and without regard to the deduction for state death taxes allowed under Section 2058 of the Code."

§ 105-32.3. Liability for estate tax.

(a) Primary. — The tax imposed by this Article is payable from the assets of the estate. A person who receives property from an estate is liable for the amount of estate tax attributable to that property.

(b) Personal Representative. — The personal representative of an estate is liable for an estate tax that is not paid within two years after it was due. This liability is limited to the value of the assets of the estate that were under the control of the personal representative. The amount for which the personal representative is liable may be recovered from the personal representative or from the surety on any bond filed by the personal representative under Article 8 of Chapter 28A of the General Statutes.

(c) Clerk of Court. — A clerk of court who allows a personal representative to make a final settlement of an estate without presenting one of the following is liable on the clerk's bond for any estate tax due:

(1) An affirmation by the personal representative certifying that no tax is due on the estate because this Article does not require an estate tax return to be filed for that estate.
(2) A certificate issued by the Secretary stating that the tax liability of the estate has been satisfied. (1998-212, s. 29A.2(b).)

CASE NOTES

Residuary Asset Beneficaries Properly Assessed State Estate Tax. — Co-executors who received a qualified terminal interest property trust's residuary assets were required to pay the state estate tax, particularly in light of the decedent's testamentary direction that the taxes were to be paid from the estate's residue. Jones v. German, 156 N.C. App. 421, 576 S.E.2d 401, 2003 N.C. App. LEXIS 125 (2003).

§ 105-32.4. Payment of estate tax.

(a) Due Date. — The estate tax imposed by this Article is due when an estate tax return is due. An estate tax return is due on the date a federal estate tax return is due.

(b) Filing Return. — An estate tax return must be filed under this Article if a federal estate tax return is required. The return must be filed by the personal representative of the estate on a form provided by the Secretary.

(c) Extension. — An extension of time to file a federal estate tax return is an automatic extension of the time to file an estate tax return under this Article. The Secretary may, in accordance with G.S. 105-263, extend the time for paying the estate tax imposed by this Article or for filing an estate tax return.

(d) Obtaining Amount Due. — The personal representative of an estate may sell assets in the estate to obtain money to pay the tax imposed by this Article.

(e) Administration. — Article 9 of this Chapter applies to this Article. (1998-212, s. 29A.2(b).)

§ 105-32.5. Making installment payments of tax due when federal estate tax is payable in installments.

A personal representative who elects under section 6166 of the Code to make installment payments of federal estate tax may elect to make installment payments of the tax imposed by this Article. An election under this section extends the time for payment of the tax due in accordance with the extension elected under section 6166 of the Code. Payments of tax are due under this section at the same time and in the same proportion to the total amount of tax due as payments of federal estate tax under section 6166 of the Code. Acceleration of payments under section 6166 of the Code accelerates the payments due under this section. (1998-212, s. 29A.2(b).)

§ 105-32.6. Estate tax is a lien on real property in the estate.

The tax imposed by this Article on an estate is a lien on the real property in the estate and on the proceeds of the sale of the real property in the estate. The lien is extinguished when one of the following occurs:

(1) The personal representative certifies to the clerk of court that no tax is due on the estate because this Article does not require an estate tax return to be filed for that estate.

(2) The Secretary issues a certificate stating that the tax liability of the estate has been satisfied.
(3) For specific real property, when the Secretary issues a tax waiver for that property.
(4) Ten years have elapsed since the date of the decedent's death. (1998-212, s. 29A.2(b).)

§ 105-32.7. Generation-skipping transfer tax.

(a) Tax. — A tax is imposed on a generation-skipping transfer that is subject to the tax imposed by Chapter 13 of Subtitle B of the Code when any of the following apply:

(1) The original transferor is a resident of this State at the date of the original transfer.
(2) The original transferor is not a resident of this State at the date of the original transfer and the transfer includes any of the following:
  a. Real or tangible personal property that is located in this State.
  b. Intangible personal property that has a tax situs in this State.

(b) Amount. — The amount of the tax imposed by this section is the maximum credit for state generation-skipping transfer taxes allowed under section 2604 of the Code. If property in the transfer is located in a state other than North Carolina, the amount of tax payable is the North Carolina percentage of the credit.

If the original transferor was a resident of this State at the date of the original transfer, the North Carolina percentage is the net value of the property transferred that does not have a tax situs in another state, divided by the net value of all property transferred. If the original transferor was not a resident of this State at the date of the original transfer, the North Carolina percentage is the net value of real property that is located in North Carolina plus the net value of any personal property that has a tax situs in North Carolina, divided by the net value of all property transferred, unless the original transferor's state of residence uses a different formula to determine that state's percentage. In that circumstance, the North Carolina percentage is the amount determined by the formula used by the original transferor's state of residence.

The net value of property that is located in or has a tax situs in this State is its gross value reduced by any debt secured by that property. The net value of all the property in a transfer is its gross value reduced by any debts secured by the property.

(c) Payment. — The tax imposed by this section is due when a return is due. A return is due the same date as the federal return for payment of the federal generation-skipping transfer tax. The tax is payable by the person who is liable for the federal generation-skipping transfer tax. (1998-212, s. 29A.2(b).)

§ 105-32.8. Federal determination that changes the amount of tax payable to the State.

If the federal government corrects or otherwise determines the gross estate tax imposed under section 2001 of the Code or the amount of the maximum state death tax credit allowed an estate under section 2011 of the Code, the personal representative must, within six months after being notified of the correction or final determination by the federal government, file an estate tax return with the Secretary reflecting the correct amount of tax payable under this Article. If the federal government corrects or otherwise determines the amount of the maximum state generation-skipping transfer tax credit allowed under section 2604 of the Code, the person who made the transfer must, within six months after being notified of the correction or final determination by the federal government, file a tax return with the Secretary reflecting the correct amount of tax payable under this Article.

The Secretary must propose an assessment for any additional tax due as provided in Article 9 of this Chapter and must refund any overpayment of tax as provided in Article 9 of this Chapter. A person who fails to report a federal correction or determination in accordance with this section is subject to the penalties in G.S. 105-236 and forfeits the right to any refund due by reason of the determination. (1998-212, s. 29A.2(b); 1999-337, s. 13; 2005-435, s. 24; 2006-18, s. 3; 2007-491, s. 6.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2005-435, s. 24, effective September 27, 2005, in the first sentence, inserted "the gross estate tax imposed under section 2001 of the Code or" and substituted "2011" for "6166" preceding "of the Code."

Session Laws 2006-18, s. 3, effective July 1, 2006, and applicable to federal determinations made on or after that date, substituted "six months" for "two years" throughout the section.

Session Laws 2007-491, s. 6, effective for taxable years beginning on or after January 1, 2007, in the second paragraph, substituted "propose an assessment for" for "assess and collect" in the first sentence, and inserted "is subject to the penalties in G.S. 105-236 and" in the last sentence. For applicability, see editor's note.

ARTICLE 2.

Privilege Taxes.

§ 105-33. Taxes under this Article.

(a) General. — Taxes in this Article are imposed for the privilege of carrying on the business, exercising the privilege, or doing the act named.

(b) License Taxes. — A license tax imposed by this Article is an annual tax. The tax is due by July 1 of each year. The tax is imposed for the privilege of engaging in a specified activity during the fiscal year that begins on the July 1 due date of the tax. The full amount of a license tax applies to a person who, during a fiscal year, begins to engage in an activity for which this Article requires a license. Before a person engages in an activity for which this Article requires a license, the person must obtain the required license.

(c) Other Taxes. — The taxes imposed by this Article on a percentage basis or another basis are due as specified in this Article.

(d) Repealed by Session Laws 1998-95, s. 2, effective July 1, 1999.

(e) Repealed by Session Laws 1989, c. 584, s. 1.

(f), (g) Repealed by Session Laws 1998-95, s. 2, effective July 1, 1999.

(h) Liability Upon Transfer. — A grantee, transferee, or purchaser of any business or property subject to the State taxes imposed in this Article must make diligent inquiry as to whether the State tax has been paid. If the business or property has been granted, sold, transferred, or conveyed to an innocent purchaser for value and without notice that the vendor owed or is liable for any of the State taxes imposed under this Article, the property, while in the possession of the innocent purchaser, is not subject to any lien for the taxes.

(i), (j) Repealed by Session Laws 1998-95, s. 2, effective July 1, 1999.

(k) Repealed by Session Laws 1987, c. 190. (1939, c. 158, s. 100; 1943, c. 400, s. 2; 1951, c. 643, s. 2; 1953, c. 981, s. 1; 1963, c. 294, s. 3; 1973, c. 476, s. 193; 1977, c. 657, s. 1; 1981, c. 83, ss. 1, 2; 1985, c. 114, s. 10; 1985 (Reg. Sess., 1986), c. 826, ss. 1, 2; c. 934, s. 3; 1987, c. 190; 1989, c. 584, s. 1; 1989 (Reg. Sess., 1990), c. 814, s. 1; 1991 (Reg. Sess., 1992), c. 981, s. 1; 1993, c. 539, s. 688; 1994, Ex. Sess., c. 24, s. 14(c); 1996, 2nd Ex. Sess., c. 14, ss. 18, 19; 1998-95, ss. 1, 2.)

Local Modification. — Town of Pittsboro: 1993, c. 358, s. 9(a).

Cross References. — As to power of county to levy license taxes as authorized by this Article, see G.S. 153A-152. For deletion of Division I designation for G.S. 105-103 through 105-113 of this Article, see the Editor's note under G.S. 105-103.

Editor's Note. — Effective July 1, 1999, Session Laws 1998-95, s. 1 changed the head to this Article to read "Privilege Taxes."

Session Laws 1996, Second Extra Session, c. 13, s. 1, provides that this act shall be known as the William S. Lee Quality Jobs and Business Expansion Act.

Session Laws 1996, Second Extra Session, c. 13, s. 4.2, effective July 1, 1999, provided: "Effective July 1, 1999, Article 2B of Chapter 105 of the General Statutes, as amended by this act, is repealed. The Secretary shall retain from collections under Article 2 of Chapter 105 of the General Statutes the cost of refunding the taxes levied in Article 2B of Chapter 105 of the General Statutes."

Session Laws 1996, Second Extra Session, c. 13, s. 10.1, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before its amendment or repeal; nor does it affect the right to any refund or credit of a tax that would otherwise have been available under the amended or repealed statute before its amendment or repeal."

Legal Periodicals. — For comment on 1943 amendment which made additions to the section, see 21 N.C.L. Rev. 368 (1943).

CASE NOTES

Several Occupations Conducted by Individual. — Where several occupations are conducted in a town by the same individual, a privilege tax on one does not prevent a similar tax on another. Guano Co. v. Town of Tarboro, 126 N.C. 68, 35 S.E. 231 (1900).

Goods Manufactured in Another State. — The right of a state to tax traders, professions and avocations within the borders of the state is unquestionable, though the goods dealt in are manufactured in another state. State v. Gorham, 115 N.C. 721, 20 S.E. 179 (1894).

Peddling. — A State license issued under G.S. 105-53 authorizes the licensee to engage in the business of peddling. State v. Byrd, 259 N.C. 141, 130 S.E.2d 55 (1963).

Applied in Eastern Carolina Tastee-Freez, Inc. v. City of Raleigh, 256 N.C. 208, 123 S.E.2d 632 (1962).

Cited in State v. Warren, 211 N.C. 75, 189 S.E. 108 (1937); Duke Power Co. v. Bowles, 229 N.C. 143, 48 S.E.2d 287 (1948); Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967); Greene v. City of Winston-Salem, 287 N.C. 66, 213 S.E.2d 231 (1975); Chrysler Fin. Co., L.L.C. v. Offerman, 138 N.C. App. 268, 531 S.E.2d 223, 2000 N.C. App. LEXIS 605 (2000).

§ 105-33.1. Definitions.

The following definitions apply in this Article:

(1) City. — Defined in G.S. 105-228.90.
(1a) Code. — Defined in G.S. 105-228.90.
(2) Repealed by Session Laws 1998-95, s. 3, effective July 1, 1999.
(3) Person. — Defined in G.S. 105-228.90.
(4) Secretary. — Defined in G.S. 105-228.90. (1991, c. 45, s. 1; 1991 (Reg. Sess., 1992), c. 922, s. 2; 1993, c. 12, s. 3; c. 354, s. 6; 1998-95, s. 3.)

§ 105-34: Repealed by Session Laws 1979, c. 63.

§ 105-35: Repealed by Session Laws 1979, c. 72.

§§ 105-36 through 105-37: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ 105-37.1. Dances, athletic events, shows, exhibitions, and other entertainments.

(a) Scope. — A privilege tax is imposed on the gross receipts of a person who is engaged in any of the following:

(1) Giving, offering, or managing a dance or an athletic contest for which an admission fee in excess of fifty cents (50¢) is charged.

(2) Giving, offering, or managing a form of amusement or entertainment that is not taxed by another provision of this Article and for which an admission fee is charged.

(3) Exhibiting a performance, show, or exhibition, such as a circus or dog show, that is not taxed by another provision of this Article.

(b) Rate and Payment. — The rate of the privilege tax is three percent (3%) of the gross receipts from the activities described in subsection (a) of this section. The tax is due when a return is due. A return is due by the 10th day after the end of each month and covers the gross receipts received during the previous month.

(c) Advance Report. — A person who owns or controls a performance, show, or exhibition subject to the tax imposed by this section and who plans to bring the performance to this State from outside the State must file a statement with the Secretary that lists the dates, times, and places of the performance, show, or exhibition. The statement must be filed no less than five days before the first performance, show, or exhibition in this State.

(d) Local Taxes. — Cities may levy a license tax on a person taxed under subdivision (a)(1) or (a)(2) of this section; however, the tax may not exceed twenty-five dollars ($25.00). Cities may levy a license tax on a person taxed under subdivision (a)(3) of this section; however, the tax may not exceed twenty-five dollars ($25.00) for each day or part of a day the performance, show, or exhibition is given at each location.

Counties may not levy a license tax on a person taxed under subdivision (a)(1) or (a)(2) of this section. Counties may levy a license tax on a person taxed under subdivision (a)(3) to the same extent as a city. (1939, c. 158, ss. 105, 106; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2; 1963, c. 1231; 1967, c. 865; 1973, c. 476, s. 193; c. 476, s. 193; 1977, c. 657, s. 1; 1981, c. 2; c. 83, s. 3; c. 977; 1985, c. 376; 1985 (Reg. Sess., 1986), c. 819, s. 3; 1987 (Reg. Sess., 1988), c. 1082, s. 1.1; 1989, c. 584, ss. 5, 6; 1989 (Reg. Sess., 1990), c. 814, s. 2; 1991, c. 45, s. 2; 1996, 2nd Ex. Sess., c. 14, s. 20; 1998-95, ss. 4, 5; 1999-337, s. 14(a); 1999-456, s. 26.)

Local Modification. — Cabarrus: 1961, c. 1032; city of Greensboro: 1989, c. 383, s. 1; Forsyth-Guilford Metropolitan Baseball Park Authority: 1997-380, s. 1.

Editor's Note. — The historical citation for this section incorporates the history of repealed G.S. 105-38, which was combined into this section by Session Law 1999-337.

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

CASE NOTES

Constitutionality. — Imposition of a privilege tax on a live entertainment business under, G.S. 105-37.1, after the application of this tax to movie theaters had been legislatively removed, without a rational basis, was unconstitutional. Deadwood, Inc. v. N.C. Dep't of Revenue, 148 N.C. App. 122, 557 S.E.2d 596, 2001 N.C. App. LEXIS 1275 (2001), appeal dismissed, cert. denied, 355 N.C. 490, 563 S.E.2d 565 (2002).

Legislature had a rational basis for taxing businesses hosting live entertainment differently than moving picture shows, because the former placed greater demands on public resources, created greater risks, and generated larger revenues than the latter. Deadwood, Inc. v. N.C. Dep't of Revenue, 356 N.C. 407, 572 S.E.2d 103, 2002 N.C. LEXIS 1114 (2002).

Taxpayer's payment of sales tax on admissions it received for entertainment did not relieve it of payment of a tax under this provision. Deadwood, Inc. v. N.C. Dep't of Revenue, 148 N.C. App. 122, 557 S.E.2d 596, 2001 N.C. App. LEXIS 1275 (2001), appeal dismissed, cert. denied, 355 N.C. 490, 563 S.E.2d 565 (2002).

§ **105-37.2:** Repealed pursuant to Session Law 1998-96, s. 3, effective July 1, 1999.

Cross References. — As to tax exemption for arts festivals and community festivals, see now G.S. 105-40 (10) and (11).

Editor's Note. — Session Laws 1998-96, s. 3, made this section, relating to tax exemptions for arts festivals and community festivals, effective August 14, 1998. Section 3 further stated that s. 1 of that act would be repealed effective July 1, 1999, only if Senate Bill 1252, An Act To Simplify And Modify Privilege And Excise Taxes And Related Permit Fees, was enacted by the 1998 General Assembly. Senate Bill 1252 was enacted as Session Laws 1998-95.

§ **105-38:** Repealed by Session Laws 1999-337, s. 14(b), effective July 22, 1999.

§ 105-38.1. Motion picture shows.

(a) A privilege tax at the rate of one percent (1%) is imposed on the gross receipts of a person who is engaged in the business of operating a motion picture show for which an admission is charged. The tax is due when a return is due. A return is due by the 10th day after the end of each month and covers the gross receipts received during the previous month. If a person offers an entertainment or amusement that includes both a motion picture taxable under this section and an entertainment or amusement taxable under G.S. 105-37.1, the tax in that statute applies to the entire gross receipts and the tax levied in this section does not apply.

(b) Repealed by Session Laws 1999-337, s. 15(a), effective July 22, 1999. (1998-95, s. 5.1; 1999-337, s. 15(a).)

CASE NOTES

Constitutionality. — Legislature had a rational basis for taxing businesses hosting live entertainment differently than moving picture shows, because the former placed greater demands on public resources, created greater risks, and generated larger revenues than the latter. Deadwood, Inc. v. N.C. Dep't of Revenue, 356 N.C. 407, 572 S.E.2d 103, 2002 N.C. LEXIS 1114 (2002).

§ 105-39: Repealed by Session Laws 1987 (Regular Session, 1988), c. 1082, s. 1.

§ 105-40. Amusements — Certain exhibitions, performances, and entertainments exempt from tax.

The following forms of amusement are exempt from the taxes imposed under this Article:

(1) All exhibitions, performances, and entertainments, except as in this Article expressly mentioned as not exempt, produced by local talent exclusively, for the benefit of religious, charitable, benevolent or educational purposes, as long as no compensation is paid to the local talent.

(2) The North Carolina Symphony Society, Incorporated, as specified in G.S. 140-10.1.

(3) All exhibits, shows, attractions, and amusements operated by a society or association organized under the provisions of Chapter 106 of the General Statutes where the society or association has obtained a permit from the Secretary to operate without the payment of taxes under this Article.

(4) All outdoor historical dramas, as specified in Article 19C of Chapter 143 of the General Statutes.

(5) All elementary and secondary school athletic contests, dances, and other amusements.

(6) The first one thousand dollars ($1,000) of gross receipts derived from dances and other amusements actually promoted and managed by civic organizations when the entire proceeds of the dances or other amusements are used exclusively for civic and charitable purposes of the organizations and not to defray the expenses of the organization conducting the dance or amusement. The mere sponsorship of a dance or another amusement by a civic or fraternal organization does not exempt the dance or other amusement, because the exemption applies only when the dance or amusement is actually managed and conducted by the civic or fraternal organization.

(6a) A youth athletic contest with an admissions price that does not exceed ten dollars ($10.00) sponsored by a person exempt from income tax under Article 4 of this Chapter. For the purpose of this subdivision, a youth athletic contest means a contest in which each participating athlete is less than 20 years of age.

(7a) All exhibitions, performances, and entertainments promoted and managed by "a nonprofit arts organization." This exemption does not apply to athletic events. A "nonprofit arts organization" is an organization that meets both of the following requirements:
   a. It is exempt from income tax under G.S. 105-130.11(a)(3).
   b. Its primary purpose is to offer choral and theatrical performances.

(8) A person that is exempt from income tax under Article 4 of this Chapter and is engaged in the business of operating a teen center. A "teen center" is a fixed facility whose primary purpose is to provide recreational activities, dramatic performances, dances, and other amusements exclusively for teenagers.

(9) All entertainments or amusements offered or given on the Cherokee Indian reservation when the person giving, offering, or managing the entertainment or amusement is authorized to do business on the reservation and pays the tribal gross receipts levy to the tribal council.

(10) Arts festivals held by a person that is exempt from income tax under Article 4 of this Chapter and that meets the following conditions:
  a. The person holds no more than two arts festivals during a calendar year.
  b. Each of the person's arts festivals last no more than seven consecutive days.
  c. The arts festivals are held outdoors on public property and involve a variety of exhibitions, entertainments, and activities.

(11) Community festivals held by a person who is exempt from income tax under Article 4 of this Chapter and that meets all of the following conditions:
  a. The person holds no more than one community festival during a calendar year.
  b. The community festival lasts no more than seven consecutive days.
  c. The community festival involves a variety of exhibitions, entertainments, and activities, the majority of which are held outdoors and are open to the public.

(12) All farm-related exhibitions, shows, attractions, or amusements offered on land used for bona fide farm purposes as defined in G.S. 153A-340. (1939, c. 158, s. 108; 1998-95, ss. 5.1, 6; 1998-96, s. 2; 1999-337, s. 15(b); 2000-140, s. 61; 2004-84, s. 1; 2006-216, s. 1; 2007-527, ss. 2, 3(a), (b).)

Editor's Note. — The historical citation for this section incorporates the history of repealed G.S. 105-38.1(b), which was combined into this section by Session Laws 1999-337.

Session Laws 1998-96, s. 3 provided that s. 2 of that act, which added subdivisions (10) and (11) would become effective July 1, 1999, if Senate Bill 1252, An Act To Simplify And Modify Privilege License And Excise Taxes And Related Permit Fees, was enacted by the 1997 General Assembly. Senate Bill 1252 was enacted as S.L. 1998-95.

Effect of Amendments. — Session Laws 2006-216, s. 1, effective retroactively to January, 1, 1999, and applicable to activities occurring on or after that date, added subdivision (12).

Session Laws 2007-527, ss. 2, 3(a), (b), effective August 31, 2007, rewrote subdivision (7a); and in sub-subdivisions (10)b and (11)b inserted "consecutive."

CASE NOTES

Applied in Markham v. Southern Conservatory of Music, 130 N.C. 276, 41 S.E. 531 (1902).

Cited in Redevelopment Comm'n v. Guilford County, 1 N.C. App. 512, 162 S.E.2d 108 (1968).

§ 105-41. Attorneys-at-law and other professionals.

(a) Every individual in this State who practices a profession or engages in a business and is included in the list below must obtain from the Secretary a statewide license for the privilege of practicing the profession or engaging in the business. A license required by this section is not transferable to another person. The tax for each license is fifty dollars ($50.00).

(1) An attorney-at-law.
(2) A physician, a veterinarian, a surgeon, an osteopath, a chiropractor, a chiropodist, a dentist, an ophthalmologist, an optician, an optometrist, or another person who practices a professional art of healing.
(3) A professional engineer, as defined in G.S. 89C-3.
(4) A registered land surveyor, as defined in G.S. 89C-3.
(5) An architect.
(6) A landscape architect.

(7) A photographer, a canvasser for any photographer, or an agent of a photographer in transmitting photographs to be copied, enlarged, or colored.

(8) A real estate broker or a real estate salesman, as defined in G.S. 93A-2. A real estate broker or a real estate salesman who is also a real estate appraiser is required to obtain only one license under this section to cover both activities.

(9) A real estate appraiser, as defined in G.S. 93E-1-4. A real estate appraiser who is also a real estate broker or a real estate salesman is required to obtain only one license under this section to cover both activities.

(10) A person who solicits or negotiates loans on real estate as agent for another for a commission, brokerage, or other compensation.

(11) A mortician or embalmer licensed under G.S. 90-210.25.

(b) The following persons are exempt from the tax:

(1) A person who is at least 75 years old.

(2) A person practicing the professional art of healing for a fee or reward, if the person is an adherent of an established church or religious organization and confines the healing practice to prayer or spiritual means.

(3) A blind person engaging in a trade or profession as a sole proprietor. A "blind person" means any person who is totally blind or whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses, or where the widest diameter of visual field subtends an angle no greater than 20 degrees. This exemption shall not extend to any sole proprietor who permits more than one person other than the proprietor to work regularly in connection with the trade or profession for remuneration or recompense of any kind, unless the other person in excess of one so remunerated is a blind person.

(c) Every person engaged in the public practice of accounting as a principal, or as a manager of the business of public accountant, shall pay for such license fifty dollars ($50.00), and in addition shall pay a license of twelve dollars and fifty cents ($12.50) for each person employed who is engaged in the capacity of supervising or handling the work of auditing, devising or installing systems of accounts.

(d) Repealed by Session Laws 1998-95, s. 7, effective July 1, 1999.

(e) Licenses issued under this section are issued as personal privilege licenses and shall not be issued in the name of a firm or corporation. A licensed photographer having a located place of business in this State is liable for a license tax on each agent or solicitor employed by the photographer for soliciting business. If any person engages in more than one of the activities for which a privilege tax is levied by this section, the person is liable for a privilege tax with respect to each activity engaged in.

(f) Repealed by Session Laws 1981, c. 17.

(g) Repealed by Session Laws 1998-95, s. 7, effective July 1, 1999.

(h) Counties and cities may not levy any license tax on the business or professions taxed under this section.

(i) Obtaining a license required by this Article does not of itself authorize the practice of a profession, business, or trade for which a State qualification license is required. (1939, c. 158, s. 109; 1941, c. 50, s. 3; 1943, c. 400, s. 2; 1949, c. 683; 1953, c. 1306; 1957, c. 1064; 1973, c. 476, s. 193; 1981, c. 17; c. 83, ss. 4, 5; 1989, c. 584, s. 7; 1991 (Reg. Sess., 1992), c. 974, s. 1; 1993, c. 419, s. 13.2; 1998-95, s. 7; 2002-158, s. 3; 2005-276, s. 23A.1(b).)

Editor's Note. — Session Laws 2002-158, s. 15.1, provides that nothing in the act obligates the General Assembly to appropriate funds to implement the act now or in the future.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 23A.1(b), effective January 1, 2006, and applicable to the membership fees due for 2006, deleted the former last two sentences of subdivision (a)(1), which read: "In addition to the tax, whenever an attorney pays the tax, the Department must give that attorney an opportunity to make a contribution of fifty dollars ($50.00) to support the North Carolina Public Campaign Financing Fund established by G.S. 163-278.63. Payment of the contribution is not required and is not considered part of the tax owed."

Legal Periodicals. — For comment on the 1943 amendment which added the last sentence of subsection (e), see 21 N.C.L. Rev. 367 (1943).

For survey of 1976 case law on taxation, see 55 N.C.L. Rev. 1083 (1977).

CASE NOTES

A "professional" art is one requiring knowledge of advanced type in a given field of science or learning gained by a prolonged course of specialized instruction and study. Smith v. Keator, 21 N.C. App. 102, 203 S.E.2d 411, aff'd, 285 N.C. 530, 206 S.E.2d 203, appeal dismissed, 419 U.S. 1043, 95 S. Ct. 613, 42 L. Ed. 2d 636 (1974).

A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. Smith v. Keator, 21 N.C. App. 102, 203 S.E.2d 411, aff'd, 285 N.C. 530, 206 S.E.2d 203, appeal dismissed, 419 U.S. 1043, 95 S. Ct. 613, 42 L. Ed. 2d 636 (1974).

The word "healing" in this section is ordinarily understood to mean the curing of diseases or injuries. Smith v. Keator, 21 N.C. App. 102, 203 S.E.2d 411, aff'd, 285 N.C. 530, 206 S.E.2d 203, appeal dismissed, 419 U.S. 1043, 95 S. Ct. 613, 42 L. Ed. 2d 636 (1974).

Rulings by Secretary of Revenue Not Binding on Courts. — Rulings made by the Secretary of Revenue setting forth his interpretations of this section are not binding upon the courts. Smith v. Keator, 21 N.C. App. 102, 203 S.E.2d 411, aff'd, 285 N.C. 530, 206 S.E.2d 203, appeal dismissed, 419 U.S. 1043, 95 S. Ct. 613, 42 L. Ed. 2d 636 (1974).

Masseurs are not persons "practicing any professional art of healing" within the meaning of subsection (a). Smith v. Keator, 21 N.C. App. 102, 203 S.E.2d 411, aff'd, 285 N.C. 530, 206 S.E.2d 203, appeal dismissed, 419 U.S. 1043, 95 S. Ct. 613, 42 L. Ed. 2d 636 (1974).

Masseurs are not required to obtain a privilege license from the State, and they are subject to regulation by local governments. Smith v. Keator, 21 N.C. App. 102, 203 S.E.2d 411, aff'd, 285 N.C. 530, 206 S.E.2d 203, appeal dismissed, 419 U.S. 1043, 95 S. Ct. 613, 42 L. Ed. 2d 636 (1974).

Persons Making "Negatives" Are Photographers Subject to License Tax. — To solicit persons to have their photographs taken, arrange for the sitting and actually have the camera present and take what is popularly called a picture, but in fact is a "negative," which is the outline of the subject on glass is engaging within the State in the profession or business of photography within the meaning of this section. Lucas v. City of Charlotte, 14 F. Supp. 163 (W.D.N.C. 1936), aff'd, 86 F.2d 394 (4th Cir. 1936).

Although the "negatives" are sent to another state for development the assessment of the tax under this section on photographers does not constitute an interference with or burden upon interstate commerce. Lucas v. City of Charlotte, 14 F. Supp. 163 (W.D.N.C. 1936), aff'd, 86 F.2d 394 (4th Cir. 1936).

Discriminatory Statute Applying to Real Estate Brokers Is Unconstitutional. — Public-Local Laws of 1927, c. 241, requiring real estate brokers and salesmen in certain designated counties to be licensed by a real estate commission on the basis of moral character and proficiency in the public interest and requiring the payment of a license fee in addition to the license required by this section, was held unconstitutional as discriminatory. State v. Warren, 211 N.C. 75, 189 S.E. 108 (1937).

Cited in State v. Dixon, 215 N.C. 161, 1 S.E.2d 521 (1939); Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

OPINIONS OF ATTORNEY GENERAL

Faith healers are "persons practicing any professional art of healing for fee or reward" within the purview of this section. See opinion of Attorney General to Mr. John R. Parker, 42 N.C.A.G. 286 (1973).

Exemption Under Subsection (b) Does

Not Revive the Right of a County to Levy a Tax. — See opinion of Attorney General to Mr. John R. Parker, 42 N.C.A.G. 286 (1973).

§ **105-41.1:** Repealed by Session Laws 1975, c. 619, s. 2.

Cross References. — For present provisions as to license fees for professional bondsmen and runners, see G.S. 58-71-55, 58-71-75.

§ **105-42:** Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ **105-43:** Repealed by Session Laws 1973, c. 1195, s. 8.

Cross References. — For present provisions as to license fees for auctioneers, see G.S. 85B-6.

§ **105-44:** Repealed by Session Laws 1981 (Regular Session, 1982), c. 1228.

§§ **105-45, 105-46:** Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ **105-47:** Repealed by Session Laws 1979, c. 69.

§ **105-48:** Repealed by Session Laws 1979, c. 67.

§ **105-48.1:** Repealed by Session Laws 1981, c. 7.

§ **105-49:** Repealed by Session Laws 1989, c. 584, s. 10.

§ **105-50:** Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ **105-51:** Repealed by Session Laws 1989, c. 584, s. 12.

§ **105-51.1:** Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ **105-52:** Repealed by Session Laws 1979, c. 16, s. 1.

§§ **105-53 through 105-55:** Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

Cross References. — For provisions dealing with peddlers, itinerant merchants, and specialty markets, see G.S. 66-250 et seq.

§ 105-56: Repealed by Session Laws 1981, c. 5.

§ 105-57: Repealed by Session Laws 1987 (Regular Session, 1988), c. 1081, s. 1.

§ 105-58: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ 105-59: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1282, s. 44.

§§ 105-60, 105-61: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ 105-61.1: Repealed by Session Laws 1989, c. 584, s. 17.

§ 105-62: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ 105-63: Repealed by Session Laws 1979, c. 65.

§ 105-64: Repealed by Session Laws 1989, c. 584, s. 19.

§ 105-64.1: Repealed by Laws 1989, c. 584, s. 19. =rsns 105-65: Repealed by Session Laws, 1996, Second Extra Session, c. 14, s. 17.

§ 105-65.2: Repealed by Session Laws 1989, c. 584, s. 19.

§ 105-66: Repealed by Session Laws 1989, c. 584, s. 19.

§ 105-66.1: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ 105-67: Repealed by Session Laws 1991 (Reg. Sess., 1992), c. 965, s. 1.

§ 105-68: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1229.

§ 105-69: Repealed by Session Laws 1973, c. 1200, s. 1.

§ 105-70: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

Cross References. — See N.C. Const., Art. V, § 2 (1), (2), (6) and note thereto.

§ 105-71: Repealed by Session Laws 1979, c. 70.

§ 105-72: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ 105-73: Repealed by Session Laws 1957, c. 1340, ss. 2, 9.

§ 105-74: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ 105-75: Repealed by Session Laws 1979, 2nd Session, c. 1304, s. 1.

§ 105-75.1: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ 105-76: Repealed by Session Laws 1979, c. 62.

§ 105-77: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ 105-78: Repealed by Session Laws 1979, c. 66.

§ 105-79: Repealed by Session Laws 1979, c. 150, s. 4.

§ 105-80: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ 105-81: Repealed by Session Laws 1947, c. 501, s. 2.

§ 105-82: Repealed by Session Laws 1989, c. 584, s. 24.

§ 105-83. Installment paper dealers.

(a) Every person engaged in the business of dealing in, buying, or discounting installment paper, notes, bonds, contracts, or evidences of debt for which, at the time of or in connection with the execution of the instruments, a lien is reserved or taken upon personal property located in this State to secure the payment of the obligations, shall submit to the Secretary quarterly no later than the twentieth day of January, April, July, and October of each year, upon forms prescribed by the Secretary, a full, accurate, and complete statement, verified by the officer, agent, or person making the statement, of the total face value of the obligations dealt in, bought, or discounted within the preceding three calendar months and, at the same time, shall pay a tax of two hundred seventy-seven thousandths of one percent (.277%) of the face value of these obligations.

(b) Repealed by Session Laws 1998-95, s. 9, effective July 1, 1999.

(c) If any person deals in, buys, or discounts any obligations described in this section without paying a tax imposed by this section, the person may not bring an action in a State court to enforce collection of an obligation dealt in, bought, or discounted during the period of noncompliance with this section until the person pays the amount of tax, penalties, and interest due.

(d) This section does not apply to corporations liable for the tax levied under G.S. 105-102.3 or to savings and loan associations.

(e) Counties and cities shall not levy any license tax on the business taxed under this section. (1939, c. 158, s. 148; 1957, c. 1340, s. 2; 1973, c. 476, s. 193; 1981, c. 83, ss. 8, 9; 1991, c. 45, s. 3; 1991 (Reg. Sess., 1992), c. 965, s. 3; 1998-95, s. 9; 1998-98, s. 1(f).)

CASE NOTES

Constitutionality. — The imposition of taxes on installment paper dealers is not rendered discriminatory by the exemption from the tax of corporations organized under the State or national banking laws, even though banks, in addition to their regular banking business, carry on the identical business of discounting commercial paper, since the two businesses are distinct in fact, and the one is subject to regulations and controls which are not applicable to the other. Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543, appeal dismissed, 368 U.S. 289, 82 S. Ct. 375, 7 L. Ed. 336 (1961).

The defendant/finance corporation was not subject to tax assessment under this section for its wholesale installment paper business where the buying and selling of the installment paper took place entirely within a foreign state and its other activities were not incident to the buying and selling of the paper. The defendant's retail installment paper business in North Carolina had no relation to its wholesale installment paper business; and the record contained no evidence that the defendant engaged in the promotion or solicitation of the buying or selling of installment paper in North Carolina. Chrysler Fin. Co., L.L.C. v. Offerman, 138 N.C. App. 268, 531 S.E.2d 223, 2000 N.C. App. LEXIS 605 (2000).

Bank Distinguished from Installment Paper Dealer. — See Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543, appeal dismissed, 368 U.S. 289, 82 S. Ct. 375, 7 L. Ed. 336 (1961).

"Engaged in the Business." — The defendant/finance corporation was "engaged in the business of dealing in . . . installment paper" where it purchased credit sale agreements from another corporation although it did so in order to provide dealerships with financing under a wholesale finance plan and not for the purpose of making a profit. Chrysler Fin. Co., L.L.C. v. Offerman, 138 N.C. App. 268, 531 S.E.2d 223, 2000 N.C. App. LEXIS 605 (2000).

§ 105-84: Repealed by Session Laws 1979, c. 150, s. 5.

§§ 105-85, 105-86: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ 105-87: Repealed by Session Laws 1981, c. 6.

§ 105-88. Loan agencies.

(a) Every person, firm, or corporation engaged in any of the following businesses must pay for the privilege of engaging in that business an annual tax of two hundred fifty dollars ($250.00) for each location at which the business is conducted:

(1) The business of making loans or lending money, accepting liens on, or contracts of assignments of, salaries or wages, or any part thereof, or other security or evidence of debt for repayment of such loans in installment payment or otherwise.

(2) The business of check cashing regulated under Article 22 of Chapter 53 of the General Statutes.

(3) The business of pawnbroker regulated under Chapter 91A of the General Statutes.

(b) This section does not apply to banks, industrial banks, trust companies, savings and loan associations, cooperative credit unions, the business of negotiating loans on real estate as described in G.S. 105-41, or insurance premium finance companies licensed under Article 35 of Chapter 58 of the General Statutes. This section applies to those persons or concerns operating what are commonly known as loan companies or finance companies and whose business is as hereinbefore described, and those persons, firms, or corporations pursuing the business of lending money and taking as security for the payment of the loan and interest an assignment of wages or an assignment of wages with power of attorney to collect the amount due, or other order or chattel mortgage or bill of sale upon household or kitchen furniture. No real estate mortgage broker is required to obtain a privilege license under this section merely because the broker advances the broker's own funds and takes a security interest in real estate to secure the advances and when, at the time of the advance, the broker has already made arrangements with others for the sale or discount of the obligation at a later date and does so sell or discount the obligation within the period specified in the arrangement or extensions thereof; or when, at the time of the advance the broker intends to sell the obligation to others at a later date and does, within 12 months from date of initial advance, make arrangements with others for the sale of the obligation and does sell the obligation within the period specified in the arrangement or extensions thereof; or because the broker advances the broker's own funds in temporary financing directly involved in the production of permanent-type loans for sale to others; and no real estate mortgage broker whose mortgage lending operations are essentially as described above is required to obtain a privilege license under this section.

(c) At the time of making any such loan, the person, or officer of the firm or corporation making the loan, shall give to the borrower in writing in convenient form a statement showing the amount received by the borrower, the amount to be paid back by the borrower, the time in which the amount is to be paid, and the rate of interest and discount agreed upon.

(d) A loan made by a person who does not comply with this section is not collectible at law under G.S. 105-269.13.

(e) Counties, cities, and towns may levy a license tax on the business taxed under this section. Except as provided in G.S. 160A-211 and G.S. 153A-152, the tax may not exceed one hundred dollars ($100.00). (1939, c. 158, s. 152; 1967, c. 1080; c. 1232, s. 2; 1973, c. 476, s. 193; 1991, c. 45, s. 4; 1993, c. 539, s. 695; 1994, Ex. Sess., c. 24, s. 14(c); 1998-98, s. 1(g); 1999-438, s. 2; 2000-120, s. 3; 2000-173, s. 2.)

Cross References. — For the Consumer Finance Act, see G.S. 53-164 through 53-191.

CASE NOTES

Purpose of Section Is to Raise Revenue. — The tax imposed on loan agencies or brokers by this section is merely one of the Section B license taxes imposed by this Article for the privilege of carrying on a particular business, and its purpose is to raise revenue. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

This Section Applies to Loan Agencies Irrespective of the Amounts Loaned. — All loan agencies subject to the provisions of this section are not subject to the provisions of the Consumer Finance Act, G.S. 53-164 et seq. This section applies to all the loan agencies specified therein, irrespective of the amounts which they loan or the interest they charge. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§§ 105-89 through 105-90: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ 105-90.1: Repealed by Session Laws 1989 (Regular Session, 1990), c. 814, s. 4.

§ 105-91: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ 105-92: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1227.

§ 105-93: Repealed by Session Laws 1979, c. 68.

§ 105-94: Repealed by Session Laws 1947, c. 501, s. 2.

§ 105-95: Repealed by Session Laws 1947, c. 831, s. 2.

§ 105-96: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1231.

§ 105-97: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ 105-100: Repealed by Session Laws 1979, c. 64.

§ 105-101: Repealed by Session Laws 1979, c. 85, s. 1.

§ 105-102: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1230.

§ 105-102.1: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ 105-102.2: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1213.

§ 105-102.3. Banks.

There is imposed upon every bank or banking association, including each national banking association, that is operating in this State as a commercial bank, an industrial bank, a savings bank created other than under Chapter 54B or 54C of the General Statutes or the Home Owners' Loan Act of 1933 (12 U.S.C. §§ 1461-68), a trust company, or any combination of such facilities or services, and whether such bank or banking association, hereinafter to be referred to as a bank or banks, is organized, under the laws of the United States or the laws of North Carolina, in the corporate form or in some other form of business organization, an annual privilege tax. A report and the privilege tax are due by the first day of July of each year on forms provided by the Secretary. The tax rate is thirty dollars ($30.00) for each one million dollars ($1,000,000) or fractional part thereof of total assets held as provided in this section. The assets upon which the tax is levied shall be determined by averaging the total assets shown in the four quarterly call reports of condition (consolidating domestic subsidiaries) for the preceding calendar year as required by bank regulatory authorities. If a bank has been in operation less than a calendar year, then the assets upon which the tax is levied shall be determined by multiplying the average of the total assets by a fraction, the denominator of which is 365 and the numerator of which is the number of days of operation. If a bank operates an international banking facility, as defined in G.S. 105-130.5(b)(13), the assets upon which the tax is levied shall be reduced by the average amount for the taxable year of all assets of the international banking facility which are employed outside the United States, as computed pursuant to G.S. 105-130.5(b)(13)c. For an out-of-state bank with one or more branches in this State, or for an in-state bank with one or more branches outside this State, the assets of the out-of-state bank or of the in-state bank upon which the tax is levied shall be reduced by the average amount for the taxable year of all assets of the out-of-state bank or of the in-state bank which are employed outside this State. The tax imposed in this section shall be for the privilege of carrying on the businesses herein defined on a statewide basis regardless of the number of places or locations of business within the State. Counties and cities may not levy a license or privilege tax on the businesses taxed under this section, nor on the business of an international banking facility as defined in subsection (b)(13) of G.S. 105-130.5. (1973, c. 1053, s. 7; 1981, c. 855, s. 2; 1985 (Reg. Sess., 1986), c. 985, s. 4; 1995, c. 322, s. 2; 1998-95, s. 10; 1998-98, s. 1(h).)

§ 105-102.4: Repealed by Session Laws 1989, c. 584, s. 35.

§ 105-102.5: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 17.

§ 105-102.6. Publishers of newsprint publications.

(a) Purpose. — The purpose of this section is to provide incentives for the recycling of newsprint and magazines and for the use of newsprint that contains recycled content.

(b) Definitions. — The following definitions apply in this section:

(1) Gross tonnage of newsprint consumed. — The weight in metric tons of all newsprint consumed by a publisher.

(2) Newsprint. — Uncoated paper, whether supercalendered or machine finished, made primarily from mechanical wood pulp combined with some chemical wood pulp, weighing between 24.5 and 35 pounds for 500 sheets of paper two feet by three feet in size, and having a brightness of less than 60.

(2a) Nonvirgin newsprint. — Newsprint that contains recycled postconsumer recovered paper.

(3) Postconsumer recovered paper. — Paper products, generated by a business or consumer, that have served their intended end uses and have been separated or diverted from solid waste.

(4) Publisher. — A person engaged in the business of producing publications printed on newsprint who acquires and uses newsprint for this business.

(5) Recycled content percentage. — The percentage by weight of the total gross tonnage of newsprint consumed by the publisher that is recycled postconsumer recovered paper. For example, if a publisher consumes 10 tons of virgin newsprint, 10 tons of nonvirgin newsprint that contains fifty percent (50%) recycled postconsumer recovered paper,

and 10 tons of nonvirgin newsprint that contains ten percent (10%) recycled postconsumer recovered paper, the publisher's recycled content percentage is 6/30 or twenty percent (20%).

(6) Recycled content tonnage. — The weight in metric tons of the total gross tonnage of newsprint consumed by the publisher that is recycled postconsumer recovered paper.

(7) Recycling. — Any process by which solid waste, or materials that would otherwise become solid waste, are collected, separated, or processed, and reused or returned to use in the form of raw materials or products.

(8) Recycling tonnage. — The weight in metric tons of newsprint and magazines recycled or diverted to recycling by a publisher.

(9) Virgin newsprint. — Newsprint that does not contain recycled postconsumer recovered paper.

(c) Minimum Recycled Content Percentage. — The recycled content percentage of newsprint consumed by a publisher shall equal or exceed the following minimum recycled content percentages:

During 1991 and 1992, twelve percent (12%).
During 1993, fifteen percent (15%).
During 1994, twenty percent (20%).
During 1995 and 1996, twenty-five percent (25%).
During 1997 and 1998, thirty percent (30%).
During 1999 through 2004, thirty-five percent (35%).
After 2004, forty percent (40%).

A publisher who has developed and operates or contracts for the operation of a newspaper or magazine recycling program shall receive partial credit toward the recycled content percentage goals established in this subsection on the basis of one ton of credit toward its total recycled content tonnage for each ton of recycling tonnage.

(d) Tax. — Every publisher shall apply for and obtain from the Secretary a newsprint publisher tax reporting number and shall file an annual report with the Secretary by January 31 of each year. The report shall include the following information for the preceding calendar year:

(1) Tonnage of virgin newsprint consumed.
(2) Tonnage of nonvirgin newsprint consumed.
(3) Gross tonnage of newsprint consumed.
(4) Itemized percentages of recycled postconsumer recovered paper contained in tonnage of nonvirgin newsprint consumed.
(5) Recycled content tonnage.
(6) Recycled content percentage.
(7) Recycling tonnage.

In addition, each publisher whose recycled content percentage for a calendar year is less than the applicable minimum recycled content percentage provided in subsection (c) shall pay a tax of fifteen dollars ($15.00) on each ton by which the publisher's recycled content tonnage falls short of the tonnage of recycled postconsumer recovered paper needed to achieve the applicable minimum recycled content percentage provided in subsection (c). This tax is due when the report is filed. No county or city may impose a license tax on the business taxed under this section.

(e) Exemption. — The tax levied in this section does not apply to an amount calculated pursuant to subsection (d) to the extent the amount is attributable solely to the publisher's inability to obtain sufficient recycled content newsprint because (i) recycled content newsprint was not available at a price comparable to the price of virgin newsprint; (ii) recycled content newsprint of a quality comparable to virgin newsprint was not available; or (iii) recycled content newsprint was not available within a reasonable period of time during the reporting period. In order to claim the exemption provided in this subsection, a publisher must certify to the Secretary:

(1) The amount of virgin newsprint consumed by the publisher during the reporting period solely for one of the reasons listed above.

(2) That the publisher attempted to obtain recycled content newsprint from every manufacturer of recycled content newsprint that offered to sell recycled content newsprint to the publisher within the preceding calendar year.

(3) The name, address, and telephone number of each recycled content newsprint manufacturer contacted, including the company name and the name of the company's individual representative or employee.

(f) Use of Proceeds. — The Secretary shall, on or before April 15 of each year, credit the net proceeds of the tax imposed by this section to the Solid Waste Management Trust Fund created in G.S. 130A-309.12. (1991, c. 539, s. 2; c. 761, s. 18; 1991 (Reg. Sess., 1992), c. 1007, s. 1; 1995, c. 459, s. 1; 1997-456, s. 27; 1998-95, s. 11; 1999-346, s. 1.)

§ 105-103. Unlawful to operate without license.

When a license tax is required by law, and whenever the General Assembly shall levy a license tax on any business, trade, employment, or profession, or for doing any act, it shall be unlawful for any person, firm, or corporation without a license to engage in such business, trade, employment, profession, or do the act; and when such tax is imposed it shall be lawful to grant a license for the business, trade, employment, or for doing the act; and no person, firm, or corporation shall be allowed the privilege of exercising any business, trade, employment, profession, or the doing of any act taxed in this schedule throughout the State under one license, except under a statewide license. (1939, c. 158, s. 181; 1998-98, s. 41.)

Editor's Note. — Session Laws 1998-98, s. 41, effective August 14, 1998, deleted the former Division I designation from sections 105-103 through 105-113, so that Article 2 now contains G.S. 105-33 through 105-113 without any subdivision into Parts.

§ 105-104: Repealed by Session Laws 2007-491, s. 2, effective January 1, 2008.

Editor's Note. — Session Laws 2007-491, s. 47 provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-105. Persons, firms, and corporations engaged in more than one business to pay tax on each.

Where any person, firm, or corporation is engaged in more than one business, trade, employment, or profession which is made under the provisions of this Article subject to State license taxes, such persons, firms, or corporations shall pay the license tax prescribed in this Article for each separate business, trade, employment, or profession. (1939, c. 158, s. 183.)

§ 105-106. Effect of change in name of firm.

No change in the name of a firm, partnership, or corporation, nor the taking in of a new partner, nor the withdrawal of one or more of the firm, shall be considered as commencing business; but if any one or more of the partners remain in the firm, or if there is change in ownership of less than a majority of the stock, if a corporation, the business shall be regarded as continuing. (1939, c. 158, s. 184.)

§ 105-107: Repealed by Session Laws 1998-95, s. 12, effective July 1, 1999.

§ 105-108. Property used in a licensed business not exempt from taxation.

A State license, issued under any of the provisions of this Article shall not be construed to exempt from other forms of taxation the property employed in such licensed business, trade, employment, or profession. (1939, c. 158, s. 186.)

§ 105-109. Obtaining license and paying tax.

(a) Repealed by Session Laws 1998-95, s. 13, effective July 1, 1999.

(b) License Required. — Before a person may engage in a business, trade, or profession for which a license is required under this Article, the person must be licensed by the Department. To obtain a license, a person must submit an application to the Department for the license and pay the required tax. An application for a license is considered a return.

The Department must issue a license to a person who files a completed application and pays the required tax. A license must be displayed conspicuously at the location of the licensed business, trade, or profession.

(c) Repealed by Session Laws 1998-212, s. 29A.14(a), effective January 1, 1999.

(d) Penalties. — The penalties in G.S. 105-236 apply to this Article. The Secretary may collect a tax due under this Article in any manner allowed under Article 9 of this Chapter.

(e) Local License Taxes. — The penalty and collection provisions of this section apply to taxes levied by counties of the State under the authority of this Article in the same manner and to the same extent as they apply to taxes levied by the State. The provisions of this section for the collection of delinquent license taxes apply to license taxes levied by the cities and towns of this State under authority of this Article, or any other provision of law, in the same manner and to the same extent as they apply to taxes levied by the State. (1939, c. 158, s. 187; 1957, c. 859; 1963, c. 294, s. 5; 1973, c. 108, s. 51; c. 476, s. 193; 1993, c. 539, ss. 698, 699; 1994, Ex. Sess., c. 24, s. 14(c); 1998-95, s. 13; 1998-212, s. 29A.14(a); 2007-491, s. 7.)

Local Modification. — City of Charlotte: 1991, c. 64, s. 1.

Editor's Note. — Session Laws 2007-491, s. 47 provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act.

This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 7, effective January 1, 2008, rewrote subsection (b). For applicability, see Editor's note.

§ 105-109.1: Repealed by Session Laws 1999-337, s. 16, effective July 22, 1999.

§ 105-110: Repealed by Session Laws 1998-212, s. 29A.14(b), effective January 1, 1999.

§ 105-111: Repealed by Session Laws 2001-414, s. 2, effective September 14, 2001.

§ 105-112: Repealed by Session Laws 1998-212, s. 29A.14(c), effective January 1, 1999.

§ 105-113: Repealed by Session Laws 1999-337, s. 17, effective July 22, 1999.

§ 105-113.1: Deleted.

Editor's Note. — This section, which related to privilege taxes payable in advance and provided for the reduction of taxes levied under certain sections, was derived from Session Laws 1943, c. 400, s. 2, and was amended by Session Laws 1945, c. 708, s. 2. As the section expired by limitation on June 1, 1947, it has been deleted.

Article 2A.

Tobacco Products Tax.

Part 1. General Provisions.

§ 105-113.2. Short title.

This Article may be cited as the "Tobacco Products Tax Act" or "Tobacco Products Tax Article." (1969, c. 1075, s. 2; 1991, c. 689, s. 266; 1998-98, s. 56.)

§ 105-113.3. Scope of tax; administration.

(a) Scope. — The taxes imposed by this Article shall be collected only once on the same tobacco product. Except as permitted by Article 2 of this Chapter, a city or county may not levy a privilege license tax on the sale of tobacco products.

(b) Administration. — Article 9 of this Chapter applies to this Article. (1969, c. 1075, s. 2; 1991, c. 689, s. 268; 1998-212, s. 29A.14(d).)

§ 105-113.4. Definitions.

The following definitions apply in this Article:

(1) Cigar. — A roll of tobacco wrapped in a substance that contains tobacco, other than a cigarette.

(1a) Cigarette. — Any of the following:

a. A roll of tobacco wrapped in paper or in a substance that does not contain tobacco.

b. A roll of tobacco wrapped in a substance that contains tobacco and that, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to or purchased by a consumer as a cigarette described in subpart a. of this subdivision.

(2) Cost price. — The price a person liable for the tax on tobacco products imposed by Part 3 of this Article paid for the products, before any discount, rebate, or allowance or the tax imposed by that Part.

(3) Distributor. — Either of the following:

a. A person, wherever resident or located, who purchases non-tax-paid cigarettes directly from the manufacturer of the cigarettes and stores, sells, or otherwise disposes of the cigarettes.

b. A person who manufactures or produces cigarettes or causes them to be manufactured or produced.

(4) Repealed by Session Laws 1991, c. 689, s. 267.

(4a) Integrated wholesale dealer. — A wholesale dealer who is an affiliate of a manufacturer of tobacco products, other than cigarettes, is the only person to whom the manufacturer sells its products, and is not a retail dealer. An "affiliate" is a person who directly or indirectly controls, is controlled by, or is under common control with another person.

(5) Licensed distributor. — A distributor licensed under Part 2 of this Article.

(6) Manufacturer. — A person who manufactures or produces tobacco products.

(7) Package. — The individual packet, can, box, or other container used to contain and to convey tobacco products to the consumer.

(8) Person. — Defined in G.S. 105-228.90.

(9) Retail dealer. — A person who sells a tobacco product to the ultimate consumer of the product.

(10) Sale. — A transfer, a trade, an exchange, or a barter, in any manner or by any means, with or without consideration.

(10a) Secretary. — The Secretary of Revenue.

(11) Repealed by Session Laws 1993, c. 442, s. 1, effective January 1, 1994.

(11a) Tobacco product. — A cigarette, a cigar, or any other product that contains tobacco and is intended for inhalation or oral use.

(12) Repealed by Session Laws 1993, c. 442, s. 1, effective January 1, 1994.

(13) Use. — The exercise of any right or power over cigarettes, incident to the ownership or possession thereof, other than the making of a sale thereof in the course of engaging in a business of selling cigarettes. The term includes the keeping or retention of cigarettes for use.

(14) Wholesale dealer. — A person who makes tobacco products other than cigarettes or who acquires tobacco products other than cigarettes for sale to another wholesale dealer or to a retail dealer. (1969, c. 1075, s. 2; 1973, c. 476, s. 193; 1991, c. 689, s. 267; 1993, c. 354, s. 7; c. 442, s. 1; 2007-435, s. 2.)

Effect of Amendments. — Session Laws 2007-435, s. 2, effective October 1, 2007, added subdivision (4a).

§ 105-113.4A. Licenses.

(a) General. — To obtain a license required by this Article, an applicant must apply to the Secretary and pay the tax due for the license. A license is not transferable or assignable and must be displayed at the place of business for which it is issued.

(b) Refund. — A refund of a license tax is allowed only when the tax was collected or paid in error. No refund is allowed when a license holder surrenders a license or the Secretary revokes a license.

(c) Duplicate or Amended License. — Upon application to the Secretary, a license holder may obtain without charge one of the following:

(1) A duplicate license, if the license holder establishes that the original license has been lost, destroyed, or defaced.

(2) An amended license, if the license holder establishes that the location of the place of business for which the license was issued has changed.

A duplicate or amended license shall state that it is a duplicate or amended license, as appropriate. (1991 (Reg. Sess., 1992), c. 955, s. 3.)

§ 105-113.4B. Reasons why the Secretary can cancel a license.

(a) Reasons. — The Secretary may cancel a license issued under this Article upon the written request of the license holder. The Secretary may summarily cancel the license of a license holder when the Secretary finds that the license holder is incurring liability for the tax imposed under this Article after failing to pay a tax when due under this Article. In addition, the Secretary may cancel the license of a license holder that commits one or more of the following acts after holding a hearing on whether the license should be cancelled:

(1) A violation of this Article.

(2) A violation of G.S. 14-401.18.

(b) Procedure. — The Secretary must send a person whose license is summarily cancelled a notice of the cancellation and must give the person an opportunity to have a hearing on the cancellation within 10 days after the cancellation. The Secretary must give a person whose license may be cancelled after a hearing at least 10 days' written notice of the date, time, and place of the hearing. A notice of a summary license cancellation and a notice of hearing must be sent by registered mail to the last known address of the license holder. (1999-333, s. 6.)

§ 105-113.4C. Enforcement of Master Settlement Agreement Provisions.

The Master Settlement Agreement between the states and the tobacco product manufacturers, incorporated by reference into the consent decree referred to in S.L. 1999-2, requires each state to diligently enforce Article 37 of Chapter 66 of the General Statutes. The Office of the Attorney General and the Secretary of Revenue shall perform the following responsibilities in enforcing Article 37:

(1) The Office of the Attorney General must give to the Secretary of Revenue a list of the nonparticipating manufacturers under the Master Settlement Agreement and the brand names of the products of the nonparticipating manufacturers.

(2) The Office of the Attorney General must update the list provided under subdivision (1) of this section when a nonparticipating manufacturer becomes a participating manufacturer, another nonparticipating manufacturer is identified, or more brands or products of nonparticipating manufacturers are identified.

(3) The Secretary of Revenue must require the taxpayers of the tobacco excise tax to identify the amount of tobacco products of nonparticipating manufacturers sold by the taxpayers, and may impose this requirement as provided in G.S. 66-290(10).

(4) The Secretary of Revenue must determine the amount of State tobacco excise taxes attributable to the products of nonparticipating manufacturers, based on the information provided by the taxpayers, and must report this information to the Office of the Attorney General. (1999-311, s. 2.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1999-311, s. 2 having been G.S. 105-113.4B.

Part 2. Cigarette Tax.

§ 105-113.5. Tax on cigarettes.

A tax is levied on the sale or possession for sale in this State, by a distributor, of all cigarettes at the rate of one and three-fourths cents (1.75¢) per individual cigarette. (1969, c. 1075, s. 2; c. 1246, s. 1; 1991, c. 689, s. 262; 2004-170, s. 5; 2005-276, s. 34.1(a), (b).)

Effect of Amendments. — Session Laws 2005-276, s. 34.1(a), effective September 1, 2005, substituted "one and one-half cents (1.50¢)" for "two and one-half mills."

Session Laws 2005-276, s. 34.1(b), effective July 1, 2006, substituted "one and three-fourths cents (1.75¢)" for "one and one-half cents (1.50¢)."

§ 105-113.6. Use tax levied.

A tax is levied upon the sale or possession for sale by a person other than a distributor, and upon the use, consumption, and possession for use or consumption of cigarettes within this State at the rate set in G.S. 105-113.5. This tax does not apply, however, to cigarettes upon which the tax levied in G.S. 105-113.5 has been paid. (1969, c. 1075, s. 2; 1993, c. 442, s. 2.)

§ 105-113.7. Tax with respect to inventory on effective date of tax increase.

Every distributor subject to the taxes levied in this Article who, on the effective date of a tax increase under this Article, has on hand any cigarettes shall file a complete inventory of the cigarettes within 20 days after the effective date of the increase, and shall pay an additional tax to the Secretary when filing the inventory. The amount of tax due is the amount due based on the difference between the former tax rate and the increased tax rate. (1969, c. 1075, s. 2; 1973, c. 476, s. 193; 1991, c. 689, s. 263.)

§ 105-113.8. Federal Constitution and statutes.

Any activities which this Article may purport to tax in violation of the Constitution of the United States or any federal statute are hereby expressly exempted from taxation under this Article. (1969, c. 1075, s. 2.)

§ 105-113.9. Out-of-state shipments.

Any distributor engaged in interstate business shall be permitted to set aside part of the stock as necessary to conduct interstate business without paying the tax otherwise required by this Part, but only if the distributor complies with the requirements prescribed by the Secretary concerning keeping of records, making of reports, posting of bond, and other matters for administration of this Part.

"Interstate business" as used in this section means:

(1) The sale of cigarettes to a nonresident where the cigarettes are delivered by the distributor to the business location of the nonresident purchaser in another state; and

(2) The sale of cigarettes to a nonresident wholesaler or retailer registered through the Secretary who has no place of business in North Carolina and who purchases the cigarettes for the purposes of resale not within this State and where the cigarettes are delivered to the purchaser at the business location in North Carolina of the distributor who is also licensed as a distributor under the laws of the state of the nonresident purchaser. (1969, c. 1075, s. 2; 1973, c. 476, s. 193; 1977, c. 874; 1993, c. 442, s. 3.)

§ 105-113.10. Manufacturers shipping to distributors exempt.

Any manufacturer shipping cigarettes to other distributors who are licensed under G.S. 105-113.12 may, upon application to the Secretary and upon compliance with requirements prescribed by the Secretary, be relieved of paying the taxes levied in this Part. No manufacturer may be relieved of the requirement to be licensed as a distributor in order to make shipments, including drop shipments, to a retail dealer or ultimate user. (1969, c. 1075, s. 2; c. 1246, s. 2; 1973, c. 476, s. 193; 1975, c. 275, s. 2; 1993, c. 442, s. 4.)

§ 105-113.11. Licenses required.

After the effective date of this Article, no person shall engage in business as a distributor in this State, without having first obtained from the Secretary the appropriate license for that purpose as prescribed herein. Any license required by this Article shall be in addition to any and all other licenses which may be required by law. (1969, c. 1075, s. 2; 1973, c. 476, s. 193.)

§ 105-113.12. Distributor must obtain license.

(a) A distributor shall obtain for each place of business a continuing distributor's license and shall pay a tax of twenty-five dollars ($25.00) for the license.

(b) For the purposes of this section, a "place of business" is a place where a distributor receives or stores non-tax-paid cigarettes.

(c) An out-of-state distributor may obtain a distributor's license upon compliance with the provisions of G.S. 105-113.24 and payment of a tax of twenty-five dollars ($25.00). (1969, c. 1075, s. 2; 1991 (Reg. Sess., 1992), c. 955, s. 4; 1993, c. 442, s. 5.)

§ 105-113.13. Secretary may investigate applicant for distributor's license and require a bond.

(a) Investigation. — The Secretary may investigate an applicant for a distributor's license to determine if the information the applicant submits with the application is accurate and if the applicant is eligible to be licensed as a distributor. The Secretary may decline to issue a distributor's license to an applicant when the Secretary has reasonable cause to believe any of the following:

(1) That the applicant has willfully withheld information requested by the Secretary for the purpose of determining the applicant's eligibility for the license.

(2) That information submitted with the application is false or misleading.

(3) That the application is not made in good faith.

(b) Bond. — The Secretary may require a distributor to furnish a bond in an amount that adequately protects the State from loss if the distributor fails to pay taxes due under this Part. A bond shall be conditioned on compliance with this Part, shall be payable to the State, and shall be in the form required by the Secretary. The Secretary shall set the bond amount based on the anticipated tax liability of the distributor. The Secretary shall periodically review the sufficiency of bonds required of the distributor and shall increase the amount of a required bond if the bond amount no longer covers the anticipated tax liability of the distributor. The Secretary shall decrease the amount of a required bond if the Secretary finds that a lower bond amount will protect the State adequately from loss. (1969, c. 1075, s. 2; 1973, c. 476, s. 193; 1991 (Reg. Sess., 1992), c. 955, s. 5; 1993, c. 442, s. 6.)

§§ 105-113.14 through 105-113.15: Repealed by Session Laws 1991 (Regular Session, 1992), c. 955, § 6.

§ 105-113.16: Repealed by Session Laws 1999-333, s. 7, effective December 1, 1999.

§ 105-113.17. Identification of dispensers.

Each vending machine that dispenses cigarettes must be marked to identify its owner in the manner required by the Secretary. (1969, c. 1075, s. 2; 1973, c. 476, s. 193; 1991 (Reg. Sess., 1992), c. 955, s. 8.)

§ 105-113.18. Payment of tax; reports.

The taxes levied in this Part are payable when a report is required to be filed. The following reports are required to be filed with the Secretary:

(1) Distributor's Report. — A distributor shall file a monthly report in the form prescribed by the Secretary. The report covers sales and other activities occurring in a calendar month and is due within 20 days after the end of the month covered by the report. The report shall state the amount of tax due and shall identify any transactions to which the tax does not apply.

(1a) Report of Free Cigarettes. — A manufacturer who distributes cigarettes without charge shall file a monthly report in the form prescribed by the Secretary. The report covers cigarettes distributed without charge in a calendar month and is due within 20 days after the end of the month covered by the report. The report shall state the number of cigarettes distributed without charge and the amount of tax due.

(2) Use Tax Report. — Every other person who has acquired non-tax-paid cigarettes for sale, use, or consumption subject to the tax imposed by this Part shall, within 96 hours after receipt of the cigarettes, file a report in the form prescribed by the Secretary showing the amount of cigarettes so received and any other information required by the

Secretary. The report shall be accompanied by payment of the full amount of the tax.

(3) Shipping Report. — Any person, except a licensed distributor, who transports cigarettes upon the public highways, roads, or streets of this State, upon notice from the Secretary, shall file a report in the form prescribed by the Secretary and containing the information required by the Secretary.

(4) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1209, s. 1. (1969, c. 1075, s. 2; 1973, c. 476, s. 193; 1981 (Reg. Sess., 1982), c. 1209, s. 1; 1993, c. 442, s. 7; 1993 (Reg. Sess., 1994), c. 745, s. 2.)

§§ 105-113.19, 105-113.20: Repealed by Session Laws 1993, c. 442, s. 8.

§ 105-113.21. Discount; refund.

(a) Repealed by Session Laws 2003-284, s. 45A.1(a), effective for reporting periods beginning on or after August 1, 2003.

(a1) Discount. — A distributor who files a timely report under G.S. 105-113.18 and who sends a timely payment may deduct from the amount due with the report a discount of two percent (2%). This discount covers expenses incurred in preparing the records and reports required by this Part, and the expense of furnishing a bond.

(b) Refund. — A distributor in possession of packages of stale or otherwise unsalable cigarettes upon which the tax has been paid may return the cigarettes to the manufacturer and apply to the Secretary for refund of the tax. The application shall be in the form prescribed by the Secretary and shall be accompanied by an affidavit from the manufacturer stating the number of cigarettes returned to the manufacturer by the applicant. The Secretary shall refund the tax paid, less the discount allowed, on the unsalable cigarettes. (1969, c. 1075, s. 2; cc. 1222, 1238; 1973, c. 476, s. 193; 1993, c. 442, s. 9; 2001-414, s. 3; 2003-284, s. 45A.1(a); 2004-84, s. 2(a).)

§§ 105-113.22, 105-113.23: Repealed by Session Laws 1993, c. 442, s. 8.

§ 105-113.24. Out-of-State distributors to register and remit tax.

(a) The Secretary may authorize any distributor outside this State engaged in the business of selling and shipping cigarettes into the State to obtain a license and report and pay taxes required by this Part.

(b) A nonresident distributor must agree to submit the distributor's books, accounts, and records to reasonable examination by the Secretary or the Secretary's duly authorized agents. The Secretary may require a nonresident distributor to file a bond in accordance with G.S. 105-113.13.

(c) Each such nonresident distributor, other than a foreign corporation which has qualified with the Secretary of State as doing business in this State shall, by a duly executed instrument filed in the office of the Secretary of State, constitute and appoint the Secretary of State his lawful attorney in fact upon whom any original process in any action or legal proceeding against such nonresident distributor arising out of any matter relating to this Article may be served, and therein agree that any original process against him so served shall be of the same force and effect as if served on him within this State, and that the authority thereof shall continue in force irrevocably so long as any such nonresident distributor shall remain liable for any taxes, interest and penalties under this Article.

(d) Any nonresident distributor who shall comply with the provisions of this section may be licensed as a distributor. (1969, c. 1075, s. 2; 1973, c. 476, s. 193; 1991 (Reg. Sess., 1992), c. 955, s. 9; 1993, c. 442, ss. 9.1(a), 9.1(b).)

§ 105-113.25: Repealed by Session Laws 1993, c. 442, s. 8.

§ 105-113.26. Records to be kept.

Every person required to be licensed under this Article and every person required to make reports under this Article shall keep complete and accurate records of all sales and other information as required under this Article. The records shall be in the form prescribed by the Secretary.

These records shall be safely preserved for a period of three years in a manner to ensure their security and accessibility for inspection by the Department. The Secretary may consent to the destruction of any records at any time within this three-year period. (1969, c. 1075, s. 2; 1973, c. 476, s. 193; 1993, c. 442, s. 10.)

§ 105-113.27. Non-tax-paid cigarettes.

(a) Except as otherwise provided in this Article, licensed distributors shall not sell, borrow, loan, or exchange non-tax-paid cigarettes to, from, or with other licensed distributors.

(b) No person shall sell or offer for sale non-tax-paid cigarettes.

(c) The possession of more than six hundred cigarettes on which tax has been paid to another state or country, by any person other than a licensed distributor, is prima facie evidence that the cigarettes are possessed in violation of this Part. (1969, c. 1075, s. 2; 1993, c. 442, s. 11; 1999-337, s. 18.)

§ 105-113.28: Repealed by Session Laws 1993, c. 442, s. 8.

§ 105-113.29. Unlicensed place of business.

It shall be unlawful for any person to maintain a place of business within this State required by this Article to be licensed to engaged in the business of selling or offering for sale cigarettes without first obtaining such licenses. (1969, c. 1075, s. 2.)

§ 105-113.30. Records and reports.

It shall be unlawful for any person who is required under the provisions of this Article to keep records or make reports, to fail to keep such records, refuse to keep such reports, make false entries in such records, fail to produce such records for inspection by the Secretary or his duly authorized agents, fail to file a report, or make a false or fraudulent report or statement. (1969, c. 1075, s. 2; 1973, c. 476, s. 193.)

§ 105-113.31. Possession and transportation of non-tax-paid cigarettes; seizure and confiscation of vehicle or vessel.

(a) It shall be unlawful for any person to transport non-tax-paid cigarettes in violation of this Part. The Secretary may adopt rules allowing quantities of non-tax-paid cigarettes, not exceeding six hundred, to be brought into this State by a transient, a tourist, or a person returning to this State after traveling outside this State, for their own use. The possession or transportation of these cigarettes is not subject to the penalties imposed by this section.

(b)(1) Every person who transports non-tax-paid cigarettes on the public highways, roads, streets, or waterways of this State must transport with the cigarettes invoices or delivery tickets for the cigarettes showing the true name and complete and exact address of the consignee or purchaser, the quantity and brands of the cigarettes transported, and the true name and complete and exact address of the person who has paid or who will pay the tax imposed by this Part or the tax, if any, of the state or foreign country at the point of ultimate destination.

(2) A common carrier that has issued a bill of lading for a shipment of cigarettes and is without notice to itself or to any of its agents or employees that the cigarettes are non-tax-paid in violation of this Part is considered to have complied with this Part and the vehicle or vessel in which the cigarettes are being transported is not subject to confiscation under this section. In the absence of the required invoices, delivery tickets, or bills of lading, the cigarettes so transported, the vehicle or vessel in which the cigarettes are being transported, and any paraphernalia or devices used in connection with the non-tax-paid cigarettes are declared to be contraband goods and may be seized by any officer of the law, who shall take possession of the vehicle or vessel and cigarettes and shall arrest any person in charge of the vehicle or vessel and cigarettes.

(3) The officer shall at once proceed against the person arrested, under the provisions of this Part, in any court having competent jurisdiction; but the vehicle or vessel shall be returned to the owner upon execution by the owner of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which bond shall be approved by the officer and shall be conditioned to return the property to the custody of the officer on the day of trial to abide the judgment of the court. All non-tax-paid cigarettes seized under this section shall be held and shall, upon the acquittal of the person so charged, be returned to the established owner.

(4) Unless the claimant can show that the non-tax-paid cigarettes seized were not transported in violation of this Part and that the property seized belongs to the claimant or that in the case of property other than cigarettes, the property was used in transporting non-tax-paid cigarettes in violation of this Part without the claimant's knowledge or consent, with the right on the part of the claimant to have a jury pass upon this claim, the court shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the cost of the tax due, which the officer shall pay upon sale, expenses of keeping the property, the fee for the seizure, and the costs of the sale, shall pay all liens according to their priorities, which are established, by intervention or otherwise, at the hearing or in another proceeding brought for the purpose as being bona fide and as having been created without the lien or having any notice that the vehicle or vessel was being used for the unlawful transportation of non-tax-paid cigarettes, and shall pay the balance of the proceeds to the State Treasurer for the General Fund.

(5) All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one is found claiming the cigarettes, or the vehicle or vessel, then the taking of the cigarettes, vehicle, or vessel, along with a description, shall be advertised in a newspaper having

circulation in the county where the items were taken, once a week for two weeks and by notices posted in three public places near the place of seizure, and if no claimant appears within ten days after the last publication of the advertisement, the property shall be sold, and the proceeds, after deducting the expenses and costs, shall be paid to the State Treasurer for the General Fund.

(6) This section does not authorize an officer to search any vehicle or vessel or baggage of any person without a search warrant duly issued, except where the officer has knowledge that there are non-tax-paid cigarettes in the vehicle or vessel. (1969, c. 1075, s. 2; 1973, c. 476, s. 193; 1993, c. 442, s. 12.)

CASE NOTES

Cited in Lynn v. West, 134 F.3d 582, 1998 U.S. App. LEXIS 403 (4th Cir.), cert. denied, 525 U.S. 813, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998) (But see Milligan v. State, 135 N.C. App. 781, 522 S.E.2d 330 (1999)).

§ 105-113.32. Non-tax-paid cigarettes subject to confiscation.

All non-tax-paid cigarettes subject to the tax imposed by this Part, together with any container in which they are stored or displayed for sale (including but not limited to vending machines), are declared to be contraband goods and may be seized by any officer of the law. The officer shall arrest any person in charge of the contraband goods and shall at once proceed against the person arrested, under the provisions of this Part, in any court having competent jurisdiction. The disposition of the seized cigarettes and container shall be governed by the provisions of G.S. 105-113.31. (1969, c. 1075, s. 2; 1993, c. 442, s. 13.)

§ 105-113.33. Criminal penalties.

Any person who violates any of the provisions of this Article for which no other punishment is specifically prescribed shall be guilty of a Class 1 misdemeanor. (1969, c. 1075, s. 2; 1993, c. 539, s. 700; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 105-113.34: Repealed by Session Laws 1993, c. 442, s. 8.

Part 3. Tax on Other Tobacco Products.

§ 105-113.35. Tax on tobacco products other than cigarettes; use of proceeds.

(a) Tax. — An excise tax is levied on tobacco products other than cigarettes at the rate of ten percent (10%) of the cost price of the products. This tax does not apply to the following:

(1) A tobacco product sold outside the State.
(2) A tobacco product sold to the federal government.
(3) A sample tobacco product distributed without charge.

(b) Primary Liability. — The wholesale dealer or retail dealer who first acquires or otherwise handles tobacco products subject to the tax imposed by this section is liable for the tax imposed by this section. A wholesale dealer or retail dealer who brings into this State a tobacco product made outside the State is the first person to handle the tobacco product in this State. A wholesale dealer or retail dealer who is the original consignee of a tobacco product that is made outside the State and is shipped into the State is the first person to handle the tobacco product in this State.

(c) Secondary Liability. — A retail dealer who acquires non-tax-paid tobacco products subject to the tax imposed by this section from a wholesale dealer is liable for any tax due on the tobacco products. A retail dealer who is liable for tax under this subsection may not deduct a discount from the amount of tax due when reporting the tax.

(d) Manufacturer's Option. — A manufacturer who is not a retail dealer and who ships tobacco products other than cigarettes to either a wholesale dealer or retail dealer licensed under this Part may apply to the Secretary to be relieved of paying the tax imposed by this section on the tobacco products. Once granted permission, a manufacturer may choose not to pay the tax until otherwise notified by the Secretary. To be relieved of payment of the tax imposed by this section, a manufacturer must comply with the requirements set by the Secretary.

Permission granted under this subsection to a manufacturer to be relieved of paying the tax imposed by this section applies to an integrated wholesale dealer with whom the manufacturer is an affiliate. A manufacturer must notify the Secretary of any integrated wholesale dealer with whom it is an affiliate when the manufacturer applies to the Secretary for permission to be relieved of paying the tax and when an integrated wholesale dealer becomes an affiliate of the manufacturer after the Secretary has given the manufacturer permission to be relieved of paying the tax.

If a person is both a manufacturer of cigarettes and a wholesale dealer of tobacco products other than cigarettes and the person is granted permission under G.S. 105-113.10 to be relieved of paying the cigarette excise tax, the permission applies to the tax imposed by this section on tobacco products other than cigarettes. A cigarette manufacturer who becomes a wholesale dealer after receiving permission to be relieved of the cigarette excise tax must notify the Secretary of the permission received under G.S. 105-113.10 when applying for a license as a wholesale dealer.

(e) Use. — Of the funds collected pursuant to this section, the Secretary shall deposit an amount equal to three percent (3%) of the cost price of the products to the General Fund, and the Secretary shall remit the remainder of the funds to the University Cancer Research Fund established pursuant to G.S. 116-29.1. (1969, c. 1075, s. 2; 1977, c. 1114, s. 4; 1991, c. 689, s. 269; 1991 (Reg. Sess., 1992), c. 955, s. 10; 2003-284, s. 45A.1(b); 2004-84, s. 2(b); 2005-276, s. 34.1(c); 2007-323, s. 6.23(a); 2007-435, s. 3.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-323, s. 6.23(d), provides, in part, that: "A wholesale dealer or retail dealer of tobacco products other than cigarettes who has an inventory of these products on hand on the effective date of the tax increase made by subsection (a) of this section must file a report of the inventory with the Secretary and pay an additional tax on the inventory. The report must be filed within 20 days after the effective date of the tax increase. The amount of the additional tax is the difference between the amount of tax payable at the former tax rate and the increased tax rate."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 34.1(c), effective September 1, 2005, substituted "three percent (3%)" for "two percent (2%)" in subdivision (a).

Session Laws 2007-323, s. 6.23(a), effective October 1, 2007, and applicable to products acquired on or after October 1, 2007, and taxes paid on or after October 1, 2007, added "use of proceeds" in the section heading; substituted "ten percent (10%)" for "three percent (3%)" in subsection (a); and added subsection (e).

Session Laws 2007-435, s. 3, effective October 1, 2007, added the second and third paragraphs in subsection (d).

§ 105-113.36. Wholesale dealer and retail dealer must obtain license.

A wholesale dealer shall obtain for each place of business a continuing tobacco products license and shall pay a tax of twenty-five dollars ($25.00) for the license. A retail dealer shall obtain for each place of business a continuing tobacco products license and shall pay a tax of ten dollars ($10.00) for the license. A "place of business" is a place where a wholesale dealer or where a retail dealer makes tobacco products other than cigarettes or a wholesale dealer or a retail dealer receives or stores non-tax-paid tobacco products other than cigarettes. (1969, c. 1075, s. 2; 1973, c. 476, s. 193; 1991, c. 689, s. 270; 1991 (Reg. Sess., 1992), c. 955, s. 11.)

§ 105-113.37. Payment of tax.

(a) Monthly Report. — Except for tax on a designated sale under subsection (b), the taxes levied by this Article are payable when a report is required to be filed. A report is due on a monthly basis. A monthly report covers sales and other activities occurring in a calendar month and is due within 20 days after the end of the month covered by the report. A report shall be filed on a form provided by the Secretary and shall contain the information required by the Secretary.

(b) Designation of Exempt Sale. — A wholesale dealer who sells a tobacco product to a person who has notified the wholesale dealer in writing that the person intends to resell the item in a transaction that is exempt from tax under G.S. 105-113.35(a)(1) or (2) may, when filing a monthly report under subsection (a), designate the quantity of tobacco products sold to the person for resale. A wholesale dealer shall report a designated sale on a form provided by the Secretary.

A wholesale dealer is not required to pay tax on a designated sale when filing a monthly report. The wholesale dealer shall pay the tax due on all other sales in accordance with this section. A wholesale dealer or a customer of a wholesale dealer may not delay payment of the tax due on a tobacco product by failing to pay tax on a sale that is not a designated sale or by overstating the quantity of tobacco products that will be resold in a transaction exempt under G.S. 105-113.35(a)(1) or (2).

A person who does not sell a tobacco product in a transaction exempt under G.S. 105-113.35(a)(1) or (2) after a wholesale dealer has failed to pay the tax due on the sale of the item to the person in reliance on the person's written notification of intent is liable for the tax and any penalties and interest due on the designated sale. If the Secretary determines that a tobacco product reported as a designated sale is not sold as reported, the Secretary shall assess the person who notified the wholesale dealer of an intention to resell the item in an exempt transaction for the tax due on the sale and any applicable penalties and interest. A wholesale dealer who does not pay tax on a tobacco product in reliance on a person's written notification of intent to resell the item in an exempt transaction is not liable for any tax assessed on the item.

(c) Repealed by Session Laws 1991 (Regular Session, 1992), c. 955, s. 12. (1969, c. 1075, s. 2; 1973, c. 476, s. 193; 1991, c. 689, s. 271; 1991 (Reg. Sess., 1992), c. 955, s. 12.)

§ 105-113.38. Bond.

The Secretary may require a wholesale dealer or a retail dealer to furnish a bond in an amount that adequately protects the State from loss if the dealer fails to pay taxes due under this Part. A bond shall be conditioned on compliance with this Part, shall be payable to the State, and shall be in the form required by the Secretary. The Secretary shall proportion a bond amount to the anticipated tax liability of the wholesale dealer or retail dealer. The Secretary shall periodically review the sufficiency of bonds required of dealers, and shall increase the amount of a required bond when the amount of the bond furnished no longer covers the anticipated tax liability of the wholesale dealer or retail dealer. The Secretary shall decrease the amount of a required bond when the Secretary determines that a smaller bond amount will adequately protect the State from loss. (1969, c. 1075, s. 2; 1991, c. 689, s. 272.)

§ 105-113.39. Discount; refund.

(a) Discount. — A wholesale dealer or a retail dealer who is primarily liable under G.S. 105-113.35(b) for the excise taxes imposed by this Part, who files a timely report under G.S. 105-113.37, and who sends a timely payment may deduct from the amount due with the report a discount of two percent (2%). This discount covers losses due to damage to tobacco products, expenses incurred in preparing the records and reports required by this Part, and the expense of furnishing a bond.

(b) Refund. — A wholesale dealer or retail dealer who is primarily liable under G.S. 150-113.35(b) for the excise taxes imposed by this Part and is in possession of stale or otherwise unsalable cigars upon which the tax has been paid may return the cigars to the manufacturer and apply to the Secretary for refund of the tax. The application shall be in the form prescribed by the Secretary and shall be accompanied by an affidavit from the manufacturer stating the number of cigars returned to the manufacturer by the applicant. The Secretary shall refund the tax paid, less the discount allowed, on the unsalable cigars. (1969, c. 1075, s. 2; 1991, c. 689, s. 273; 2001-414, s. 4; 2003-284, s. 45A.1(c); 2004-84, s. 2(c); 2005-406, s. 2.)

Editor's Note. — Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

This section was repealed by Session Laws 2003-284, s. 45A.1(c), effective for reporting periods beginning on or after August 1, 2003. Session Laws 2004-84, s. 2(c), reenacted and amended the section, effective for reporting periods beginning on or after August 1, 2004.

Effect of Amendments. — Session Laws 2005-406, s. 2, effective September 1, 2005, added "refund" to the section heading; inserted the subsection (a) designation and "Discount" as the heading; added subsection (b); and made a minor punctuation change.

§ 105-113.40. Records of sales, inventories, and purchases to be kept.

Every wholesale dealer and retail dealer shall keep accurate records of the dealer's purchases, inventories, and sales of tobacco products. These records shall be open at all times for inspection by the Secretary or an authorized representative of the Secretary. (1969, c. 1075, s. 2; 1973, c. 476, s. 193; 1991, c. 689, s. 274.)

ARTICLE 2B.

Soft Drink Tax.

§§ 105-113.41 through 105-113.67: Repealed by Session Laws 1996, Second Extra Session, c. 13, s. 4.2, effective July 1, 1999.

Editor's Note. — Session Laws 1996, Second Extra Session, c. 13, s. 4.2, effective July 1, 1999, provides: "Effective July 1, 1999, Article 2B of Chapter 105 of the General Statutes, as amended by this act, is repealed. The Secretary shall retain from collections under Article 2 of Chapter 105 of the General Statutes the cost of refunding the taxes levied in Article 2B of Chapter 105 of the General Statutes."

Session Laws 1996, Second Extra Session, c. 13, s. 1, provides that this act shall be known as the William S. Lee Quality Jobs and Business Expansion Act.

Session Laws 1996, Second Extra Session, c. 13, s. 10.1, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before its amendment or repeal; nor does it affect the right to any refund or credit of a tax that would otherwise have been available under the amended or repealed statute before its amendment or repeal."

Repealed G.S. 105-113.43, 105-113.48, 105-113.49, 105-113.54 to 105-113.56C, 105-113.59 to 105-113.62, 105-113.66 and 105-113.67 had been repealed by Session Laws 1991, c. 689, s. 286. Repealed G.S. 105-113.65 had been repealed by Session Laws 1983 (Reg. Sess., 1984), c. 1004, s. 1.

ARTICLE 2C.

Alcoholic Beverage License And Excise Taxes.

Part 1. General Provisions.

§ 105-113.68. Definitions; scope.

(a) Definitions. — The following definitions apply in this Article:

(1) ABC Commission. — The North Carolina Alcoholic Beverage Control Commission established under G.S. 18B-200.
(2) Repealed by Session Laws 2004-170, s. 6, effective August 2, 2004.
(3) ABC permit. — Defined in G.S. 18B-101.
(4) Alcoholic beverage. — Defined in G.S. 18B-101.
(5) Fortified wine. — Defined in G.S. 18B-101.
(6) License. — A certificate, issued pursuant to this Article by a city or county, that authorizes a person to engage in a phase of the alcoholic beverage industry.
(7) Malt beverage. — Defined in G.S. 18B-101.
(8) Person. — Defined in G.S. 105-228.90.
(9) Sale. — Defined in G.S. 18B-101.
(10) Secretary. — The Secretary of Revenue.
(11) Spirituous liquor or liquor. — Defined in G.S. 18B-101.
(12) Unfortified wine. — Defined in G.S. 18B-101.
(13) Wholesaler or importer. — When used with reference to wholesalers or importers of wine or malt beverages, the term includes resident wineries that sell their wines at retail and resident breweries that produce fewer than 25,000 barrels of malt beverages per year.
(14) Wine. — Unfortified and fortified wine.
(15) Wine shipper permittee. — A winery that holds a wine shipper permit issued by the ABC Commission under G.S. 18B-1001.1.

(b) Scope. — All alcoholic beverages shall be taxed as provided in this Article regardless whether they meet all criteria of these definitions. (1971, c. 872, s.

2; 1973, c. 476, s. 193; 1975, c. 411, s. 1; 1981, c. 747, s. 2; 1985, c. 114, s. 1; c. 596, s. 3; 1993, c. 354, s. 9; c. 415, s. 26; 1995, c. 466, s. 16; 1998-95, s. 14; 1998-98, s. 58; 2003-402, s. 8; 2004-135, s. 3; 2004-170, s. 6; 2005-277, s. 2; 2005-435, s. 25(b).)

Editor's Note. — Session Laws 1971, c. 872, s. 2 added this Article, which contains revenue provisions similar to those formerly appearing in repealed Chapter 18.

Session Laws 1981, c. 747, ss. 1-32, extensively amended this Article so as to bring it into conformity with the revision of the laws governing alcoholic beverages, contained in Chapter 18B, as enacted by Session Laws 1981, c. 412.

Session Laws 1985, c. 114, s. 1, again extensively amended this Article. The historical citations to sections of this Article as it read prior to its 1985 amendment have been added where appropriate to corresponding sections of the Article as amended.

Effect of Amendments. — Session Laws 2005-277, s. 2, effective August 13, 2005, and Session Laws 2005-435, s. 25(b), effective September 27, 2005, made nearly identical amendments in subsection (a), replacing definitions with statutory references and making stylistic changes. Session Laws 2005-435, s. 25(b), further amended the section by rewriting the introductory language and in subdivision (a)(13), inserting "term" and substituting "25,000 barrels" for "310,000 gallons." Subsection (a) has been set out in the form above at the direction of the Revisor of Statutes.

§ 105-113.69. License tax; effect of license.

The taxes imposed in Part 3 of this Article are license taxes on the privilege of engaging in the activity authorized by the license. Licenses issued under this Article authorize the licensee to engage in only those activities that are authorized by the corresponding ABC permit. The activities authorized by each retail ABC permit are described in Article 10 of Chapter 18B of the General Statutes and the activities authorized by each commercial ABC permit are described in Article 11 of that Chapter. (1949, c. 974, s. 6; 1951, c. 378, s. 4; 1963, c. 426, s. 12; 1971, c. 872, s. 2; 1981, c. 747, s. 3; 1985, c. 114, s. 1; 1998-95, s. 15.)

§ 105-113.70. Issuance, duration, transfer of license.

(a) Issuance, Qualifications. — Each person who receives an ABC permit shall obtain the corresponding local license, if any, under this Article. All local licenses are issued by the city or county where the establishment for which the license is sought is located. The information required to be provided and the qualifications for a local license are the same as the information and qualifications required for the corresponding ABC permit. Upon proper application and payment of the prescribed tax, issuance of a local license is mandatory if the applicant holds the corresponding ABC permit. No local license may be issued under this Article until the applicant has received from the ABC Commission the applicable permit for that activity, and no county license may be issued for an establishment located in a city in that county until the applicant has received from the city the applicable license for that activity.

(b) Duration. — All licenses issued under this section are annual licenses for the period from May 1 to April 30.

(c) Transfer. — A license may not be transferred from one person to another or from one location to another.

(d) License Exclusive. — A local government may not require a license for activities related to the manufacture or sale of alcoholic beverages other than the licenses stated in this Article. (1985, c. 114, s. 1; 1998-95, s. 16.)

CASE NOTES

Commission Decision Granting Permit Preempts Zoning Ordinance. — In case in which petitioner, without objection by respondent board, argued that the decision of the ABC Commission to grant him a permit preempted respondent's denial of his special exception use permit request since the zoning ordinance, upon which respondent's denial was based, attempted to regulate the sale of alcoholic beverages, which is a violation of State law, the trial court did not err in concluding that petitioner, as the holder of a valid ABC permit issued by the State Alcoholic Beverage Control Commission, was entitled to be issued a city beer license, and in ordering the tax collector of the city to issue any city license. Melkonian v. Board of Adjustment, 85 N.C. App. 351, 355 S.E.2d 503, cert. denied, 320 N.C. 631, 360 S.E.2d 91 (1987).

§ 105-113.71. Local government may refuse to issue license.

(a) Refusal to Issue. — Notwithstanding G.S. 105-113.70, the governing board of a city or county may refuse to issue a license if it finds that the applicant committed any act or permitted any activity in the preceding year that would be grounds for suspension or revocation of his permit under G.S. 18B-104. Before denying the license, the governing board shall give the applicant an opportunity to appear at a hearing before the board and to offer evidence. The applicant shall be given at least 10 days' notice of the hearing. At the conclusion of the hearing the board shall make written findings of fact based on the evidence at the hearing. The applicant may appeal the denial of a license to the superior court for that county, if notice of appeal is given within 10 days of the denial.

(b) Local Exceptions. — The governing bodies of the following counties and cities in their discretion may decline to issue on-premises unfortified wine licenses: the counties of Alamance, Alexander, Ashe, Avery, Chatham, Clay, Duplin, Granville, Greene, Haywood, Jackson, Macon, Madison, McDowell, Montgomery, Nash, Pender, Randolph, Robeson, Sampson, Transylvania, Vance, Watauga, Wilkes, Yadkin; any city within any of those counties; and the cities of Greensboro, Aulander, Pink Hill, and Zebulon. (1985, c. 114, s. 1.)

§ 105-113.72: Repealed by Session Laws 1998-95, s. 17, effective May 1, 1999.

§ 105-113.73. Misdemeanor.

Except as otherwise expressly provided, violation of a provision of this Article is a Class 1 misdemeanor. (1939, c. 158, s. 525; 1971, c. 872, s. 2; 1981, c. 747, s. 32; 1985, c. 114, s. 1; 1993, c. 539, s. 701; 1994, Ex. Sess., c. 24, s. 14(c); 2003-402, s. 9.)

Part 2. State Licenses.

§ 105-113.74: Repealed by Session Laws 1998-95, s. 18, effective May 1, 1999.

Editor's Note. — A former G.S. 105-113.74 was repealed by Session Laws 1981, c. 747, s. 8, effective January 1, 1982.

§ 105-113.75: Repealed by Session Laws 1998-95, s. 19, effective May 1, 1999.

§ 105-113.76: Repealed by Session Laws 1998-95, s. 20, effective May 1, 1999.

Part 3. Local Licenses.

§ 105-113.77. City beer and wine retail licenses.

(a) License and Tax. — A person holding any of the following retail ABC permits for an establishment located in a city shall obtain from the city a city license for that activity. The annual tax for each license is as stated.

ABC Permit	*Tax for Corresponding License*
On-premises malt beverage	$15.00
Off-premises malt beverage	5.00
On-premises unfortified wine, on-premises fortified wine, or both	15.00
Off-premises unfortified wine, off-premises fortified wine, or both	10.00

(b) Tax on Additional License. — The tax stated in subsection (a) is the tax for the first license issued to a person. The tax for each additional license of the same type issued to that person for the same year is one hundred ten percent (110%) of the base license tax, that increase to apply progressively for each additional license. (1985, c. 114, s. 1.)

Editor's Note. — A former G.S. 105-113.77 was repealed by Session Laws 1981, c. 747, s. 11, effective January 1, 1982.

§ 105-113.78. County beer and wine retail licenses.

A person holding any of the following retail ABC permits for an establishment located in a county shall obtain from the county a county license for that activity. The annual tax for each license is as stated.

ABC Permit	*Tax for Corresponding License*
On-premises malt beverage	$25.00
Off-premises malt beverage	5.00
On-premises unfortified wine, on-premises fortified wine, or both	25.00
Off-premises unfortified wine, off-premises fortified wine, or both	25.00

(1985, c. 114, s. 1.)

Editor's Note. — A former G.S. 105-113.78 was repealed by Session Laws 1981, c. 747, s. 11, effective January 1, 1982.

§ 105-113.79. City wholesaler license.

A city may require city malt beverage and wine wholesaler licenses for businesses located inside the city, but may not require a license for a business located outside the city, regardless whether that business sells or delivers malt beverages or wine inside the city. The city may charge an annual tax of not more than thirty-seven dollars and fifty cents ($37.50) for a city malt beverage wholesaler or a city wine wholesaler license. (1985, c. 114, s. 1; 1998-95, s. 21.)

Part 4. Excise Taxes, Distribution of Tax Revenue.

§ 105-113.80. Excise taxes on beer, wine, and liquor.

(a) Beer. — An excise tax of fifty-three and one hundred seventy-seven one thousandths cents (53.177¢) per gallon is levied on the sale of malt beverages.

(b) Wine. — An excise tax of twenty-one cents (21¢) per liter is levied on the sale of unfortified wine, and an excise tax of twenty-four cents (24¢) per liter is levied on the sale of fortified wine.

(c) Liquor. — An excise tax of twenty-five percent (25%) is levied on liquor sold in ABC stores. Pursuant to G.S. 18B-804(b), the price of liquor on which this tax is computed is the distiller's price plus (i) the State ABC warehouse freight and bailment charges, and (ii) a markup for local ABC boards. (1985, c. 114, s. 1; 1987, c. 832, s. 2; 1998-95, s. 22; 2001-424, s. 34.23(c), (d).)

Legal Periodicals. — For article, "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

OPINIONS OF ATTORNEY GENERAL

Computation of "Net Profit." — Taxes payable under former G.S. 18-85 were not deductible in computing "net profit" for purposes of determining the tax ceiling. See opinion of Attorney General to Honorable I.L. Clayton, Commissioner of Revenue of N.C., and Mr. W.C. Pickett, Jr., Director, Privilege License Beverage and Cigarette Tax Division, 41 N.C.A.G. 144 (1970), rendered under former G.S. 18-85.

§ 105-113.81. Exemptions.

(a) Major Disaster. — Wholesalers and importers of malt beverages and wine are not required to remit excise taxes on malt beverages or wine rendered unsalable by a major disaster. To qualify for this exemption, the wholesaler or importer shall prove to the satisfaction of the Secretary that a major disaster occurred. A major disaster is the destruction, spoilage, or rendering unsalable of 50 or more cases, or the equivalent, of malt beverages or 25 or more cases, or the equivalent, of wine.

(b) Sales to Oceangoing Vessels. — Wholesalers and importers of malt beverages and wine are not required to remit excise taxes on malt beverages and wine sold and delivered for use on oceangoing vessels. An oceangoing vessel is a ship that plies the high seas in interstate or foreign commerce, in the transport of freight or passengers, or both, for hire exclusively. To qualify for this exemption the beverages shall be delivered to an officer or agent of the vessel for use on that vessel. Sales made to officers, agents, crewmen, or passengers for their personal use are not exempt.

(c) Sales to Armed Forces. — Wholesalers and importers of malt beverages and wine are not required to remit excise taxes on malt beverages and wine sold to the United States Armed Forces. The Secretary may require malt beverages and wine sold to the Armed Forces to be marked "For Military Use Only" to facilitate identification of those beverages.

(d) Out-of-State Sales. — Wholesalers and importers of malt beverages and wine are not required to remit excise taxes on malt beverages and wine shipped out of this State for resale outside the State.

(e) Tasting. — Resident breweries and wineries are not required to remit excise taxes on malt beverages and wine given free of charge to customers, visitors, and employees on the manufacturer's licensed premises for consumption on those premises. (1963, c. 992, s. 1; 1967, c. 759, s. 24; 1971, c. 872, s. 2; 1975, c. 586, s. 3; 1985, c. 114, s. 1.)

§ 105-113.81A. Distribution of part of wine taxes attributable to North Carolina wine.

The Secretary shall on a quarterly basis credit to the Department of Commerce two hundred thousand dollars ($200,000) from the net proceeds of the excise tax collected on unfortified wine. The Department of Commerce shall allocate the funds received under this section to the North Carolina Wine and Grape Growers Council to be used to promote the North Carolina grape and wine industry and to contract for research and development services to improve viticultural and enological practices in North Carolina. Any funds credited to the Department of Commerce under this section that are not expended by June 30 of any fiscal year do not revert to the General Fund, but remain available to the Department for the uses set forth in this section. (1987, c. 836, s. 1; 1987 (Reg. Sess., 1988), c. 1036, s. 12(a); 1991 (Reg. Sess., 1992), c. 900, s. 176(b); 1996, 2nd Ex. Sess., c. 18, ss. 25.2(a), 25.2(b); 1997-261, s. 109; 1997-443, s. 14.4; 1999-237, s. 13.7; 2001-475, s. 1; 2005-276, s. 11.4; 2005-380, s. 4(c); 2006-227, s. 14; 2006-264, s. 98.3(b).)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 11.4, effective July 1, 2005, substituted "five hundred thousand dollars ($500,000)" for "three hundred fifty thousand dollars ($350,000)."

Session Laws 2005-380, s. 4(c), effective September 8, 2005, substituted "Commerce" for "Agriculture and Consumer Services" throughout the section.

Session Laws 2006-227, s. 14, effective July 1, 2007, rewrote the first sentence, and substituted "do not revert" for "may not revert" and deleted "shall" preceding "remain" in the second sentence.

Session Laws 2006-264, s. 98.3(b), effective August 27, 2006, inserted "Wine and" in the second sentence.

§ 105-113.82. Distribution of part of beer and wine taxes.

(a) Amount, Method. — The Secretary shall distribute annually the following percentages of the net amount of excise taxes collected on the sale of malt beverages and wine during the preceding 12-month period ending March 31 to the counties or cities in which the retail sale of these beverages is authorized in the entire county or city:

(1) Of the tax on malt beverages levied under G.S. 105-113.80(a), twenty-three and three-fourths percent (23§ %);

(2) Of the tax on unfortified wine levied under G.S. 105-113.80(b), sixty-two percent (62%); and

(3) Of the tax on fortified wine levied under G.S. 105-113.80(b), twenty-two percent (22%).

For purposes of this subsection, "net amount" means gross collections less refunds and amounts credited to the Department of Commerce under G.S. 105-113.81A. If malt beverages, unfortified wine, or fortified wine may be licensed to be sold at retail in both a county and a city located in the county, both the county and city shall receive a portion of the amount distributed, that portion to be determined on the basis of population. If one of these beverages may be licensed to be sold at retail in a city located in a county in which the sale of the beverage is otherwise prohibited, only the city shall receive a portion of the amount distributed, that portion to be determined on the basis of population. The amounts distributed under subdivisions (1), (2), and (3) shall be computed separately.

(b) Repealed by Session Laws 2000, c. 173, s. 3, effective August 2, 2000.

(c) Exception. — Notwithstanding subsection (a), in a county in which ABC stores have been established by petition, the revenue shall be distributed as though the entire county had approved the retail sale of a beverage whose retail sale is authorized in part of the county.

(d) Time. — The revenue shall be distributed to cities and counties within 60 days after March 31 of each year. The General Assembly finds that the revenue distributed under this section is local revenue, not a State expenditure, for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold the distribution.

(e) Population Estimates. — To determine the population of a city or county for purposes of the distribution required by this section, the Secretary shall use the most recent annual estimate of population certified by the State Budget Officer.

(f) City Defined. — As used in this section, the term "city" means a city as defined in G.S. 153A-1(1) or an urban service district defined by the governing body of a consolidated city-county.

(g) Use of Funds. — Funds distributed to a county or city under this section may be used for any public purpose.

(h) Disqualification. — No municipality may receive any funds under this section if it was incorporated with an effective date of on or after January 1, 2000, and is disqualified from receiving funds under G.S. 136-41.2. No municipality may receive any funds under this section, incorporated with an effective date on or after January 1, 2000, unless a majority of the mileage of its streets is open to the public. The previous sentence becomes effective with respect to distribution of funds on or after July 1, 1999. (1985, c. 114, s. 1; 1987, c. 836, s. 2; 1989 (Reg. Sess., 1990), c. 813, s. 5; 1991, c. 689, s. 28(b); 1993, c. 321, s. 26(g); c. 485, s. 2; 1995, c. 17, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 25.2(a); 1997-261, s. 109; 1999-458, s. 10; 2000-173, s. 3; 2002-120, s. 1; 2004-203, s. 5(d); 2005-435, s. 34(a); 2006-162, s. 1; 2007-527, s. 4.)

Local Modification. — Community of Gray's Creek: 1999-458, s. 13 (contingent on petition filed before July 1, 2002); Community of Union Cross: 1999-458, s. 13 (contingent on petition filed before July 1, 2002).

Effect of Amendments. — Session Laws 2005-435, s. 34(a), effective September 27, 2005, made a minor stylistic change in the next-to-last sentence of subsection (h).

Session Laws 2006-162, s. 1, effective July 24, 2006, substituted "Department of Commerce" for "Department of Agriculture and Consumer Services" near the middle of subsection (a).

Session Laws 2007-527, s. 4, effective August 31, 2007, in subsection (a), deleted "less the amount of the net proceeds credited to the Department of Commerce under G.S. 105-113.81A" following "March 31," substituted "counties or cities" for "counties and cities," and added the first sentence of the last paragraph.

Part 5. Administration.

§ 105-113.83. Payment of excise taxes.

(a) Liquor. — The excise tax on liquor levied under G.S. 105-113.80(c) is payable monthly by the local ABC board to the Secretary. The tax shall be paid on or before the 15th day of the month following the month in which the tax was collected.

(b) Beer and Wine. — The excise taxes on malt beverages and wine levied under G.S. 105-113.80(a) and (b), respectively, are payable to the Secretary by the resident wholesaler or importer who first handles the beverages in this State. The excise taxes levied under G.S. 105-113.80(b) on wine shipped directly to consumers in this State pursuant to G.S. 18B-1001.1 must be paid by the wine shipper permittee. The taxes on malt beverages and wine are payable only once on the same beverages. The tax is due on or before the 15th day of the month following the month in which the beverage is first sold or otherwise disposed of in this State by the wholesaler, importer, or wine shipper permittee. When excise taxes are paid on wine or malt beverages, the wholesaler, importer, or wine shipper permittee must submit to the Secretary verified reports on forms provided by the Secretary detailing sales records for the month for which the taxes are paid. The report must indicate the amount of excise tax due, contain the information required by the Secretary, and indicate separately any transactions to which the excise tax does not apply.

(c) Railroad Sales. — Each person operating a railroad train in this State on which alcoholic beverages are sold must submit monthly reports of the amount of alcoholic beverages sold in this State and must remit the applicable excise tax due on the sale of these beverages when the report is submitted. The report is due on or before the 15th day of the month following the month in which the beverages are sold. The report must be made on a form prescribed by the Secretary. (1985, c. 114, s. 1; 1998-95, s. 23; 2003-402, s. 10; 2004-170, s. 7; 2005-435, s. 26.)

Effect of Amendments. — Session Laws 2005-435, s. 26, effective September 27, 2005, in subsection (b), inserted "in this State" following "consumers" in the second sentence, substituted "are payable" for "shall be paid" and "is due" for "shall be paid" in the third and fourth sentences, and substituted "must" for "shall" in the last two sentences.

CASE NOTES

Constitutionality. — Provisions of North Carolina's alcoholic beverage code, which prohibited out-of-state wineries from selling wine directly to North Carolina residents but allowed North Carolina wineries to make direct sales, violated the Commerce Clause of the U.S. Constitution, and federal district court enjoined state officials from enforcing those provisions. Beskind v. Easley, 197 F. Supp. 2d 464, 2002 U.S. Dist. LEXIS 6045 (W.D.N.C. 2002).

Cited in Beskind v. Easley, 325 F.3d 506, 2003 U.S. App. LEXIS 6603 (4th Cir. 2003).

§ 105-113.84. Report of resident brewery, resident winery, nonresident vendor, or wine shipper permittee.

A resident brewery, resident winery, nonresident vendor, and wine shipper permittee must file a monthly report with the Secretary. The report must list the amount of beverages delivered to North Carolina wholesalers, importers, and purchasers under G.S. 18B-1001.1 during the month. The report is due by the 15th day of the month following the month covered by the report. The report must be filed on a form approved by the Secretary and must contain the information required by the Secretary. (1985, c. 114, s. 1; 1998-95, s. 24; 2000-173, s. 4; 2003-402, s. 11.)

§ 105-113.85. Discount.

Each wholesaler or importer who files a timely return and sends a timely payment may deduct from the amount payable a discount of two percent (2%). This discount covers losses due to spoilage and breakage, expenses incurred in preparing the records and reports required by this Article, and the expense of furnishing a bond. (1985, c. 114, s. 1; 2000-173, s. 5; 2001-414, s. 5; 2003-284, s. 45A.2(a); 2004-84, s. 2(d).)

Editor's Note. — Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

This section was repealed by Session Laws 2003-284, s. 45A.2(a), effective for reporting periods beginning on or after August 1, 2003. Session Laws 2004-84, s. 2(d), reenacted and amended the section, effective for reporting periods beginning on or after August 1, 2004.

§ 105-113.86. Bonds.

(a) Wholesalers and Importers. — A wholesaler or importer shall furnish a bond in an amount of not less than five thousand dollars ($5,000) nor more than fifty thousand dollars ($50,000). The bond shall be conditioned on compliance with this Article, shall be payable to the State, shall be in a form acceptable to the Secretary, and shall be secured by a corporate surety or by a pledge of obligations of the federal government, the State, or a political subdivision of the State. The Secretary shall proportion the bond amount to the anticipated tax liability of the wholesaler or importer. The Secretary shall periodically review the sufficiency of bonds furnished by wholesalers and importers, and shall increase the amount of a bond required of a wholesaler or importer when the amount of the bond furnished no longer covers the wholesaler's or importer's anticipated tax liability.

(b) Nonresident Vendors. — The Secretary may require the holder of a nonresident vendor ABC permit to furnish a bond in an amount not to exceed two thousand dollars ($2,000). The bond shall be conditioned on compliance with this Article, shall be payable to the State, shall be in a form acceptable to the Secretary, and shall be secured by a corporate surety or by a pledge of obligations of the federal government, the State, or a political subdivision of the State. (1985, c. 114, s. 1; 1987, c. 18; 1998-95, s. 25.)

§ 105-113.87. Refund for excise tax paid on sacramental wine.

(a) Refund Allowed. — A person who purchases wine for the purpose stated in G.S. 18B-103(8) may obtain a refund from the Secretary for the amount of the excise tax levied under this Article. The Secretary shall make refunds annually.

(b) Application. — An applicant for a refund authorized by this section shall file a written request with the Secretary for the refund due for the prior calendar year on or before April 15. The Secretary may by rule prescribe what information and records shall be supplied by the applicant to qualify for the refund. No refund may be made if the application is filed more than three years after the date it is due.

(c) Repealed by Session Laws 1998-212, s. 29A.14(e), effective January 1, 1999. (1985, c. 114, s. 1; 1998-212, s. 29A.14(e).)

§ 105-113.88. Record-keeping requirements.

A person who is required to file a report or return under this Article must keep a record of all documents used to determine information the person provides in a report or return. The records must be kept for three years from the due date of the report or return to which the records apply. (1939, c. 158,

s. 520; 1945, c. 903, s. 1; 1971, c. 872, s. 2; 1973, c. 476, s. 193; 1981, c. 747, s. 28; 1985, c. 114, s. 1; 2000-173, s. 6.)

§ 105-113.89. Other applicable administrative provisions.

The administrative provisions of Article 9 of this Chapter apply to this Article. (1985, c. 114, s. 1; 1998-95, s. 26.)

CASE NOTES

Cited in N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

§§ 105-113.90, 105-113.91: Repealed by Session Laws 1985, c. 114, s. 1.

§ 105-113.92: Repealed by Session Laws 1981, c. 747, s. 25.

§ 105-113.93: Repealed by Session Laws 1985, c. 114, s. 1.

Cross References. — As to excise taxes on beer, wine and liquor, see now G.S. 105-113.80.

§ 105-113.94: Repealed by Session Laws 1975, c. 53, s. 3.

§§ 105-113.95 through 105-113.104: Repealed by Session Laws 1985, c. 114, s. 1.

Cross References. — For general provisions dealing with alcoholic beverage license and excise taxes, see now G.S. 105-113.68 et seq. As to local licenses, see now G.S. 105-113.77 et seq. As to excise taxes and distribution of tax revenue, see now G.S. 105-113.80 et seq. For administrative provisions, see now G.S. 105-113.83 et seq.

ARTICLE 2D.

Unauthorized Substances Taxes.

§ 105-113.105. Purpose.

The purpose of this Article is to levy an excise tax to generate revenue for State and local law enforcement agencies and for the General Fund. Nothing in this Article may in any manner provide immunity from criminal prosecution for a person who possesses an illegal substance. (1989, c. 772, s. 1; 1995, c. 340, s. 1; 1997-292, s. 1; 1998-98, s. 59.)

Legal Periodicals. — For article, "Law Between the Lines," 25 Campbell L. Rev. 151 (2003).

CASE NOTES

Federal court's view of this section as a criminal penalty prevented the defendant's subsequent drug conviction from being enhanced with a mandatory life sentence. The court found that such enhancement would be unconstitutional where the state had previously assessed and collected a portion of its drug tax against him with respect to the very drugs at issue in the conviction and where the defendant had not waived his double jeopardy claim because it would have been futile for him to have raised it in state court where the drug tax was not considered a criminal penalty. United States v. Anderson, — F.3d —, 2000 U.S. App. LEXIS 10610 (4th Cir. May 15, 2000).

Did Not Result in the Issuance of a Writ of Habeas Corpus. — Because the tax outlined in this section is neither contingent upon arrest, nor assessed on property that has necessarily been confiscated or destroyed and because it allows for anonymous reporting and payment, the state court's finding that this section was not a criminal penalty and its consequent refusal to dismiss the defendant's sentence of imprisonment for trafficking in cocaine, based in part on the same drugs upon which the Drug Tax was assessed, as multiple punishment in violation of the Double Jeopardy clause of the Fifth Amendment did not warrant a writ of habeas corpus although a federal court deciding the issue on direct appeal might have come to a different conclusion. Vick v. Williams, 233 F.3d 213, 2000 U.S. App. LEXIS 29523 (4th Cir. 2000), cert denied, 533 U.S. 952, 121 S. Ct. 2596, 150 L. Ed. 2d 754 (2001).

Double Jeopardy. — A judgment entered for unpaid taxes on seized drugs did not preclude, under double jeopardy principles, the defendant's prosecution for controlled substances violations. State v. Adams, 132 N.C. App. 819, 513 S.E.2d 588, 1999 N.C. App. LEXIS 274 (1999), cert. denied, 350 N.C. 836, 538 S.E.2d 570, cert. denied, 528 U.S. 1022, 120 S. Ct. 534, 145 L. Ed. 2d 414 (1999).

The North Carolina Controlled Substance Tax, G.S. 105-113.105 through 105-113.113, did not violate the double jeopardy clause as it did not have fundamentally punitive characteristics to render it violative. State v. Crenshaw, 144 N.C. App. 574, 551 S.E.2d 147, 2001 N.C. App. LEXIS 538 (2001).

Because the Department of Revenue's collection of unpaid taxes on seized drugs pursuant to this section did not constitute criminal punishment, subsequent marijuana charges were not barred by double jeopardy. State v. Woods, 136 N.C. App. 386, 524 S.E.2d 363, 2000 N.C. App. LEXIS 4 (2000), cert. denied, 351 N.C. 370, 543 S.E.2d 147 (2000).

Tax Not Punishment. — Assessment and collection of the North Carolina Controlled Substance Tax does not constitute punishment so as to bar subsequent prosecution and punishment for criminal possession of the same drugs. State v. Ballenger, 123 N.C. App. 179, 472 S.E.2d 572 (1996), aff'd, 345 N.C. 626, 481 S.E.2d 84, cert. denied, 522 U.S. 817, 118 S. Ct. 68, 139 L. Ed. 2d 29 (1997).

The Controlled Substance Tax Is Not a Criminal Penalty. — Whether challenged in a criminal proceeding or a civil proceeding, the drug tax is not a criminal penalty, and the plaintiff was, therefore, not entitled to the procedural safeguards required for criminal proceedings. (But see Lynn v. West, 134 F.3d 582 (4th Cir. 1998).) Milligan v. State, 135 N.C. App. 781, 522 S.E.2d 330, 1999 N.C. App. LEXIS 1234 (1999), cert. denied, 531 U.S. 819, 121 S. Ct. 60, 148 L. Ed. 2d 26 (2000).

The controlled substance tax is a criminal penalty, given its high rate of taxation and its deterrent purpose, and thus the state's enforcement scheme must provide the constitutional safeguards that attach to criminal prosecutions. Lynn v. West, 134 F.3d 582, 1998 U.S. App. LEXIS 403 (4th Cir.), cert. denied, 525 U.S. 813, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998) (But see Milligan v. State, 135 N.C. App. 781, 522 S.E.2d 330 (1999)).

Monies Received for Excise Tax Versus Penalties and Interest Payments. — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public schools; however, the penalties and interest payments collected by the Department of Revenue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

The Tax Injunction Act did not apply to bar the district court from exercising subject matter jurisdiction over the plaintiffs' claims for declaratory and injunctive relief with regard to the controlled substances tax because the tax is in reality a criminal penalty. Lynn v. West, 134 F.3d 582, 1998 U.S. App. LEXIS 403 (4th Cir.), cert. denied, 525 U.S. 813, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998) (But see Milligan v. State, 135 N.C. App. 781, 522 S.E.2d 330 (1999)).

Purpose is to levy an excise tax to generate revenue for state and local law enforcement agencies and for the General Fund, which is a remedial purpose; payments collected under G.S. 105-113.105 thus are not subject to N.C. Const. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

Cited in Nivens v. Gilchrist, 319 F.3d 151, 2003 U.S. App. LEXIS 2453 (4th Cir. 2003), cert. denied, 539 U.S. 915, 123 S. Ct. 2279, 156 L. Ed. 2d 131 (2003); State v. Harris, 157 N.C. App. 647, 580 S.E.2d 63 (2003).

OPINIONS OF ATTORNEY GENERAL

If money or property is not seized as evidence of a controlled substance law violation, agents of the Department of Revenue may seize it for satisfaction of controlled substance excise taxes without an order from the court having jurisdiction over the criminal offense and without the district attorney's consent provided the seizure otherwise is made in compliance with law. See opinion of Attorney General to Secretary Janice H. Faulkner, — N.C.A.G. — (July 19, 1994).

§ 105-113.106. Definitions.

The following definitions apply in this Article:

(1) Controlled Substance. — Defined in G.S. 90-87.

(2) Repealed by Session Laws 1995, c. 340, s. 1.

(3) Dealer. — Any of the following:

a. A person who actually or constructively possesses more than 42.5 grams of marijuana, seven or more grams of any other controlled substance that is sold by weight, or 10 or more dosage units of any other controlled substance that is not sold by weight.

b. A person who in violation of Chapter 18B of the General Statutes possesses illicit spirituous liquor for sale.

c. A person who in violation of Chapter 18B of the General Statutes possesses mash.

d. A person who in violation of Chapter 18B of the General Statutes possesses an illicit mixed beverage for sale.

(4) Repealed by Session Laws 1995, c. 340, s. 1.

(4a) Illicit mixed beverage. — A mixed beverage, as defined in G.S. 18B-101, composed in whole or in part from spirituous liquor on which the charge imposed by G.S. 18B-804(b)(8) has not been paid, but not including a premixed cocktail served from a closed package containing only one serving.

(4b) Illicit spirituous liquor. — Spirituous liquor, as defined in G.S. 105-113.68, not authorized by the North Carolina Alcoholic Beverage Control Commission. Some examples of illicit spirituous liquor are the products known as "bootleg liquor", "moonshine", "non-tax-paid liquor", and "white liquor".

(4c) Local law enforcement agency. — A municipal police department, a county police department, or a sheriff's office.

(4d) Low-street-value drug. — Any of the following controlled substances:

a. An anabolic steroid as defined in G.S. 90-91(k).

b. A depressant described in G.S. 90-89(4), 90-90(4), 90-91(b), or 90-92(a).

c. A hallucinogenic substance described in G.S. 90-89(3) or G.S. 90-90(5).

d. A stimulant described in G.S. 90-89(5), 90-90(3), 90-91(j), 90-92(a)(3), or 90-93(a)(3).

e. A controlled substance described in G.S. 90-91(c), (d), or (e), 90-92(a)(3), or (a)(5), or 90-93(a)1.

(5) Repealed by Session Laws 1995, c. 340, s. 1.

(6) Marijuana. — All parts of the plant of the genus Cannabis, whether growing or not; the seeds of this plant; the resin extracted from any part of this plant; and every compound, salt, derivative, mixture, or preparation of this plant, its seeds, or its resin.

(6a) Mash. — The fermentable starchy mixture from which spirituous liquor can be distilled.

(7) Person. — Defined in G.S. 105-228.90.

(8) Secretary. — Defined in G.S. 105-228.90.

(8a) State law enforcement agency. — Any State agency, force, department, or unit responsible for enforcing criminal laws.

(9) Unauthorized substance. — A controlled substance, an illicit mixed beverage, illicit spirituous liquor, or mash. (1989, c. 772, s. 1; 1993, c. 354, s. 10; 1995, c. 340, s. 1; 1997-292, s. 1; 1999-337, s. 19; 2000-119, ss. 3, 4.)

CASE NOTES

Seizure by Filing Certificate of Tax Liability. — Filing a certificate of tax liability following assessment of a controlled substance tax constituted a meaningful interference with possessory interests and thus was a fourth amendment seizure. Andrews v. Crump, 984 F. Supp. 393 (W.D.N.C. 1996).

Monies Received for Excise Tax Versus Penalties and Interest Payments. — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public schools; however, the penalties and interest payments collected by the Department of Revenue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

No Probable Cause. — Agents did not have probable cause to believe that plaintiff was a dealer or that he possessed the marijuana forming the basis of the controlled substance tax assessment, and thus they did not have probable cause to seize his property by way of tax assessment and lien. Andrews v. Crump, 984 F. Supp. 393 (W.D.N.C. 1996).

Cited in Vick v. Williams, 233 F.3d 213, 2000 U.S. App. LEXIS 29523 (4th Cir. 2000), cert denied, 533 U.S. 952, 121 S. Ct. 2596, 150 L. Ed. 2d 754 (2001); Nivens v. Gilchrist, 319 F.3d 151, 2003 U.S. App. LEXIS 2453 (4th Cir. 2003), cert. denied, 539 U.S. 915, 123 S. Ct. 2279, 156 L. Ed. 2d 131 (2003).

§ 105-113.107. Excise tax on unauthorized substances.

(a) Controlled Substances. — An excise tax is levied on controlled substances possessed, either actually or constructively, by dealers at the following rates:

(1) At the rate of forty cents (40¢) for each gram, or fraction thereof, of harvested marijuana stems and stalks that have been separated from and are not mixed with any other parts of the marijuana plant.

(1a) At the rate of three dollars and fifty cents ($3.50) for each gram, or fraction thereof, of marijuana, other than separated stems and stalks taxed under subdivision (1) of this section.

(1b) At the rate of fifty dollars ($50.00) for each gram, or fraction thereof, of cocaine.

(2) At the rate of two hundred dollars ($200.00) for each gram, or fraction thereof, of any other controlled substance that is sold by weight.

(2a) At the rate of fifty dollars ($50.00) for each 10 dosage units, or fraction thereof, of any low-street-value drug that is not sold by weight.

(3) At the rate of two hundred dollars ($200.00) for each 10 dosage units, or fraction thereof, of any other controlled substance that is not sold by weight.

(a1) Weight. — A quantity of marijuana or other controlled substance is measured by the weight of the substance whether pure or impure or dilute, or by dosage units when the substance is not sold by weight, in the dealer's possession. A quantity of a controlled substance is dilute if it consists of a detectable quantity of pure controlled substance and any excipients or fillers.

(b) Illicit Spirituous Liquor. — An excise tax is levied on illicit spirituous liquor possessed by a dealer at the following rates:

(1) At the rate of thirty-one dollars and seventy cents ($31.70) for each gallon, or fraction thereof, of illicit spirituous liquor sold by the drink.

(2) At the rate of twelve dollars and eighty cents ($12.80) for each gallon, or fraction thereof, of illicit spirituous liquor not sold by the drink.

(c) Mash. — An excise tax is levied on mash possessed by a dealer at the rate of one dollar and twenty-eight cents ($1.28) for each gallon or fraction thereof.

(d) Illicit Mixed Beverages. — A tax is levied on illicit mixed beverages sold by a dealer at the rate of twenty dollars ($20.00) on each four liters and a proportional sum on lesser quantities. (1989, c. 772, s. 1; 1995, c. 340, s. 1; 1997-292, s. 1; 1998-218, s. 1.)

CASE NOTES

Failure to Pay Excise Tax. — Convictions for trafficking in cocaine by possession and for failure to pay excise tax on the controlled substance did not constitute double jeopardy, nor did the punishments imposed upon those convictions violate the prohibition against multiple punishments for the same offense, where the State sought to collect the drug excise tax from defendant in the same prosecution, and where neither of the crimes in question was a lesser included offense of the other. State v. Morgan, 118 N.C. App. 461, 455 S.E.2d 490 (1995).

Tax Not Punishment. — Assessment and collection of the North Carolina Controlled Substance Tax does not constitute punishment so as to bar subsequent prosecution and punishment for criminal possession of the same drugs. State v. Ballenger, 123 N.C. App. 179, 472 S.E.2d 572 (1996), aff'd, 345 N.C. 626, 481 S.E.2d 84, cert. denied, 522 U.S. 817, 118 S. Ct. 68, 139 L. Ed. 2d 29 (1997).

Monies Received for Excise Tax Versus Penalties and Interest Payments. — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public schools; however, the penalties and interest payments collected by the Department of Revenue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

Cited in Lynn v. West, 134 F.3d 582, 1998 U.S. App. LEXIS 403 (4th Cir.), cert. denied, 525 U.S. 813, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998) (But see Milligan v. State, 135 N.C. App. 781, 522 S.E.2d 330 (1999)); Vick v. Williams, 233 F.3d 213, 2000 U.S. App. LEXIS 29523 (4th Cir. 2000), cert denied, 533 U.S. 952, 121 S. Ct. 2596, 150 L. Ed. 2d 754 (2001); Nivens v. Gilchrist, 319 F.3d 151, 2003 U.S. App. LEXIS 2453 (4th Cir. 2003), cert. denied, 539 U.S. 915, 123 S. Ct. 2279, 156 L. Ed. 2d 131 (2003).

§ 105-113.107A. Exemptions.

(a) Authorized Possession. — The tax levied in this Article does not apply to a substance in the possession of a dealer who is authorized by law to possess the substance. This exemption applies only during the time the dealer's possession of the substance is authorized by law.

(b) Certain Marijuana Parts. — The tax levied in this Article does not apply to the following marijuana:

(1) Harvested mature marijuana stalks when separated from and not mixed with any other parts of the marijuana plant.

(2) Fiber or any other product of marijuana stalks described in subdivision (1) of this subsection, except resin extracted from the stalks.

(3) Marijuana seeds that have been sterilized and are incapable of germination.

(4) Roots of the marijuana plant. (1995, c. 340, s. 1; 1997-292, s. 1.)

CASE NOTES

Cited in Lynn v. West, 134 F.3d 582, 1998 U.S. App. LEXIS 403 (4th Cir.), cert. denied, 525 U.S. 813, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998) (But see Milligan v. State, 135 N.C. App. 781, 522 S.E.2d 330 (1999)); Vick v. Williams, 233 F.3d 213, 2000 U.S. App. LEXIS 29523 (4th Cir. 2000), cert denied, 533 U.S. 952, 121 S. Ct. 2596, 150 L. Ed. 2d 754 (2001).

§ 105-113.108. Reports; revenue stamps.

(a) Revenue Stamps. — The Secretary shall issue stamps to affix to unauthorized substances to indicate payment of the tax required by this Article. Dealers shall report the taxes payable under this Article at the time and on the return prescribed by the Secretary. Notwithstanding any other provision of law, dealers are not required to give their name, address, social security number, or other identifying information on the return, and the return is not required to be verified by oath or affirmation. Upon payment of the tax, the Secretary shall issue stamps in an amount equal to the amount of the tax paid. Taxes may be paid and stamps may be issued either by mail or in person.

(b) Reports. — Every local law enforcement agency and every State law enforcement agency must report to the Department within 48 hours after seizing an unauthorized substance, or making an arrest of an individual in possession of an unauthorized substance, listed in this subsection upon which a stamp has not been affixed. The report must be in the form prescribed by the Secretary and it must include the time and place of the arrest or seizure, the amount, location, and kind of substance, the identification of an individual in possession of the substance and that individual's social security number, and any other information prescribed by the Secretary. The report must be made when the arrest or seizure involves any of the following unauthorized substances upon which a stamp has not been affixed as required by this Article:

(1) More than 42.5 grams of marijuana.
(2) Seven or more grams of any other controlled substance that is sold by weight.
(3) Ten or more dosage units of any other controlled substance that is not sold by weight.
(4) Any illicit mixed beverage.
(5) Any illicit spirituous liquor.
(6) Mash. (1989, c. 772, s. 1; 1995, c. 340, s. 1; 1997-292, s. 1; 2000-119, s. 5; 2004-170, s. 8.)

CASE NOTES

Monies Received for Excise Tax Versus Penalties and Interest Payments. — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public schools; however, the penalties and interest payments collected by the Department of Revenue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

Deprivation of Rights Claims. — United States Supreme Court had declined to hold that a former version of the Unauthorized Substances Tax (UST), (now G.S. 105-113.108(b) and related sections), created a criminal or punitive penalty for purposes of constitutional safeguards and defendants (an arresting deputy and a state tax official), in their official capacities, were immune from liability pursuant to the Eleventh Amendment; further, taxpayers were barred by principles of comity from asserting 42 U.S.C.S. § 1983 actions against the validity of state tax systems in federal courts. Leon-Sanchez v. Tolson, — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 28903 (W.D.N.C. Aug. 5, 2004).

Cited in Lynn v. West, 134 F.3d 582, 1998 U.S. App. LEXIS 403 (4th Cir.), cert. denied, 525 U.S. 813, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998) (But see Milligan v. State, 135 N.C. App. 781, 522 S.E.2d 330 (1999)); Vick v. Williams, 233 F.3d 213, 2000 U.S. App. LEXIS 29523 (4th Cir. 2000), cert denied, 533 U.S. 952, 121 S. Ct. 2596, 150 L. Ed. 2d 754 (2001).

§ 105-113.109. When tax payable.

The tax imposed by this Article is payable by any dealer who actually or constructively possesses an unauthorized substance in this State upon which the tax has not been paid, as evidenced by a stamp. The tax is payable within

48 hours after the dealer acquires actual or constructive possession of a non-tax-paid unauthorized substance, exclusive of Saturdays, Sundays, and legal holidays of this State, in which case the tax is payable on the next working day. Upon payment of the tax, the dealer shall permanently affix the appropriate stamps to the unauthorized substance. Once the tax due on an unauthorized substance has been paid, no additional tax is due under this Article even though the unauthorized substance may be handled by other dealers. (1989, c. 772, s. 1; 1995, c. 340, s. 1; 1997-292, s. 1.)

CASE NOTES

Tax Not Punishment. — Assessment and collection of the North Carolina Controlled Substance Tax does not constitute punishment so as to bar subsequent prosecution and punishment for criminal possession of the same drugs. State v. Ballenger, 123 N.C. App. 179, 472 S.E.2d 572 (1996), aff'd, 345 N.C. 626, 481 S.E.2d 84, cert. denied, 522 U.S. 817, 118 S. Ct. 68, 139 L. Ed. 2d 29 (1997).

Monies Received for Excise Tax Versus Penalties and Interest Payments. — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public schools; however, the penalties and interest payments collected by the Department of Revenue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

Cited in Vick v. Williams, 233 F.3d 213, 2000 U.S. App. LEXIS 29523 (4th Cir. 2000), cert denied, 533 U.S. 952, 121 S. Ct. 2596, 150 L. Ed. 2d 754 (2001).

§ 105-113.110: Repealed by Session Laws 1995, c. 340, s. 1.

§ 105-113.110A. Administration.

Article 9 of this Chapter applies to this Article. (1989 (Reg. Sess., 1990), c. 814, s. 7; 1995, c. 340, s. 1; 1997, c. 292, s. 1; 1998-218, s. 2.)

CASE NOTES

Monies Received for Excise Tax Versus Penalties and Interest Payments. — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public schools; however, the penalties and interest payments collected by the Department of Revenue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

Cited in Vick v. Williams, 233 F.3d 213, 2000 U.S. App. LEXIS 29523 (4th Cir. 2000), cert denied, 533 U.S. 952, 121 S. Ct. 2596, 150 L. Ed. 2d 754 (2001); Nivens v. Gilchrist, 319 F.3d 151, 2003 U.S. App. LEXIS 2453 (4th Cir. 2003), cert. denied, 539 U.S. 915, 123 S. Ct. 2279, 156 L. Ed. 2d 131 (2003).

§ 105-113.111. Assessments.

Notwithstanding any other provision of law, an assessment against a dealer who possesses an unauthorized substance to which a stamp has not been affixed as required by this Article shall be made as provided in this section. The Secretary shall assess a tax, applicable penalties, and interest based on personal knowledge or information available to the Secretary. The Secretary shall notify the dealer in writing of the amount of the tax, penalty, and interest due, and demand its immediate payment. The notice and demand shall be either mailed to the dealer at the dealer's last known address or served on the dealer in person. If the dealer does not pay the tax, penalty, and interest immediately upon receipt of the notice and demand, the Secretary shall collect the tax, penalty, and interest pursuant to the jeopardy collection procedures in

G.S. 105-241.23 or the general collection procedures in G.S. 105-242, including causing execution to be issued immediately against the personal property of the dealer, unless the dealer files with the Secretary a bond in the amount of the asserted liability for the tax, penalty, and interest. The Secretary shall use all means available to collect the tax, penalty, and interest from any property in which the dealer has a legal, equitable, or beneficial interest. The dealer may seek review of the assessment as provided in Article 9 of this Chapter. (1989, c. 772, s. 1; 1989 (Reg. Sess., 1990), c. 1039, s. 2; 1991 (Reg. Sess., 1992), c. 900, s. 20(d); 1995, c. 340, s. 1; 1997-292, s. 1; 2007-491, s. 8.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 8, effective January 1, 2008, in the fifth sentence, substituted "jeopardy collection procedures in G.S. 105-241.23 or the general collection procedures in G.S. 105-242" for "procedure set forth in G.S. 105-241.1(g) for jeopardy assessments or the procedure set forth in G.S. 105-242." For applicability, see Editor's note.

CASE NOTES

Seizure by Filing Certificate of Tax Liability. — Filing a certificate of tax liability following assessment of a controlled substance tax constituted a meaningful interference with possessory interests and thus was a fourth amendment seizure. Andrews v. Crump, 984 F. Supp. 393 (W.D.N.C. 1996).

Cited in Salas v. McGee, 125 N.C. App. 255, 480 S.E.2d 714 (1997); Lynn v. West, 134 F.3d 582, 1998 U.S. App. LEXIS 403 (4th Cir.), cert. denied, 525 U.S. 813, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998) (But see Milligan v. State, 135 N.C. App. 781, 522 S.E.2d 330 (1999)); Milligan v. State, 135 N.C. App. 781, 522 S.E.2d 330, 1999 N.C. App. LEXIS 1234 (1999), cert. denied, 531 U.S. 819, 121 S. Ct. 60, 148 L. Ed. 2d 26 (2000); Vick v. Williams, 233 F.3d 213, 2000 U.S. App. LEXIS 29523 (4th Cir. 2000), cert denied, 533 U.S. 952, 121 S. Ct. 2596, 150 L. Ed. 2d 754 (2001); Andrews v. Crump, 144 N.C. App. 68, 547 S.E.2d 117, 2001 N.C. App. LEXIS 340 (2001).

§ 105-113.112. Confidentiality of information.

Information obtained by the Department in the course of administering the tax imposed by this Article, including information on whether the Department has issued a revenue stamp to a person, is confidential tax information and is subject to the following restrictions on disclosure:

(1) G.S. 105-259 prohibits the disclosure of the information, except in the limited circumstances provided in that statute.

(2) The information may not be used as evidence, as defined in G.S. 15A-971, in a criminal prosecution for an offense other than an offense under this Article or under Article 9 of this Chapter. Under this prohibition, no officer, employee, or agent of the Department may testify about the information in a criminal prosecution for an offense other than an offense under this Article or under Article 9 of this Chapter. This subdivision implements the protections against double jeopardy and self-incrimination set out in Amendment V of the United

States Constitution and the restrictions in it apply regardless of whether information may be disclosed under G.S. 105-259. This subdivision does not apply to information obtained from a source other than an employee, officer, or agent of the Department. An officer, employee, or agent of the Department who provides evidence or testifies in violation of this subdivision is guilty of a Class 1 misdemeanor. (1989, c. 772, s. 1; 1993, c. 539, s. 702; 1994, Ex. Sess., c. 24, s. 14(c); 1997, c. 292, s. 1; 2005-435, s. 27.)

Effect of Amendments. — Session Laws 2005-435, s. 26, effective September 27, 2005, rewrote the section.

CASE NOTES

Monies Received for Excise Tax Versus Penalties and Interest Payments. — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public schools; however, the penalties and interest payments collected by the Department of Revenue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

Cited in Lynn v. West, 134 F.3d 582, 1998 U.S. App. LEXIS 403 (4th Cir.), cert. denied, 525 U.S. 813, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998) (But see Milligan v. State, 135 N.C. App. 781, 522 S.E.2d 330 (1999)); Vick v. Williams, 233 F.3d 213, 2000 U.S. App. LEXIS 29523 (4th Cir. 2000), cert denied, 533 U.S. 952, 121 S. Ct. 2596, 150 L. Ed. 2d 754 (2001).

§ 105-113.113. Use of tax proceeds.

(a) Special Account. — The Unauthorized Substances Tax Account is established as a special nonreverting account. The Secretary shall credit the proceeds of the tax levied by this Article to the Account.

(b) Distribution. — The Secretary shall distribute unencumbered tax proceeds in the Unauthorized Substances Tax Account on a quarterly or more frequent basis. Tax proceeds in the Account are unencumbered when they are collectible under G.S. 105-241.22. The Secretary shall distribute seventy-five percent (75%) of the unencumbered tax proceeds in the Account that were collected by assessment to the State or local law enforcement agency that conducted the investigation of a dealer that led to the assessment. If more than one State or local law enforcement agency conducted the investigation, the Secretary shall determine the equitable share for each agency based on the contribution each agency made to the investigation. The Secretary shall credit the remaining unencumbered tax proceeds in the Account to the General Fund.

(c) Refunds. — The refund of a tax that has already been distributed shall be drawn initially from the Unauthorized Substances Tax Account. The amount of refunded taxes that were distributed to a law enforcement agency under this section and any interest shall be subtracted from succeeding distributions from the Account to that law enforcement agency. The amount of refunded taxes that were credited to the General Fund under this section and any interest shall be subtracted from succeeding credits to the General Fund from the Account. (1991 (Reg. Sess., 1992), c. 900, s. 20(c); 1995, c. 340, s. 1; 1997-292, s. 1; 2007-491, s. 9.)

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 19.4(a), provides: "Notwithstanding G.S. 143-18, the Department of Revenue may expend up to two million four hundred thirty-four thousand two hundred seventy dollars and seventy-one cents ($2,434,270.71) of unencumbered maintenance appropriations as of June 30, 2006, for the purpose of paying the Civil Penalty and Forfeiture Fund. The amount to be expended represents Unauthorized Substance Tax penalty collections that were paid to local law enforcement agencies for the period of July 1, 2005, through December 31, 2005. The source of the unencumbered funds shall come entirely from the Department of Revenue. If unencumbered funds are not sufficient on June 30, 2006, the Department shall use anticipated unencumbered funds as of July 1, 2006."

Session Laws 2006-66, s. 19.4(b), provides: "Through the 2008-2009 fiscal year, the Department of Revenue shall reduce succeeding distributions to a law enforcement agency under G.S. 105-113.113 to offset the amount that was improperly distributed to that agency, as described in subsection (a) of this section, and the Department shall deposit the funds collected into a reserve account which shall revert at the end of each fiscal year."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 8, effective January 1, 2008, rewrote subsection (a); in subsection (b), added the first two sentences, in the third sentence, substituted "distribute" for "remit," deleted "part of the" preceding "unencumbered tax proceeds" and inserted "in the Account" thereafter; and made minor stylistic changes throughout. For applicability, see Editor's note.

CASE NOTES

Monies Received for Excise Tax Versus Penalties and Interest Payments. — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public schools; however, the penalties and interest payments collected by the Department of Revenue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

ARTICLE 3.

Franchise Tax.

§ 105-114. Nature of taxes; definitions.

(a) Nature of Taxes. — The taxes levied in this Article upon persons and partnerships are for the privilege of engaging in business or doing the act named.

(a1) Scope. — The taxes levied in this Article upon corporations are privilege or excise taxes levied upon:

(1) Corporations organized under the laws of this State for the existence of the corporate rights and privileges granted by their charters, and the enjoyment, under the protection of the laws of this State, of the powers, rights, privileges and immunities derived from the State by the form of such existence; and

(2) Corporations not organized under the laws of this State for doing business in this State and for the benefit and protection which these corporations receive from the government and laws of this State in doing business in this State.

(a2) Condition for Doing Business. — If the corporation is organized under the laws of this State, the payment of the taxes levied by this Article is a condition precedent to the right to continue in the corporate form of organization. If the corporation is not organized under the laws of this State, payment of these taxes is a condition precedent to the right to continue to engage in doing business in this State.

(a3) Tax Year. — The taxes levied in this Article are for the fiscal year of the State in which the taxes become due, except that the taxes levied in G.S. 105-122 are for the income year of the corporation in which the taxes become due.

(a4) No Double Taxation. — G.S. 105-122 does not apply to holding companies taxed under G.S. 105-120.2. G.S. 105-122 applies to a corporation taxed under another section of this Article only to the extent the taxes levied on the corporation in G.S. 105-122 exceed the taxes levied in other sections of this Article on the corporation or on a limited liability company whose assets must be included in the corporation's tax base under G.S. 105-114.1.

(b) Definitions. — The following definitions apply in this Article:

(1) City. — Defined in G.S. 105-228.90.

(1a) Code. — Defined in G.S. 105-228.90.

(2) Corporation. — A domestic corporation, a foreign corporation, an electric membership corporation organized under Chapter 117 of the General Statutes or doing business in this State, or an association that is organized for pecuniary gain, has capital stock represented by shares, whether with or without par value, and has privileges not possessed by individuals or partnerships. The term includes a mutual or capital stock savings and loan association or building and loan association chartered under the laws of any state or of the United States. The term includes a limited liability company that elects to be taxed as a C Corporation under the Code, but does not otherwise include a limited liability company.

(3) Doing business. — Each and every act, power, or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges granted by the laws of this State.

(4) Income year. — Defined in G.S. 105-130.2(4b).

(c) Recodified as G.S. 105-114.1 by Session Laws 2002-126, s. 30G.2.(b), effective January 1, 2003. (1939, c. 158, s. 201; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1965, c. 287, s. 16; 1967, c. 286; 1969, c. 541, s. 6; 1973, c. 1287, s. 3; 1983, c. 713, s. 66; 1985, c. 656, s. 7; 1985 (Reg. Sess., 1986), c. 853, s. 1; 1987, c. 778, s. 1; 1987 (Reg. Sess., 1988), c. 1015, s. 2; 1989, c. 36, s. 2; 1989 (Reg. Sess., 1990), c. 981, s. 2; 1991, c. 30, s. 2; c. 689, s. 250; 1991 (Reg. Sess., 1992), c. 922, s. 3; 1993, c. 12, s. 4; c. 354, s. 11; c. 485, s. 5; 1997-118, s. 4; 1998-98, ss. 60, 76; 1999-337, s. 20; 2000-173, s. 8; 2001-327, s. 2(b); 2002-126, s. 30G.2(b); 2005-435, s. 59.2(a); 2006-66, s. 24A.2(a); 2006-162, ss. 3(b), 22.)

Editor's Note. — Session Laws 1998-98, s. 1(i) provides: "This section repeals any law that would otherwise exempt savings and loan associations, as defined in G.S. 54B-4, from the franchise tax imposed in Article 3 of Chapter 105 of the General Statutes."

The subdivision designation (b)(1) was assigned by the Revisor of Statutes, the designation in Session Laws 1997-118, s. 4, having been (b)(01); former subdivision (b)(1) was renumbered as (b)(1a) at the direction of the Revisor of Statutes.

The definition of "Income year," referred to in subdivision (b)(4) of this section, is found at G.S. 105-130.2(4a). Session Laws 1993, c. 354, s. 12 originally enacted the definition of "Income year" as subdivision (5); however, this definition was redesignated as subdivision (4a) at the direction of the Revisor of Statutes.

Session Laws 2001-327, s. 2(a), as amended by Session Laws 2002-126, s. 30G.2(a), provides: "The General Assembly finds that most corporations engaged in business in this State comply with the State franchise tax on corporate assets. Some taxpayers, however, take advantage of an unintended loophole in the law and avoid franchise tax by transferring their assets to a controlled limited liability company. This tax avoidance creates an unfair burden on corporate citizens that pay the franchise tax on their assets. It is the intent of this section to apply the franchise tax equally to assets held by corporations and assets held by corporate-affiliated limited liability companies. It is also the intent of this section to provide that a criminal penalty applies to taxpayers who fraudulently evade the tax.

"The General Assembly further finds that, after this loophole was closed in 2001, some taxpayers continue to avoid franchise tax by manipulating ownership of assets. One method is to interpose a controlled partnership between the corporation and the controlled limited liability company. This tax avoidance creates an unfair burden on corporate citizens that pay the franchise tax on all their assets. It is the intent of the General Assembly to apply the franchise tax equally to assets held by corporations and assets held by corporate-controlled entities."

Section 14.13(2) of Session Laws 2004-161 provides that the Revenue Laws Study Committee may study comprehensive reform and simplification of the existing State taxes on business entities, including all types of business entities under a revised form of the franchise tax, Article 3 of Chapter 105 of the General Statutes.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2005-435, s. 59.2(a), as amended by Session Laws 2006-162, s. 22, effective July 24, 2006, in subsection (a4), deleted "on the corporation" following "exceed the taxes levied" and added the language beginning "on the corporation or on a limited liability company" at the end.

Session Laws 2006-66, s. 24A.2(a), effective for taxable years beginning on or after January 1, 2007, rewrote the last sentence in subdivision (b)(2).

Session Laws 2006-162, s. 3(b), effective July 24, 2006, substituted "G.S. 105-130.2(4b)" for "G.S. 105-130.2(5)" in subdivision (b)(4).

CASE NOTES

Constitutionality. — Assessment of tax under this section against a business trust did not violate the uniformity requirement of N.C. Const., Art. V, § 2, on grounds that it was similar to a limited partnership, which is not subject to the franchise tax. First Carolina Investors v. Lynch, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

What Organizations Are Taxable Under This Section. — This section levies a franchise tax only upon organizations which are (1) corporations as defined within that section, and (2) doing business within North Carolina. First Carolina Investors v. Lynch, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

Corporation. — Under the terms of this section, an organization is properly classified as a corporation for franchise tax purposes when it satisfies three criteria: (1) It is a corporation, association, joint-stock company or any other form of organization for pecuniary gain; (2) it has capital stock represented by shares; and (3) it has privileges not possessed by individuals or partnerships. First Carolina Investors v. Lynch, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

"Capital stock" must be read to encompass ownership interests in all the different types of business organizations potentially subject to the franchise tax. First Carolina Investors v. Lynch, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

Despite the fact that plaintiff was organized as a business trust rather than as an ordinary business corporation, and that its shares of capital stock were designated as "shares of beneficial interest," plaintiff's shares were the functional equivalent of capital stock for purposes of this section. First Carolina Investors v. Lynch, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

Franchise Tax Not Ordinarily Included in Term "Privilege Tax". — While the term "privilege tax" includes franchise taxes as well as license taxes, a franchise is a special kind of privilege constituting a property right, which is ordinarily transferable and exclusive, and involves the use of public facilities. The word "privilege" is too broad, per se, as a classification for taxation, but is usually particularized into licenses and franchises in classifying businesses for taxation, and as used in our taxing statutes, the term "privilege tax" does not ordinarily include franchise taxes. Duke Power Co. v. Bowles, 229 N.C. 143, 48 S.E.2d 287 (1948).

Privileges Not Possessed by Individuals or Partnerships. — By establishing for its trustees and shareholders limited liability for trust obligations, the plaintiff obtained a privilege not possessed by individuals or partnerships for purposes of this section. First Carolina Investors v. Lynch, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

Tax Due to Royalty Payments Paid to Out-of-State Trademark Holder. — North Carolina Secretary of Revenue did not exceed his authority in imposing franchise and income taxes on out-of-state trademark holding companies that entered into licensing agreements with related retail companies that operated in North Carolina, whereby the retail companies paid the holding companies royalties for the use of the trademarks in North Carolina; the holding companies were doing business in North Carolina, and the Secretary's attempt to assess the taxes did not offend the Commerce Clause of the United States Constitution. A&F Trademark, Inc. v. Tolson, 167 N.C. App. 150, 605 S.E.2d 187, 2004 N.C. App. LEXIS 2162 (2004), appeal dismissed, 359 N.C. 320, — S.E.2d — (2005), cert. denied, — U.S. —, 126 S. Ct. 353, 163 L. Ed. 2d 62 (2005).

Tax Measured by Amount of Business Transacted. — Whenever a tax is imposed upon a corporation directly by the legislature and is not assessed by assessors, and the amount depends on the amount of business transacted by the corporation, and the extent to which it has exercised the privileges granted in its charter, without reference to the value of its property or the nature of the investments made of it, it is a franchise tax. Worth v. Petersburg R.R., 89 N.C. 301 (1883).

Franchise taxes are imposed for the privilege of engaging in business in this State. The amount of the tax varies with the nature and magnitude of the privilege taxed, the relative financial returns to be expected of the business or activities under franchise, and the burden put on government in regulating, protecting and fostering the enterprise. Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966).

Uniformity Required. — The rule of uniformity laid down in N.C. Const., Art. V, § 2, was intended to apply to taxes on franchises. Worth v. Petersburg R.R., 89 N.C. 301 (1883).

Legislature May Make Tax by State Exclusive. — The General Assembly may require a corporation to pay a license tax for the privilege of carrying on its business, and forbid counties or other municipalities to exact any other license tax or fee. Charlotte Bldg. & Loan Ass'n v. Commissioners of Mecklenburg County, 115 N.C. 410, 20 S.E. 526 (1894).

Cited in Standard Fertilizer Co. v. Gill, 225 N.C. 426, 35 S.E.2d 275 (1945); Secretary of Revenue v. Carolina Tel. & Tel. Co., 81 N.C. App. 240, 344 S.E.2d 46 (1986); Four County Elec. Membership Corp. v. Powers, 96 N.C. App. 417, 386 S.E.2d 107 (1989).

§ 105-114.1. Limited liability companies.

(a) Definitions. — The following definitions apply in this section:

(1) Affiliated group. — Defined in section 1504 of the Code.

(2) Capital interest. — The right under a limited liability company's governing law to receive a percentage of the company's assets upon dissolution after payments to creditors.

(3) Entity. — A person that is not a human being.

(4) Governing law. — A limited liability company's governing law is determined under G.S. 57C-6-05 or G.S. 57C-7-01, as applicable.

(5) Noncorporate limited liability company. — A limited liability company that does not elect to be taxed as a C Corporation under the Code.

(b) Controlled Companies. — If a corporation or an affiliated group of corporations owns more than fifty percent (50%) of the capital interests in a noncorporate limited liability company, the corporation or group of corporations must include in its three tax bases pursuant to G.S. 105-122 the same percentage of (i) the noncorporate limited liability company's capital stock, surplus, and undivided profits; (ii) fifty-five percent (55%) of the noncorporate limited liability company's appraised ad valorem tax value of property; and (iii) the noncorporate limited liability company's actual investment in tangible property in this State, as appropriate.

(c) Constructive Ownership. — Ownership of the capital interests in a noncorporate limited liability company is determined by reference to the constructive ownership rules for partnerships, estates, and trusts in section 318(a)(2)(A) and (B) of the Code with the following modifications:

(1) The term "capital interest" is substituted for "stock" each place it appears.

(2) A noncorporate limited liability company and any noncorporate entity other than a partnership, estate, or trust is treated as a partnership.

(3) The operating rule of section 318(a)(5) of the Code applies without regard to section 318(a)(5)(C).

(d) No Double Inclusion. — If a corporation is required to include a percentage of a noncorporate limited liability company's assets in its tax bases under this Article pursuant to subsection (b) of this section, its investment in the noncorporate limited liability company is not included in its computation of capital stock base under G.S. 105-122(b).

(e) Affiliated Group. — If the owner of the capital interests in a noncorporate limited liability company is an affiliated group of corporations, the percentage to be included pursuant to subsection (b) of this section by each group member that is doing business in this State is determined by multiplying the capital interests in the noncorporate limited liability company owned by the affiliated group by a fraction. The numerator of the fraction is the capital interests in the noncorporate limited liability company owned by the group member, and the denominator of the fraction is the capital interests in the noncorporate limited liability company owned by all group members that are doing business in this State.

(f) Exemption. — This section does not apply to assets owned by a noncorporate limited liability company if the total book value of the noncorporate limited liability company's assets never exceeded one hundred fifty thousand dollars ($150,000) during its taxable year.

(g) Timing. — Ownership of the capital interests in a noncorporate limited liability company is determined as of the last day of its taxable year. The adjustments pursuant to subsections (b) and (d) of this section must be made to the owner's next following return filed under this Article. If a noncorporate limited liability company and a corporation or an affiliated group of corporations have engaged in a pattern of transferring assets between them with the result that each did not own the capital interests on the last day of its taxable year, the ownership of the capital interests in the noncorporate limited liability company must be determined as of the last day of the corporation or group of corporations' taxable year.

(h) Penalty. — A taxpayer who, because of fraud with intent to evade tax, underpays the tax under this Article on assets attributable to it under this section is guilty of a Class H felony in accordance with G.S. 105-236(7). (2002-126, s. 30G.2(b); 2002-126, s. 30G.2(b); 2004-74, ss. 1, 2; 2004-170, s. 8.1; 2006-66, s. 24A.2(b).)

Editor's Note. — Session Laws 2002-126, s. 30G.2(a), provides: "The General Assembly finds that most corporations engaged in business in this State comply with the State franchise tax on corporate assets. Some taxpayers, however, take advantage of an unintended loophole in the law and avoid franchise tax by transferring their assets to a controlled limited liability company. This tax avoidance creates an unfair burden on corporate citizens that pay the franchise tax on their assets. It is the intent of this section to apply the franchise tax equally to assets held by corporations and assets held by corporate-affiliated limited liability companies. It is also the intent of this section to provide that a criminal penalty applies to taxpayers who fraudulently evade the tax.

"The General Assembly further finds that, after this loophole was closed in 2001, some taxpayers continue to avoid franchise tax by manipulating ownership of assets. One method is to interpose a controlled partnership between the corporation and the controlled limited liability company. This tax avoidance creates an unfair burden on corporate citizens that pay the franchise tax on their assets. It is the intent of the General Assembly to apply the franchise tax equally to assets held by corporations and assets held by corporate-controlled entities."

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 24A.2(b), effective for taxable years beginning on or after January 1, 2007, added subdivision (a)(5); and inserted "noncorporate" preceding "limited liability" throughout the section.

§ 105-115: Repealed by Session Laws 1989 (Regular Session, 1990), c. 1002, s. 1.

§ 105-116. Franchise or privilege tax on electric power, water, and sewerage companies.

(a) Tax. — An annual franchise or privilege tax is imposed on the following:
(1) An electric power company engaged in the business of furnishing electricity, electric lights, current, or power.
(2), (2a) Repealed by Session Laws 1998-22, s. 2, effective July 1, 1999.
(3) A water company engaged in owning or operating a water system subject to regulation by the North Carolina Utilities Commission.
(4) A public sewerage company engaged in owning or operating a public sewerage system.

The tax on an electric power company is three and twenty-two hundredths percent (3.22%) of the company's taxable gross receipts from the business of furnishing electricity, electric lights, current, or power. The tax on a water company is four percent (4%) of the company's taxable gross receipts from owning or operating a water system subject to regulation by the North Carolina Utilities Commission. The tax on a public sewerage company is six percent (6%) of the company's taxable gross receipts from owning or operating a public sewerage company. A company's taxable gross receipts are its gross receipts from business inside the State less the amount of gross receipts from sales reported under subdivision (b)(2). A company that engages in more than one business taxed under this section shall pay tax on each business.

(b) **(Effective until October 1, 2007)** Report and Payment. — The tax imposed by this section is payable quarterly, semimonthly, or monthly as specified in this subsection. A return is due quarterly.

A water company or public sewerage company must pay tax quarterly when filing a return. An electric power company must pay tax in accordance with the schedule that applies to its payments of sales and use tax under G.S. 105-164.16 and must file a return quarterly. An electric power company is not subject to interest on or penalties for an underpayment for a semimonthly or monthly payment period if the electric power company timely pays at least ninety-five percent (95%) of the amount due for each semimonthly or monthly payment period and includes the underpayment with the quarterly return for those semimonthly or monthly payment periods.

A quarterly return covers a calendar quarter and is due by the last day of the month that follows the quarter covered by the return. A taxpayer must submit a return on a form provided by the Secretary. The return must include the taxpayer's gross receipts from all property it owned or operated during the reporting period in connection with its business taxed under this section. A taxpayer must report its gross receipts on an accrual basis. A return must contain the following information:
(1) The taxpayer's gross receipts for the reporting period from business inside and outside this State, stated separately.
(2) The taxpayer's gross receipts from commodities or services described in subsection (a) that are sold to a vendee subject to the tax levied by this section or to a joint agency established under Chapter 159B of the General Statutes or a city having an ownership share in a project established under that Chapter.
(3) The amount of and price paid by the taxpayer for commodities or services described in subsection (a) that are purchased from others engaged in business in this State and the name of each vendor.
(4) For an electric power company the entity's gross receipts from the sale within each city of the commodities and services described in subsection (a).

G.S. 105-116(b) is set out twice. See notes.

(b) **(Effective October 1, 2007)** Report and Payment. — The tax imposed by this section is payable quarterly or monthly as specified in this subsection. A return is due quarterly.

A water company or public sewerage company must pay tax quarterly when filing a return. An electric power company must pay tax in accordance with the schedule and requirements that apply to payments of sales and use tax under G.S. 105-164.16 and must file a return quarterly.

A quarterly return covers a calendar quarter and is due by the last day of the month that follows the quarter covered by the return. A taxpayer must submit a return on a form provided by the Secretary. The return must include the taxpayer's gross receipts from all property it owned or operated during the reporting period in connection with its business taxed under this section. A taxpayer must report its gross receipts on an accrual basis. A return must contain the following information:

(1) The taxpayer's gross receipts for the reporting period from business inside and outside this State, stated separately.

(2) The taxpayer's gross receipts from commodities or services described in subsection (a) that are sold to a vendee subject to the tax levied by this section or to a joint agency established under Chapter 159B of the General Statutes or a city having an ownership share in a project established under that Chapter.

(3) The amount of and price paid by the taxpayer for commodities or services described in subsection (a) that are purchased from others engaged in business in this State and the name of each vendor.

(4) For an electric power company the entity's gross receipts from the sale within each city of the commodities and services described in subsection (a).

(c) Repealed by Session Laws 1998-22, s. 2, effective July 1, 1999.

(d) Distribution. — Part of the taxes imposed by this section on electric power companies is distributed to cities under G.S. 105-116.1. If a taxpayer's return does not state the taxpayer's taxable gross receipts derived within a city, the Secretary must determine a practical method of allocating part of the taxpayer's taxable gross receipts to the city.

(e) Local Tax. — So long as there is a distribution to cities from the tax imposed by this section, no city shall impose or collect any greater franchise, privilege or license taxes, in the aggregate, on the businesses taxed under this section, than was imposed and collected on or before January 1, 1947.

(e1) An electric power company engaged in the business of furnishing electricity, electric lights, current, or power that collects the annual franchise or privilege tax pursuant to subsection (a) of this section and remits the tax collected to the Secretary shall not be subject to any additional franchise or privilege tax imposed upon it by any city or county.

(f) Repealed by Session Laws 1998-22, s. 2, effective July 1, 1999. (1939, c. 158, s. 203; 1949, c. 392, s. 2; 1951, c. 643, s. 3; 1955, c. 1313, s. 2; 1957, c. 1340, s. 3; 1959, c. 1259, s. 3; 1963, c. 1169, s. 1; 1965, c. 517; 1967, c. 519, ss. 1, 3; c. 1272, ss. 1, 3; 1971, c. 298, s. 1; c. 833, s. 1; 1973, c. 476, s. 193; c. 537, s. 3; c. 1287, s. 3; c. 1349; 1975, c. 812; 1983 (Reg. Sess., 1984), c. 1097, ss. 2, 16; 1987 (Reg. Sess., 1988), c. 882, s. 4.4; 1989 (Reg. Sess., 1990), c. 813, s. 3; c. 814, s. 10; c. 945, ss. 3, 17; 1991, c. 598, s. 4; c. 689, s. 28(c); 1991 (Reg. Sess., 1992), c. 1007, s. 2; 1993, c. 321, s. 26(h); 1997-118, s. 2; 1997-426, s. 3; 1998-22, s. 2; 1998-98, s. 72; 1998-217, s. 32(a); 2000-140, s. 62; 2001-427, s. 6(c), (d); 2002-72, s. 10; 2002-120, s. 8; 2006-33, s. 10; 2006-162, s. 31.)

Subsection (b) is set out twice. — The first version of subsection (b) set out above is effective until October 1, 2007. The second version of subsection (b) set out above is effective October 1, 2007.

Effect of Amendments. — Session Laws 2006-33, s. 10, as amended by Session Laws 2006-162, s. 31, effective October 1, 2007, substituted "quarterly" for "quarterly, semimonthly" in the first sentence of subsection (b), and rewrote the second paragraph.

Legal Periodicals. — For brief comment on 1949 amendment, see 27 N.C.L. Rev. 482 (1949).

CASE NOTES

Application of Section to Electric Cooperative. — This section taxes billings for electrical service rendered by cooperatives in the same manner as billings for service rendered by investor-owned utilities; therefore, application of this section to an electric cooperative did not violate that entity's rights under N.C. Const., Art. I, § 19, or N.C. Const., Art. V, § 2 and 3. Four County Elec. Membership Corp. v. Powers, 96 N.C. App. 417, 386 S.E.2d 107 (1989), cert. denied and appeal dismissed, 326 N.C. 799, 393 S.E.2d 894 (1990), cert. denied, 498 U.S. 1040, 111 S. Ct. 711, 112 L. Ed. 2d 700 (1991).

"Privilege or License Tax" Not Including Franchise Taxes. — The term "privilege or license tax," as used in former subsection (f) prior to the 1949 amendment did not include franchise taxes, it being apparent that the legislature would have used the term "franchise" eo nomine if it had intended to include franchise taxes within the limitation upon taxes to be imposed by cities or towns. Duke Power Co. v. Bowles, 229 N.C. 143, 48 S.E.2d 287 (1948).

"Patronage Capital" as Part of Gross Receipts. — Amounts designated as "patronage capital," defined as the total revenues received by electric cooperative's monthly billings to its members for electrical service rendered, less related operating expenses arising from furnishing such electricity, including interest payments upon any debt capital used in providing electric service as well as depreciation upon operating facilities and equipment, which was determined after the close of the fiscal year, where at the time of rendering bills, the amount of the bill which would go to patronage capital could not be determined, were part of the corporation's gross receipts for the purposes of this section. Furthermore, the corporation could not deduct patronage capital actually repaid from its franchise tax base. Four County Elec. Membership Corp. v. Powers, 96 N.C. App. 417, 386 S.E.2d 107 (1989), cert. denied and appeal dismissed, 326 N.C. 799, 393 S.E.2d 894 (1990), cert. denied, 498 U.S. 1040, 111 S. Ct. 711, 112 L. Ed. 2d 700 (1991).

For history of former subsection (f) prior to 1949 amendment, see Duke Power Co. v. Bowles, 229 N.C. 143, 48 S.E.2d 287 (1948).

Application of Former Statute to Buses for Hire. — A former statute of similar import, but differently worded, was held not to apply to the operation of buses for hire within a city, even though operated on definite routes, unless used in connection with or in substitution for a street railway. Safe Bus v. Maxwell, 214 N.C. 12, 197 S.E. 567 (1938).

Applied in State ex rel. Utilities Comm'n v. Public Staff — North Carolina Utils. Comm'n, 58 N.C. App. 480, 293 S.E.2d 880 (1982).

Cited in State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

OPINIONS OF ATTORNEY GENERAL

A city may not levy a local franchise tax upon electric power companies effective July 1, 2002 when it has "received some but not all of a distribution of the state franchise tax in fiscal year 2001-2002." See opinion of Attorney General to E. Norris Tolson, Secretary of Revenue, North Carolina Department of Revenue, 2002 N.C. AG LEXIS 21 (7/11/02).

§ 105-116.1. Distribution of gross receipts taxes to cities.

(a) Definitions. — The following definitions apply in this section:

(1) Freeze deduction. — The amount by which the percentage distribution amount of a city was required to be reduced in fiscal year 1995-96 in determining the amount to distribute to the city.

(2) Percentage distribution amount. — Three and nine hundredths percent (3.09%) of the gross receipts derived by an electric power company from sales within a city that are taxable under G.S. 105-116.

(b) Distribution. — The Secretary must distribute to the cities part of the taxes collected under this Article on electric power companies. Each city's share for a calendar quarter is the percentage distribution amount for that city for that quarter minus one-fourth of the city's hold-back amount and one-fourth of the city's proportionate share of the annual cost to the Department of administering the distribution. The Secretary must make the distribution within 75 days after the end of each calendar quarter. The General Assembly finds that the revenue distributed under this section is local revenue, not a State expenditure, for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold the distribution.

(c) Limited Hold-Harmless Adjustment. — The hold-back amount for a city that, in the 1995-96 fiscal year, received from gross receipts taxes on electric power companies and natural gas companies less than ninety-five percent (95%) of the amount it received in the 1990-91 fiscal year but at least sixty percent (60%) of the amount it received in the 1990-91 fiscal year is the amount determined by the following calculation:

(1) Adjust the city's 1995-96 distribution by adding the city's freeze deduction attributable to receipts from electric power companies and natural gas companies to the amount distributed to the city for that year.
(2) Compare the adjusted 1995-96 amount with the city's 1990-91 distribution.
(3) If the adjusted 1995-96 amount is less than or equal to the city's 1990-91 distribution, the hold-back amount for the city is zero.
(4) If the adjusted 1995-96 amount is more than the city's 1990-91 distribution, the hold-back amount for the city is the city's freeze deduction attributable to receipts from electric power companies and natural gas companies minus the difference between the city's 1990-91 distribution and the city's 1995-96 distribution.

(c1) Additional Limited Hold-Harmless Adjustment. — The hold-back amount for a city that, in the 1995-96 fiscal year, received from gross receipts taxes on electric power companies and natural gas companies less than sixty percent (60%) of the amount it received in the 1990-91 fiscal year is the amount determined by the following calculation:

(1) Adjust the city's 1999-2000 distribution by adding the city's freeze deduction attributable to receipts from electric power companies and natural gas companies to the amount distributed to the city for that year.
(2) Compare the adjusted 1999-2000 amount with the city's 1990-91 distribution.
(3) If the adjusted 1999-2000 amount is less than or equal to the city's 1990-91 distribution, the hold-back amount for the city is zero.
(4) If the adjusted 1999-2000 amount is more than the city's 1990-91 distribution, the hold-back amount for the city is the city's freeze deduction attributable to receipts from electric power companies and natural gas companies minus the difference between the city's 1990-91 distribution and the city's 1999-2000 distribution.

(d) Allocation of Hold-Harmless Adjustment. — The hold-back amount for a city that, in the 1995-96 fiscal year, received from gross receipts taxes on electric power companies and natural gas companies at least ninety-five percent (95%) of the amount it received in the 1990-91 fiscal year is the amount determined by the following calculation:

(1) Determine the amount by which the freeze deduction attributable to receipts from electric power companies and natural gas companies is reduced for all cities whose hold-back amount is determined under

subsections (c) and (c1) of this section. This amount is the total hold-harmless adjustment.

(2) Determine the amount of gross receipts taxes that would be distributed for the quarter to cities whose hold-back amount is determined under this subsection if these cities received their percentage distribution amount minus one-fourth of their freeze deduction attributable to receipts from electric power companies and natural gas companies.

(3) For each city included in the calculation in subdivision (2) of this subsection, determine that city's percentage share of the amount determined under that subdivision.

(4) Add to the city's freeze deduction attributable to receipts from electric power companies and natural gas companies an amount equal to the city's percentage share under subdivision (3) of this subsection multiplied by the total hold-harmless adjustment.

(e) Disqualification. — No municipality may receive any funds under this section if it was incorporated with an effective date of on or after January 1, 2000, and is disqualified from receiving funds under G.S. 136-41.2. No municipality may receive any funds under this section, incorporated with an effective date on or after January 1, 2000, unless a majority of the mileage of its streets is open to the public. The previous sentence becomes effective with respect to distribution of funds on or after July 1, 1999. (1997-118, s. 1; 1997-426, s. 3.1; 1997-439, s. 3; 1997-456, s. 55.5; 1998-22, s. 3; 1999-458, s. 11; 2000-128, s. 2; 2001-430, s. 11; 2002-120, s. 2; 2005-435, s. 34(b).)

Local Modification. — Community of Gray's Creek: 1999-458, s. 13 (contingent on petition filed before July 1, 2002); Community of Union Cross: 1999-458, s. 13 (contingent on petition filed before July 1, 2002).

Effect of Amendments. — Session Laws 2005-435, s. 34(b), effective September 27, 2005, made a minor stylistic change in the next-to-last sentence of subsection (e).

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 481.

OPINIONS OF ATTORNEY GENERAL

Power of City to Levy Tax. — A city may not levy a local franchise tax upon electric power companies effective July 1, 2002 when it has received some but not all of a distribution of the state franchise tax in fiscal year 2001-2002. See opinion of Attorney General to E. Norris Tolson, Secretary of Revenue, North Carolina Department of Revenue, 2002 N.C. AG LEXIS 21 (7/11/02).

§§ 105-117, 105-118: Repealed by Session Laws 1995 (Regular Session, 1996), c. 646, s. 3.

§ 105-119: Repealed by Session Laws 2000-173, s. 7 effective August 2, 2000.

§ 105-120: Repealed by Session Laws 2001-430, s. 12, effective January 1, 2002, and applies to taxable services reflected on bills dated on or after January 1, 2002.

Cross References. — As to tax on telecommunications, see G.S. 105-164.4B. As to distribution of part of telecommunications taxes to cities, see G.S. 105-164.44F.

Editor's Note. — Session Laws 2001-487, s. 118(a), effective December 16, 2001, repealed the amendment to this section by Session Laws 2001-427, s. 6(e). The amendment by Session Laws 2001-427 would have been effective January 1, 2002, and therefore never went into effect.

Session Laws 2001-430, s. 18, as amended by

Session Laws 2001-487, s. 119, provides: "Pursuant to G.S. 62-31 and G.S. 62-32, the Utilities Commission must lower the rates set for telecommunications services to reflect the repeal of G.S. 105-120 and the resulting liability of local telecommunications companies for the tax imposed under G.S. 105-122."

§ 105-120.1: Repealed by Session Laws 2000-173, s. 7, effective August 2, 2000.

§ 105-120.2. Franchise or privilege tax on holding companies.

(a) Every corporation, domestic and foreign, incorporated or, by an act, domesticated under the laws of this State or doing business in this State which, at the close of its taxable year is a holding company as defined in subsection (c) of this section, shall, pursuant to the provisions of G.S. 105-122:

(1) Make a report and statement, and

(2) Determine the total amount of its issued and outstanding capital stock, surplus and undivided profits, and

(3) Apportion such outstanding capital stock, surplus and undivided profits to this State.

(b)(1) Every corporation taxed under this section shall annually pay to the Secretary of Revenue, at the time the report and statement are due, a franchise or privilege tax, which is hereby levied, at the rate of one dollar and fifty cents ($1.50) per one thousand dollars ($1,000) of the amount determined under subsection (a) of this section, but in no case shall the tax be more than seventy-five thousand dollars ($75,000) nor less than thirty-five dollars ($35.00).

(2) Notwithstanding the provisions of subdivision (1) of this subsection, if the tax produced pursuant to application of this paragraph (2) exceeds the tax produced pursuant to application of subdivision (1), then the tax shall be levied at the rate of one dollar and fifty cents ($1.50) per one thousand dollars ($1,000) on the greater of the amounts of

a. Fifty-five percent (55%) of the appraised value as determined for ad valorem taxation of all the real and tangible personal property in this State of each such corporation plus the total appraised value of intangible property returned for taxation of intangible personal property as computed under G.S. 105-122(d); or

b. The total actual investment in tangible property in this State of such corporation as computed under G.S. 105-122(d).

(c) For purposes of this section, a "holding company" is a corporation that receives during its taxable year more than eighty percent (80%) of its gross income from corporations in which it owns directly or indirectly more than fifty percent (50%) of the outstanding voting stock or voting capital interests.

(d) Repealed by Session Laws 1985, c. 656, s. 39.

(e) Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section. The tax imposed under the provisions of G.S. 105-122 shall not apply to businesses taxed under the provisions of this section.

(f) In determining the total tax payable by any holding company under this section, there shall be allowed as a credit on such tax the amount of the credit authorized under Part 5 of Article 4 of this Chapter. (1975, c. 130, s. 1; 1985, c. 656, s. 39; 1985 (Reg. Sess., 1986), c. 854, s. 1; 1987 (Reg. Sess., 1988), c. 882, s. 4.2; 1991, c. 30, s. 4; 1998-98, s. 72; 2006-196, s. 9.)

Editor's Note. — Session Laws 2006-196, s. 13, provides: "The Revenue Laws Study Committee shall study the following issues:

"(1) The simplification of the additional tax imposed on insurance contracts on property coverage, as enacted in Section 3 of this act, and the distribution of the revenue generated by the tax. The study of this issue may include a recommendation on the percentage of revenue to be distributed to the firemen's local relief funds and the formula for making this distribution. The study may also consider the increasing difference between the amount of revenue available in the Volunteer Fire Department Fund for matching grants to purchase equipment and make capital improvements and the amount of grant requests received.

"(2) The authority of the Secretary of Revenue to require taxpayers to file consolidated returns. The study of this issue may include consideration of whether the State should require some corporations or all corporations to file a consolidated return.

"(3) The feasibility of replacing the State's current corporate income and franchise tax laws with a commercial activity tax based upon business gross receipts.

"(4) The administrative process for the review of disputed tax matters."

Effect of Amendments. — Session Laws 2006-196, s. 9, effective January 1, 2007, and applicable for taxable years beginning on or after that date, in subsection (c), substituted "a corporation that" for "any corporation which" near the middle and added "or voting capital interests" at the end.

§ 105-121: Repealed by Session Laws 1945, c. 752, s. 1.

Cross References. — The repealed section related to franchise or privilege taxes on insurance companies. For present law relating to taxes thereon, see G.S. 105-228.3 through 105-228.10.

§ 105-121.1. Mutual burial associations.

An annual franchise or privilege tax on all domestic mutual burial associations shall be due and payable to the Secretary of Revenue on or before the first day of April of each year. The amount of this franchise or privilege tax shall be based on the membership of such associations according to the following schedule:

Membership less than 3,000	$15.00
Membership of 3,000 to 5,000	20.00
Membership of 5,000 to 10,000	25.00
Membership of 10,000 to 15,000	30.00
Membership of 15,000 to 20,000	35.00
Membership of 20,000 to 25,000	40.00
Membership of 25,000 to 30,000	45.00
Membership of 30,000 or more	50.00

(1943, c. 60, s. 2; 1973, c. 476, s. 193.)

§ 105-122. Franchise or privilege tax on domestic and foreign corporations.

(a) An annual franchise or privilege tax is imposed on a corporation doing business in this State. A corporation subject to the tax must file a return under affirmation with the Secretary at the place and in the manner prescribed by the Secretary. The return must be signed by the president, vice-president, treasurer, or chief financial officer of the corporation. The return is due on or before the fifteenth day of the fourth month following the end of the corporation's income year.

(b) Determination of Capital Base. — A corporation taxed under this section shall determine the total amount of its issued and outstanding capital stock, surplus, and undivided profits. No reservation or allocation from surplus or undivided profits is allowed except as provided below:

(1) Definite and accrued legal liabilities.

(2) Taxes accrued, dividends declared, and reserves for depreciation of tangible assets as permitted for income tax purposes.

(3) When including deferred tax liabilities, a corporation may reduce the amount included in its base by netting against that amount deferred

tax assets. The reduction may not decrease deferred tax liabilities below zero (0).

(4) Reserves for the cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or streams, lakes, or rivers, upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources or from a local air pollution control program for air-cleaning devices located in an area where the Environmental Management Commission has certified a local air pollution control program pursuant to G.S. 143-215.112 certifying that the Environmental Management Commission or local air pollution control program has found as a fact that the air-cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of the Environmental Management Commission or local air pollution control program with respect to such devices, plants or equipment, that such device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission or local air pollution control program and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions.

(5) Reserves for the cost of purchasing and installing equipment or constructing facilities for the purpose of recycling or resource recovering of or from solid waste or for the purpose of reducing the volume of hazardous waste generated shall be treated as deductible for the purposes of this section upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources certifying that the Department of Environment and Natural Resources has found as a fact that the equipment or facility has actually been purchased, installed or constructed, that it is in conformance with all rules and regulations of the Department of Environment and Natural Resources, and the recycling or resource recovering is the primary purpose of the facility or equipment.

(6) Reserves for the cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas shall be treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to such pollution abatement plants or equipment constructed or installed on or after January 1, 1955.

(7) The cost of treasury stock.

(8) In the case of an international banking facility, the capital base shall be reduced by the excess of the amount as of the end of the taxable year of all assets of an international banking facility which are employed outside the United States over liabilities of the international banking facility owed to foreign persons. For purposes of such reduction, foreign persons shall have the same meaning as defined in G.S. 105-130.5(b)(13)d.

Every corporation doing business in this State which is a parent, subsidiary, or affiliate of another corporation shall add to its capital stock, surplus, and undivided profits all indebtedness owed to a parent, subsidiary, or affiliated corporation as a part of its capital used in its business and as a part of the base for franchise tax under this section. If any part of the capital of the creditor corporation is capital borrowed from a source other than a parent, subsidiary, or affiliate, the debtor corporation, which is required under this subsection to include in its tax base the amount of debt by reason of being a parent, subsidiary, or affiliate of the creditor corporation, may deduct from the debt included a proportionate part determined on the basis of the ratio of the borrowed capital of the creditor corporation to the total assets of the creditor corporation. If the creditor corporation is also taxable under the provisions of this section, the creditor corporation is allowed to deduct from the total of its capital, surplus, and undivided profits the amount of any debt owed to it by a parent, subsidiary or affiliated corporation to the extent that the debt has been included in the tax base of the parent, subsidiary, or affiliated debtor corporation reporting for taxation under the provisions of this section.

The following definitions apply in this subsection:

(1) Affiliate. — The same meaning as specified in G.S. 105-130.6.

(2) Indebtedness. — All loans, credits, goods, supplies, or other capital of whatsoever nature furnished by a parent, subsidiary, or affiliated corporation, other than indebtedness endorsed, guaranteed, or otherwise supported by one of these corporations.

(3) Parent. — The same meaning as specified in G.S. 105-130.6.

(4) Subsidiary. — The same meaning as specified in G.S. 105-130.6.

(c) Repealed by Session Laws 2007-491, s. 2, effective January 1, 2008.

(c1) Apportionment. — A corporation that is doing business in this State and in one or more other states must apportion its capital stock, surplus, and undivided profits to this State. A corporation must use the apportionment method set out in subdivision (1) of this subsection unless the Department has authorized it to use a different method under subdivision (2) of this subsection. The portion of a corporation's capital stock, surplus, and undivided profits determined by applying the appropriate apportionment method is considered the amount of capital stock, surplus, and undivided profits the corporation uses in its business in this State.

(1) Statutory. — A corporation that is subject to income tax under Article 4 of this Chapter must apportion its capital stock, surplus, and undivided profits by using the fraction it applies in apportioning its income under that Article. A corporation that is not subject to income tax under Article 4 of this Chapter must apportion its capital stock, surplus, and undivided profits by using the fraction it would be required to apply in apportioning its income if it were subject to that Article. The apportionment method set out in this subdivision is considered the statutory method of apportionment and is presumed to be the best method of determining the amount of a corporation's capital stock, surplus, and undivided profits attributable to the corporation's business in this State.

(2) Alternative. — A corporation that believes the statutory apportionment method set out in subdivision (1) of this subsection subjects a greater portion of its capital stock, surplus, and undivided profits to tax under this section than is attributable to its business in this State may make a written request to the Secretary for permission to use an alternative method. The request must set out the reasons for the corporation's belief and propose an alternative method. The corporation has the burden of establishing by clear, cogent, and convincing proof that the statutory apportionment method subjects a greater

portion of the corporation's capital stock, surplus, and undivided profits to tax under this section than is attributable to its business in this State and that the proposed alternative method is a better method of determining the amount of the corporation's capital stock, surplus, and undivided profits attributable to the corporation's business in this State.

The Secretary must issue a written decision on a corporation's request for an alternative apportionment method. If the decision grants the request, it must describe the alternative method the corporation is authorized to use and state the tax years to which the alternative method applies. A decision may apply to no more than three tax years. A corporation may renew a request to use an alternative apportionment method by following the procedure in this subdivision. A decision of the Secretary on a request for an alternative apportionment method is final and is not subject to administrative or judicial review. A corporation authorized to use an alternative method may apportion its capital stock, surplus, and undivided profits in accordance with the alternative method or the statutory method.

(d) After determining the proportion of its total capital stock, surplus and undivided profits as set out in subsection (c) of this section, which amount shall not be less than fifty-five percent (55%) of the appraised value as determined for ad valorem taxation of all the real and tangible personal property in this State of each corporation nor less than its total actual investment in tangible property in this State, every corporation taxed under this section shall annually pay to the Secretary of Revenue, at the time the report and statement are due, a franchise or privilege tax at the rate of one dollar and fifty cents ($1.50) per one thousand dollars ($1,000) of the total amount of capital stock, surplus and undivided profits as provided in this section. The tax imposed in this section shall not be less than thirty-five dollars ($35.00) and shall be for the privilege of carrying on, doing business, and/or the continuance of articles of incorporation or domestication of each corporation in this State. Appraised value of tangible property including real estate is the ad valorem valuation for the calendar year next preceding the due date of the franchise tax return. The term "total actual investment in tangible property" as used in this section means the total original purchase price or consideration to the reporting taxpayer of its tangible properties, including real estate, in this State plus additions and improvements thereto less reserve for depreciation as permitted for income tax purposes, and also less any indebtedness incurred and existing by virtue of the purchase of any real estate and any permanent improvements made thereon. In computing "total actual investment in tangible personal property" there shall also be deducted reserves for the entire cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or into streams, lakes, or rivers, upon condition that the corporation claiming this deduction shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources or from a local air pollution control program for air-cleaning devices located in an area where the Environmental Management Commission has certified a local air pollution control program pursuant to G.S. 143-215.112 certifying that said Department or local air pollution control program has found as a fact that the air-cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that the device, plant or equipment complies with the requirements of the Environmental Management Commission or local air pollution control program with respect to the devices, plants or equipment, that the device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission or local air pollution control program and that the primary purpose is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas is treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to pollution abatement plants or equipment constructed or installed on or after January 1, 1955.

(d1) Credits. — A corporation is allowed a credit against the tax imposed by this section for a taxable year equal to one-half of the amount of tax payable during the taxable year under Article 5E of this Chapter. The credit allowed by this subsection may not exceed the amount of tax imposed by this section for the taxable year, reduced by the sum of all other credits allowed against that tax, except tax payments made by or on behalf of the taxpayer.

(e) Any corporation which changes its income year, and files a "short period" income tax return pursuant to G.S. 105-130.15 shall file a franchise tax return in accordance with the provisions of this section in the manner and as of the date specified in subsection (a) of this section. Such corporation shall be entitled to deduct from the total franchise tax computed (on an annual basis) on such return the amount of franchise tax previously paid which is applicable to the period subsequent to the beginning of the new income year.

(f) The report, statement and tax required by this section shall be in addition to all other reports required or taxes levied and assessed in this State.

(g) Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section.

(h) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1211, s. 5. (1939, c. 158, s. 210; 1941, c. 50, s. 4; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1947, c. 501, s. 3; 1951, c. 643, s. 3; 1953, c. 1302, s. 3; 1955, c. 1100, s. 2½; c. 1350, s. 17; 1957, c. 1340, s. 3; 1959, c. 1259, s. 3; 1963, c. 1169, s. 1; 1967, c. 286; c. 892, ss. 10, 11; c. 1110, s. 2; 1973, c. 476, s. 193; c. 695, s. 17; c. 1262, s. 23; c. 1287, s. 3; 1975, c. 764, s. 2; 1977, c. 771, s. 4; 1981, c. 704, s. 18; c. 855, s. 3; 1981 (Reg. Sess., 1982), c. 1211, s. 5; 1985, c. 656, s. 40; 1985 (Reg. Sess., 1986), c. 826, s. 6; c. 854, s. 1; 1987 (Reg. Sess., 1988), c. 882, s. 4.3; 1989, c. 148, s. 1; c. 727, ss. 218(39), 219(27); 1991, c. 30, s. 5; 1993, c. 532, s. 11; 1995 (Reg. Sess., 1996), c. 560, s. 1; 1997-443, s. 11A.119(a); 1998-22, ss. 8, 9; 1998-98, ss. 72, 77; 1998-217, s. 43; 1999-337, s. 21; 2001-427, s. 12(a); 2003-416, s. 5(j); 2006-95, s. 1.1; 2006-162, s. 2; 2007-491, ss. 2, 10, 11.)

Editor's Note. — Session Laws 1998-98, s. 1(i) provides: "This section repeals any law that would otherwise exempt savings and loan associations, as defined in G.S. 54B-4, from the franchise tax imposed in Article 3 of Chapter 105 of the General Statutes."

Session Laws 2001-430, s. 18, as amended by Session Laws 2001-487, s. 119, provides: "Pursuant to G.S. 62-31 and G.S. 62-32, the Utilities Commission must lower the rates set for telecommunications services to reflect the repeal of G.S. 105-120 and the resulting liability of local telecommunications companies for the tax imposed under G.S. 105-122."

Session Laws 2007-491, s. 47 provide: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-

241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2006-95, s. 1.1, effective for taxable years beginning on or after January 1, 2007, rewrote subsection (b).

Session Laws 2006-162, s. 2, effective July 24, 2006, rewrote subsection (d).

Session Laws 2007-491, ss. 2, 10 and 11, effective January 1, 2008, rewrote subsection (a), repealed subsection (c) and added subsection (c1). For applicability, see Editor's note.

Legal Periodicals. — For brief comment on the 1953 amendment, see 31 N.C.L. Rev. 435, 441 (1953).

CASE NOTES

Purpose of Section. — The purpose of this section is to levy a tax upon going corporations for the privilege of doing business in this State. Broadwell Realty Corp. v. Coble, 30 N.C. App. 261, 226 S.E.2d 869 (1976), rev'd on other grounds, 291 N.C. 608, 231 S.E.2d 656 (1977).

Power of Legislature. — It is within the legislative power of taxation, in respect to corporations, to levy any two or more of the following taxes simultaneously: (1) on the franchise (including corporate dividends); (2) on the capital stock; (3) on the tangible property of the corporation; and (4) on the shares of the capital stock in the hands of the stockholders. The tax on the two subjects last named is imperative. Board of Comm'rs v. Blackwell Durham Tobacco Co., 116 N.C. 441, 21 S.E. 423 (1895).

Foreign corporations do business here by comity of the State, and the latter may impose a license tax as a condition upon which such corporations may do business here under the protection of our laws, where such is not an interference with interstate commerce, or the tax is not otherwise invalid. Pittsburgh Life & Trust Co. v. Young, 172 N.C. 470, 90 S.E. 568 (1916).

Tax Is on Privilege of Existence. — By the express terms of Laws 1931, c. 427, s. 210, which was superseded by this section, the corporation was liable for the annual franchise tax for each year during which it enjoyed the privilege of the continuance of its charter. It was immaterial whether or not the corporation exercised its privilege of doing or carrying on the business authorized by its charter or certificate of incorporation; it was liable so long as it enjoyed the privilege granted by the State of "being" a corporation. Stagg v. George E. Nissen Co., 208 N.C. 285, 180 S.E. 658 (1935).

Manner of Assessment of Tax by Secretary. — This section does not require that the Secretary use generally accepted accounting principles in making his determination of the franchise tax. Broadwell Realty Corp. v. Coble, 291 N.C. 608, 231 S.E.2d 656 (1977).

The portion of this section in subsection (a) which states that the tax shall be computed from the "books and records of the corporation" is not a requirement that the Secretary follow the categorizations placed upon the information contained in the books and records. Rather, this section authorizes the Secretary to require such facts and information as is deemed necessary to comply with his duty to assess the franchise tax in accordance with the statute. Broadwell Realty Corp. v. Coble, 291 N.C. 608, 231 S.E.2d 656 (1977).

Subsection (b) clearly does not permit a deduction for future income taxes from the franchise tax base. Broadwell Realty Corp. v. Coble, 291 N.C. 608, 231 S.E.2d 656 (1977) (Decided prior to 2006 amendments).

The plaintiff corporation, having voluntarily elected the installment method of accounting for income tax purposes, may not deduct deferred, potential State and federal income tax liabilities from its franchise tax base under subsection (b) as either "definite and accrued legal liabilities" or "accrued taxes." Broadwell Realty Corp. v. Coble, 291 N.C. 608, 231 S.E.2d 656 (1977) (Decided prior to 2006 amendments).

Corporation Not Relieved of License Tax on Carrying on of Particular Business. — The franchise tax imposed upon every corporation doing business in the State is a tax upon the privilege of being a corporation, and its payment does not relieve it, or its lessee, from the payment of a tax imposed upon the privilege of carrying on the particular kind of business for which the corporation was chartered. Cobb v. Commissioners of Durham County, 122 N.C. 307, 30 S.E. 338 (1898).

Effect of Business Corporation Act (now North Carolina Business Corporation Act) on Section. — It is illogical to assume that the legislature intended by the Business Corporation Act (now North Carolina Business Corporation Act), Chapter 55, to void regulations permitting computation of taxes on the cash receipt basis and thereby outlaw that method of accounting, or to invalidate an accepted method of determining capital and surplus for franchise tax returns required by this section. Watson v. Watson Seed Farms, Inc., 253 N.C. 238, 116 S.E.2d 716 (1961) (Decided prior to 2006 amendments).

Textile finishing plant engaged in processing by mechanical and chemical means, for a fee on a contractual basis, unfinished textile goods owned by others into finished textile goods with qualities and characteristics different from those of the unfinished material is engaged in manufacturing within the purview of this section for the purpose of computing its franchise tax liability. Sayles Biltmore Bleacheries, Inc. v. Johnson, 266 N.C. 692, 147 S.E.2d 177 (1966).

Tax on Royalty Payments Paid to Out-of-State Trademark Holder. — North Carolina Secretary of Revenue did not exceed his authority in imposing franchise and income taxes on out-of-state trademark holding companies that entered into licensing agreements with related retail companies that operated in North Carolina, whereby the retail companies paid the holding companies royalties for the use of the trademarks in North Carolina; the holding companies were doing business in North Carolina, and the Secretary's attempt to assess the taxes did not offend the Commerce Clause of the United States Constitution. A&F Trademark, Inc. v. Tolson, 167 N.C. App. 150, 605 S.E.2d 187, 2004 N.C. App. LEXIS 2162 (2004), appeal dismissed, 359 N.C. 320, — S.E.2d — (2005), cert. denied, — U.S. —, 126 S. Ct. 353, 163 L. Ed. 2d 62 (2005).

Cited in Duke Power Co. v. Bowles, 229 N.C. 143, 48 S.E.2d 287 (1948); In re Vanderbilt Univ., 252 N.C. 743, 114 S.E.2d 655 (1960); Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966); Four County Elec. Membership Corp. v. Powers, 96 N.C. App. 417, 386 S.E.2d 107 (1989); In re Cent. Tel. Co., 167 N.C. App. 14, 604 S.E.2d 680, 2004 N.C. App. LEXIS 2058 (2004), appeal dismissed, cert. denied, — N.C. —, 610 S.E.2d 203 (2005).

OPINIONS OF ATTORNEY GENERAL

Equity Capital of Wholly-Owned Subsidiary Not "Indebtedness" That Parent Corporation May Deduct from Franchise Tax Base. — See opinion of Attorney General to Mr. W.B. Matthews, North Carolina Revenue Department, 41 N.C.A.G. 332 (1971).

§ 105-122.1. Credit for additional annual report fees paid by limited liability companies subject to franchise tax.

A limited liability company subject to tax under this Article is allowed a credit against the tax imposed by this Article equal to the difference between the annual report fee for corporations under G.S. 55-1-22(a)(23) and the annual report fee for limited liability companies under G.S. 57C-1-22(a). The credit allowed by this section may not exceed the amount of tax imposed by this Article for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer. (2006-66, s. 24A.2(c); 2007-323, s. 30.6(b).)

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-66, s. 24A.2(d), makes this section effective for taxable years beginning on or after January 1, 2007.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 30.6(b), effective July 1, 2007, and effective for taxable years beginning on or after January 1, 2007, inserted "(a)(23)" following "G.S. 55-1-22" in the middle of the first sentence.

§ 105-123: Repealed by Session Laws 1991, c. 30, s. 1.

§ 105-124: Repealed by Session Laws 1959, c. 1259, s. 9.

§ 105-125. Exempt corporations.

(a) Exemptions. — The following corporations are exempt from the taxes levied by this Article. Upon request of the Secretary, an exempt corporation must establish its claim for exemption in writing:

(1) A charitable, religious, fraternal, benevolent, scientific, or educational corporation not operated for profit.

(2) An insurance company subject to tax under Article 8B of this Chapter.

(3) A mutual ditch or irrigation association, a mutual or cooperative telephone association or company, a mutual canning association, a cooperative breeding association, or a similar corporation of a purely local character deriving receipts solely from assessments, dues, or fees collected from members for the sole purpose of meeting expenses.

(4) A cooperative marketing association that operates solely for the purpose of marketing the products of members or other farmers and returns to the members and farmers the proceeds of sales, less the association's necessary operating expenses, including interest and dividends on capital stock, on the basis of the quantity of product furnished by them. The association's operations may include activities directly related to these marketing activities.

(5) A production credit association organized under the federal Farm Credit Act of 1933.

(6) A club organized and operated exclusively for pleasure, recreation, or other nonprofit purposes, a civic league operated exclusively for the promotion of social welfare, a business league, or a board of trade.

(7) A chamber of commerce or merchants' association not organized for profit, no part of the net earnings of which inures to the benefit of a private stockholder, an individual, or another corporation.

(8) An organization, such as a condominium association, a homeowners' association, or a cooperative housing corporation not organized for profit, the membership of which is limited to the owners or occupants of residential units in the condominium, housing development, or cooperative housing corporation. To qualify for the exemption, the organization must be operated exclusively for the management, operation, preservation, maintenance, or landscaping of the residential units owned by the organization or its members or of the common areas and facilities that are contiguous to the residential units and owned by the organization or by its members. To qualify for the exemption, no part of the net earnings of the organization may inure, other than through the performance of related services for the members of the organization, to the benefit of any person.

(9) Except as otherwise provided by law, an organization exempt from federal income tax under the Code.

Provided, that an entity that qualifies as a real estate mortgage investment conduit, as defined in section 860D of the Code, is exempt from all of the taxes levied in this Article. Upon request by the Secretary of Revenue, a real estate mortgage investment conduit must establish in writing its qualification for this exemption.

(b) Certain Investment Companies. — A corporation doing business in North Carolina that qualifies as a "regulated investment company" under section 851 of the Code or as a "real estate investment trust" under section 856 of the Code and elects for federal income tax purposes to be treated as a "regulated investment company" or as a "real estate investment trust," may, in determining its basis for franchise tax, deduct the aggregate market value of its investments in the stocks, bonds, debentures, or other securities or evidences of debt of other corporations, partnerships, individuals, municipalities, governmental agencies, or governments. (1939, c. 158, s. 213; 1951, c. 937, s. 3; 1955, c. 1313, s. 1; 1957, c. 1340, s. 3; 1963, c. 601, s. 3; c. 1169, s. 1; 1967, c. 1110, s. 2; 1971, c. 820, s. 3; c. 833, s. 1; 1973, c. 476, s. 193; c. 1053, s. 2; c. 1287, s. 3; 1975, c. 591, s. 1; 1983, c. 28, s. 2; c. 713, s. 67; 1985 (Reg. Sess., 1986), c. 826, s. 4; 1991, c. 30, s. 6; 1993, c. 485, s. 4; c. 494, s. 1.)

Editor's Note. — Session Laws 1993, c. 494, s. 1, added the proviso at the end of subsection (a). The amendment, however, was made to the version of the section in effect before its complete revision by Session Laws 1993, c. 485, s. 4. This section has been set out in the form above at the direction of the Revisor of Statutes.

§ 105-126: Repealed by Session Laws 1959, c. 1259, s. 9.

§ 105-127. When franchise or privilege taxes payable.

(a) Every corporation, domestic or foreign, from which a report is required by law to be made to the Secretary of Revenue, shall, unless otherwise provided, pay to said Secretary annually the franchise tax as required by G.S. 105-122.

(b) Repealed by Session Laws 1998-98, s. 78, effective August 14, 1998.

(c) It shall be the duty of the treasurer or other officer having charge of any such corporation, domestic or foreign, upon which a tax is herein imposed, to transmit the amount of the tax due to the Secretary of Revenue within the time provided by law for payment of same.

(d), (e) Repealed by Session Laws 2002-72, s. 11, effective August 12, 2002.

(f) After the end of the income year in which a domestic corporation is dissolved pursuant to Article 14 of Chapter 55 of the General Statutes, the corporation is no longer subject to the tax levied in this Article unless the Secretary of Revenue finds that the corporation has engaged in business activities in this State not appropriate to winding up and liquidating its business and affairs. (1939, c. 158, s. 215; 1973, c. 476, s. 193; 1991, c. 30, s. 7; 1993, c. 485, s. 6; 1998-98, s. 78; 2002-72, s. 11.)

§ 105-128. Power of attorney.

The Secretary of Revenue shall have the authority to require a proper power of attorney of each and every agent for any taxpayer under this Article. (1939, c. 158, s. 217; 1973, c. 476, s. 193.)

§ 105-129. Extension of time for filing returns.

A return required by this Article is due on or before the date set in this Article. A taxpayer may ask the Secretary for an extension of time to file a return under G.S. 105-263. (1939, c. 158, s. 216; 1955, c. 1350, s. 17; 1959, c. 1259, s. 9; 1973, c. 476, s. 193; 1977, c. 1114, s. 6; 1989 (Reg. Sess., 1990), c. 984, s. 7; 1997-300, s. 2.)

§ 105-129.1: Repealed by Session Laws 1989, c. 582, s. 1.

ARTICLE 3A.

Tax Incentives For New And Expanding Businesses.

(See note for repeal of this Article.)

§ 105-129.2. (See note for repeal) Definitions.

The following definitions apply in this Article:

(1) Agrarian growth zone. — An area designated as an agrarian growth zone pursuant to G.S. 105-129.3B.

(1a) Air courier services. — The furnishing of air delivery of individually addressed letters and packages for compensation, except by the United States Postal Service.

(2) Central office or aircraft facility. — Any of the following:

  a. A corporate, subsidiary, or regional managing office, as defined by NAICS.

  b. An auxiliary subdivision of an interstate passenger air carrier engaged primarily in centralized training for the carrier at its hub.

  c. An auxiliary subdivision of an interstate passenger air carrier engaged primarily in aircraft maintenance and repair services or aircraft rebuilding as defined by NAICS.

(3) Computer services. — Any of the following industries or industry groups, as defined by NAICS, if the taxpayer provides the services primarily to persons who are not related entities with respect to the taxpayer:

  a. Computer systems design and related services.

  b. Software publishing.

  c. Software reproducing.

  d. On-line information services.

(4) Cost. — In the case of property owned by the taxpayer, cost is determined pursuant to regulations adopted under section 1012 of the Code. In the case of property the taxpayer leases from another, cost is value as determined pursuant to G.S. 105-130.4(j)(2).

(5) Customer service center. — An establishment of a telecommunications or financial services company, as defined by NAICS, that is primarily engaged in providing support services to the company's customers by telephone to support products or services of the company. For the purpose of this definition, an establishment is primarily engaged in providing support services by telephone if at least sixty percent (60%) of its calls are incoming.

(6) Data processing. — Any combination of the services listed in this subdivision, if the taxpayer provides the services primarily to persons who are not related entities with respect to the taxpayer. The term does not include payroll services, text processing, desktop publishing, or financial transaction processing.

  a. Data entry and preparation.

  b. Database creation, conversion, and management, including warehousing, retrieval, and utilization of data in databases.

  c. Data capture and imaging, including optical scanning and microfilm recording and imaging.

  d. Computer processing time rental.

e. Data storage media conversion.
f. Data file format conversion.

(7) Development zone. — An area designated as a development zone pursuant to G.S. 105-129.3A.

(8) Electronic mail order house. — An electronic shopping and mail order house, as defined by NAICS.

(8a) Eligible major industry. — A taxpayer is an eligible major industry for the purposes of this Article if the taxpayer is primarily engaged in one of the industries listed in G.S. 105-164.14(j)(3) and the Secretary of Commerce has certified that the owner of the facility will invest at least one hundred million dollars ($100,000,000) of private funds to acquire, construct, and equip a facility in this State to engage in one or more of those industries.

(9) Enterprise tier. — The classification assigned to an area pursuant to G.S. 105-129.3.

(10) Establishment. — Defined by NAICS.

(11) Full-time job. — A position that requires at least 1,600 hours of work per year and is intended to be held by one employee during the entire year. A full-time employee is an employee who holds a full-time job.

(12) Hub. — Defined in G.S. 105-164.3.

(12a) Interstate air courier. — Defined in G.S. 105-164.3.

(13) Interstate passenger air carrier. — Defined in G.S. 105-164.3.

(14) Large investment. — Defined in G.S. 105-129.4(b1).

(15) Machinery and equipment. — Engines, machinery, equipment, tools, and implements used or designed to be used in the business for which the credit is claimed. The term does not include real property as defined in G.S. 105-273 or rolling stock as defined in G.S. 105-333.

(16) Manufacturing. — An industry in manufacturing sectors 31 through 33, as defined by NAICS, but not including quick printing or retail bakeries.

(17) NAICS. — The North American Industry Classification System adopted by the United States Office of Management and Budget as of December 31, 1997.

(17a) Overdue tax debt. — Defined in G.S. 105-243.1.

(18) Purchase. — Defined in section 179 of the Code.

(19) Related entity. — Defined in G.S. 105-130.7A.

(20) Warehousing. — An industry in warehousing and storage subsector 493 as defined by NAICS.

(21) Wholesale trade. — An industry in wholesale trade sector 42 as defined by NAICS. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, s. 1; 1998-55, s. 1; 1999-360, ss. 1, 2; 2000-56, ss. 5(a), 5(b); 2000-173, s. 1(a); 2001-476, s. 1(a), (b); 2002-172, s. 1.5; 2003-416, s. 2; 2003-435, 2nd Ex. Sess., s. 3.1; 2004-170, s. 9; 2006-66, s. 24.16(b).)

Article Repealed Effective for Business Activities Occurring On or After January 1, 2007. — This Article is repealed effective for business activities that occur on or after January 1, 2007. See G.S. 105-129.2A(a), (a1), (a2) and (a3).

Editor's Note. — The definitions of "Computer Services" and "Cost" were renumbered at the direction of the Revisor of Statutes to preserve alphabetical order.

Session Laws 2000-173, s. 1(a) amended Session Laws 1996, Second Extra Session, c. 13, s. 10.2(3), as amended by Session Laws 1999-360, s. 1, to provide for repeal of this Article as provided within the Article.

Session Laws 2000-173, s. 1(b), codified Session Laws 1997-277, s. 4, as amended by Session Laws 1999-360, s. 18.1, as G.S. 105-129.2A(b), (c), and (d).

Session Laws 2001-476, s. 1(c) provides: "Subsection (a) of this section is effective when it becomes law. The General Assembly finds that the amendments to G.S. 105-129.2 made by subsection (a) of this section clarify the intent of the existing law and do not represent a change in the law. Subsection (b) of this section is effective for taxable years beginning on or after January 1, 2001."

Session Laws 2001-476, s. 7(a), effective November 29, 2001, provides: "The General Assembly finds that the purpose of Article 3A of Chapter 105 of the General Statutes is to encourage the creation of new quality jobs and to encourage new investment in machinery and equipment, research and development, and real property. The General Assembly further finds that allowing taxpayers to file amended returns and retroactively claim credits under that Article does not further this purpose of encouraging job creation and new investment."

Session Laws 2003-435, 2nd Ex. Sess., s. 3.1, which was effective for taxable years beginning on or after January 1, 2004, added subdivision (8a).

Session Laws 2003-435, 2nd Ex. Sess., s. 3.8, provides: "It is the intent of the General Assembly that the provisions of this part [Part 3 of Session Laws 2003-435, 2nd Ex. Sess.] not be expanded. If a court of competent jurisdiction holds any provision of this part invalid, the section containing that provision is repealed. The repeal of a section of this part under this section does not affect other provisions of this part that may be given affect without the invalid provision."

Session Laws 2005-241, s. 8, effective July 29, 2005, provides: "The Economic Development Oversight Committee, created pursuant to Section 7 of this act, shall complete a comprehensive study of Article 3A of Chapter 105 of the General Statutes (the Bill Lee Act) and the Job Development Investment Grant Program (JDIG) established under Part 2G of Article 10 of Chapter 143B of the General Statutes. Before adopting a report on this issue, the Economic Development Oversight Committee must hold at least one joint meeting with the Revenue Laws Study Committee. The Economic Development Oversight Committee shall complete the study and submit it to the General Assembly, along with any recommendations or legislative proposals, before the beginning of the 2006 Regular Session of the 2005 General Assembly. The study shall focus on comprehensive reform of the Bill Lee Act, JDIG, and related economic development incentives. It is the intent of the General Assembly to replace the current Bill Lee Act beginning with the 2007 taxable year with a program recommended by the Committee and to revamp JDIG based on the Committee's recommendations."

Session Laws 2005-370, s. 3, effective October 1, 2005, provides: "As part of the study of the William S. Lee Act and the Job Development Investment Grant Program directed in Section 8 of S.L. 2005-241, the Economic Development Oversight Committee (Committee) shall study the use of reverse auctions for the procurement of professional services, including architectural, engineering, surveying and construction management at risk, or other construction services, by businesses that receive economic development incentives from the State or a local government. The Committee shall consider the advisability of making business incentives contingent upon a business's commitment not to use a reverse auction procurement process. The Economic Development Oversight Committee shall complete the study and submit it to the General Assembly before the beginning of the 2006 Regular Session of the 2005 General Assembly."

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 24.16(b), effective for taxable years beginning on or after January 1, 2006, and applicable to business activities occurring on or after that date, added present subdivision (1); and redesignated former subdivision (1) as present subdivision (1)(a).

OPINIONS OF ATTORNEY GENERAL

Regarding an amendment which would extend existing tax benefits to establishments retailing merchandise by mail or electronic media, see opinion of Attorney General to The Honorable Bill Owens, North Carolina General Assembly, N.C. General Assembly, 1999 N.C.A.G. 18 (6/23/99).

§ 105-129.2A. Sunset; studies.

(a) Sunset. — This Article is repealed for business activities that occur in taxable years beginning on or after January 1, 2007.

(a1) Sunset for Interstate Air Couriers. — Notwithstanding subsection (a) of this section, in the case of an interstate air courier that enters into a real estate lease on or before January 1, 2006, with an airport authority that provides for the lease of at least 100 acres of real property with a lease term in excess of 15 years, this Article is repealed effective for business activities that occur on or after January 1, 2010.

(a2) Sunset for Eligible Major Industries. — Notwithstanding subsection (a) of this section, in the case of a taxpayer that qualifies as an eligible major industry on or before January 1, 2008, this Article is repealed effective for business activities that occur on or after January 1, 2010.

(a3) Sunset for Certain Taxpayers Located in Development Zones. — Notwithstanding subsection (a) of this section, in the case of a taxpayer that satisfies all of the conditions of this subsection, this Article is repealed effective for business activities that occur on or after January 1, 2010.

(1) Before January 1, 2006, the taxpayer signs a letter of commitment with the Department of Commerce describing a proposed new or expanding project and specifying the amount to be invested in real property and machinery and equipment, the number of new jobs to be created, and a proposed timetable for making the investment and creating the jobs.

(2) Before January 1, 2006, the Secretary of Commerce makes a written determination that the taxpayer is expected to purchase, lease, or construct and place in service in an eligible business at a location within a development zone within a three-year period at least ten million dollars ($10,000,000) of real property and machinery and equipment and that the taxpayer will create at least 300 new jobs at the location within a three-year period beginning when the property is first placed in service in an eligible business.

(3) Before January 1, 2006, the taxpayer places at least four million dollars ($4,000,000) of real property and machinery and equipment in service at the location and creates at least 20 new jobs at the location.

(a4) Sunset for Taxpayers That Sign a Letter of Commitment. — Notwithstanding subsection (a) of this section, in the case of a taxpayer that signs a letter of commitment with the Department of Commerce on or before December 31, 2006, stating the taxpayer's intent to create new jobs or make new investments with respect to machinery and equipment, central office or aircraft facility property, or substantial investments in other real property at a specific site in this State, this Article is repealed effective for business activities that occur on or after January 1, 2008. If a taxpayer elects to take any credit under the provisions of this subsection for activities occurring in the 2007 taxable year, the taxpayer may not take any credit under Article 3I of this Chapter with respect to the same establishment for activities occurring in the 2007 taxable year.

(b) Equity Study. — The Department of Commerce shall study the effect of the tax incentives provided in this Article on tax equity. This study shall include the following:

(1) Reexamining the formula in G.S. 105-129.3(b) used to define enterprise tiers, to include consideration of alternative measures for more equitable treatment of counties in similar economic circumstances.

(2) Considering whether the assignment of tiers and the applicable thresholds are equitable for smaller counties, for example those under 50,000 in population.

Article 3A has a delayed repeal date. See notes.

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(3) Compiling any available data on whether expanding North Carolina businesses receive fewer benefits than out-of-State businesses that locate to North Carolina.

(c) Impact Study. — The Department of Commerce shall study the effectiveness of the tax incentives provided in this Article. This study shall include:

(1) Study of the distribution of tax incentives across new and expanding industries.

(2) Examination of data on economic recruitment for the period from 1994 through the most recent year for which data are available by county, by industry type, by size of investment, and by number of jobs, and other relevant information to determine the pattern of business locations and expansions before and after the enactment of the William S. Lee Act incentives.

(3) Measuring the direct costs and benefits of the tax incentives.

(4) Compiling available information on the current use of incentives by other states and whether that use is increasing or declining.

(d) Report. — The Department of Commerce shall report the results of these studies and its recommendations to the General Assembly biennially with the first report due by April 1, 2001, and the last report due by June 1, 2007. (1997-277, s. 4; 1999-360, s. 18.1; 2000-173, ss. 1(b), 1(c); 2001-476, s. 2(a); 2002-146, s. 2; 2003-435, 2nd Ex. Sess., s. 3.2; 2005-241, ss. 1(a), 1(b); 2006-168, s. 2.1; 2006-252, s. 1.3; 2007-515, ss. 4, 5.)

Editor's Note. — Session Laws 2000-173, ss. 1(b) and (c), effective August 2, 2000, codified Session Laws 1997-277, s. 4, as amended by Session Laws 1999-360, s. 18.1, as subsections (b), (c), and (d) of this section, adding subsection headings, and added subsection (a); and in subsections (b) and (c), substituted "this Article" for "the William S. Lee Quality Jobs and Business Expansion Act, codified as Article 3A of Chapter 105 of the General Statues."

Session Laws 2002-146, s. 2, which was effective for taxable years that begin on or after January 1, 2002, added subsection (a1).

Session Laws 2002-146, s. 9, provides: "It is the intent of the General Assembly that the provisions of this act not be expanded. If a court of competent jurisdiction holds any provision of this act invalid, the section containing that provision is repealed. The repeal of a section of this act under this section does not affect other provisions of this act that may be given affect without the invalid provision."

Session Laws 2003-435, 2nd Ex. Sess., s. 3.2, which was effective for taxable years beginning on or after January 1, 2004, added subsection (a2).

Session Laws 2003-435, 2nd Ex. Sess., s. 3.8, provides: "It is the intent of the General Assembly that the provisions of this part [Part 3 of Session Laws 2003-435, 2nd Ex. Sess.] not be expanded. If a court of competent jurisdiction holds any provision of this part invalid, the section containing that provision is repealed. The repeal of a section of this part under this section does not affect other provisions of this part that may be given affect without the invalid provision."

Session Laws 2006-252, s. 1.4, provides: "The Department of Commerce shall, in consultation with the North Carolina Rural Center, Inc. and lower-tiered counties, develop additional strategies to enhance economic growth and development in economically distressed areas. The Department shall report on the results of this study to the Joint Legislation Economic Development Oversight Committee by January 1, 2007. For the purposes of this section, 'economically distressed areas' means enterprise tier one areas as defined in G.S. 105-129.3."

Effect of Amendments. — Session Laws 2005-241, ss. 1(a) and 1(b), effective July 29, 2005, substituted "2008" for "2006" at the end of subsection (a) and added subsection (a3).

Session Laws 2006-168, s. 2.1, effective July 27, 2006, substituted "January 1, 2008" for "January 1, 2006" in the middle of subsection (a2).

Session Laws 2006-252, s. 1.3, effective August 17, 2006, substituted "2007" for "2008" in subsection (a) and added subsection (a4).

Session Laws 2007-515, ss. 4 and 5, effective August 30, 2007, in subsection (a) deleted "effective" preceding "for business activities" and inserted "in taxable years beginning"; and in subsection (d) added "and the last report due by June 1, 2007."

§ 105-129.3. (See note for repeal) Enterprise tier designation.

(a) Tiers Defined. — An enterprise tier one area is a county whose enterprise factor is one of the 10 highest in the State. An enterprise tier two area is a county whose enterprise factor is one of the next 15 highest in the State. An enterprise tier three area is a county whose enterprise factor is one of the next 25 highest in the State. An enterprise tier four area is a county whose enterprise factor is one of the next 25 highest in the State. An enterprise tier five area is any area that is not in a lower-numbered enterprise tier.

(b) Annual Designation. — Each year, on or before December 31, the Secretary of Commerce shall assign to each county in the State an enterprise factor that is the sum of the following:

(1) The county's rank in a ranking of counties by average rate of unemployment from lowest to highest, for the preceding 12 months.
(2) The county's rank in a ranking of counties by average per capita income from highest to lowest, for the preceding 12 months.
(3) The county's rank in a ranking of counties by percentage growth in population from highest to lowest, for the preceding 12 months.

The Secretary of Commerce shall then rank all the counties within the State according to their enterprise factor from highest to lowest, identify all the areas of the State by enterprise tier, and publish this information. An enterprise tier designation is effective only for the calendar year following the designation.

(b1) Data. — In measuring rates of unemployment and per capita income, the Secretary shall use the latest available data published by a State or federal agency generally recognized as having expertise concerning the data. In measuring population and population growth, the Secretary shall use the most recent estimates of population certified by the State Budget Officer.

(c) Exception for Enterprise Tier One and Two Areas. — Notwithstanding the provisions of this section, a county designated as an enterprise tier one area or an enterprise tier two area may not be redesignated as a higher-numbered enterprise tier area until it has been in its enterprise tier area for at least two consecutive years.

(d) Exception for Two-County Industrial Park. — For the purpose of this Article, an eligible two-county industrial park has the lower enterprise tier designation of the designations of the two counties in which it is located if it meets all of the following conditions:

(1) It is located in two contiguous counties, one of which has a lower enterprise tier designation than the other.
(2) At least one-third of the park is located in the county with the lower tier designation.
(3) It is owned by the two counties or a joint agency of the counties.
(4) The county with the lower tier designation contributed at least the lesser of one-half of the cost of developing the park or a proportion of the cost of developing the park equal to the proportion of land in the park located in the county with the lower tier designation.

(d1) Exception for Certain Multi-Jurisdictional Industrial Park. — For the purpose of this Article, an eligible industrial park created by interlocal agreement under G.S. 158-7.4 has the lowest enterprise tier designation of the designations of the counties in which it is located if all of the following conditions are satisfied:

(1) The industrial park is located, at one or more sites, in four or more contiguous counties.
(2) At least two of the counties in which the industrial park is located are enterprise tier one areas.

(3) The industrial park is owned by four or more units of local government or a nonprofit corporation owned or controlled by four or more units of local government.

(4) In each county in which the industrial park is located, the park has at least 300 developable acres. For the purposes of this subdivision, "developable acres" includes acreage that is owned directly by the industrial park or its owners or that is the subject of a development agreement between the industrial park or its owners and a third-party owner.

(5) The total population of all of the counties in which the industrial park is located is less than 200,000.

(6) In each county in which the industrial park is located, at least sixteen and eight-tenths percent (16.8%) of the population was Medicaid eligible for the 2003-2004 fiscal year based on 2003 population estimates.

(e) Exceptions for Certain Small Counties. — The following exceptions to the provisions of this section apply to small counties:

(1) A county that has a population of less than 12,000 is designated an enterprise tier one area.

(2) A county that meets both of the conditions set out below has an enterprise tier designation one level below the designation it would otherwise have under subsection (a) of this section:
   a. Its population is less than 50,000.
   b. More than eighteen percent (18%) of its population is below the federal poverty level according to the most recent federal decennial census.

(3) A county that has a population of less than 35,000 and that would otherwise be designated an enterprise tier four or five area under this section must be designated an enterprise tier three area.

(f) Exceptions for Certain Counties with High Unemployment. — Notwithstanding the provisions of this section, a county whose rank in a ranking of counties by average rate of unemployment for the preceding 12 months, from highest to lowest, is one of the 10 highest in the State is designated an enterprise tier one area. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, s. 1; 1998-55, s. 1; 1999-360, ss. 1, 2; 1999-456, s. 64; 2000-73, s. 1; 2001-94, s. 1; 2001-476, s. 3(a); 2004-202, s. 10; 2004-203, s. 5(e); 2005-241, ss. 4, 6; 2005-406, s. 1.)

Article Repealed Effective for Business Activities Occurring On or After January , 2007. — This Article is repealed effective for business activities that occur on or after January 1, 2007. See G.S. 105-129.2A(a), (a1), (a2) and (a3).

Effect of Amendments. — Session Laws 2005-241, ss. 4 and 6, effective July 29, 2005, and applicable to designations made on or after that date, rewrote subsection (e) and added subsection (f).

Session Laws 2005-406, s. 1, effective for taxable years beginning on or after January 1, 2005, added subsection (d1).

§ 105-129.3A. (See note for repeal) Development zone designation.

(a) Development Zone Defined. — A development zone is an area comprised of either an economic development and training district as defined by G.S. 153A-317.12 or one or more contiguous census tracts, census block groups, or both in the most recent federal decennial census that meets all of the following conditions:

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(1) Every census tract and census block group in the zone is located in whole or in part within the primary corporate limits of a city with a population of more than 5,000 according to the most recent annual population estimates certified by the State Budget Officer.

(2) It has a population of 1,000 or more according to the most recent annual population estimates certified by the State Budget Officer.

(3) More than twenty percent (20%) of its population is below the poverty level according to the most recent federal decennial census.

(4) Every census tract and census block group in the zone meets at least one of the following conditions:

a. More than ten percent (10%) of its population is below the poverty level according to the most recent federal decennial census.

b. It is immediately adjacent to another census tract or census block group that is in the same zone and has more than twenty percent (20%) of its population below the poverty level according to the most recent federal decennial census.

(5) None of the census tracts or census block groups in the zone is located in another development zone designated by the Secretary of Commerce.

(b) Designation. — Upon request of a taxpayer or a local government, the Secretary of Commerce shall designate whether an area is a development zone that meets the conditions of subsection (a) of this section. If the applicant is a taxpayer, it must notify each city in which part of the zone is located. A development zone designation is effective for 24 months following the designation. The Department of Commerce must publish annually a list of all development zones with a description of their boundaries.

(c) Relationship With Enterprise Tiers. — For the purpose of the wage standard requirement of G.S. 105-129.4, the credit for investing in machinery and equipment allowed in G.S. 105-129.9, and the credit for worker training allowed in G.S. 105-129.11, a development zone is considered an enterprise tier one area. For all other purposes, a development zone has the same enterprise tier designation as the county in which it is located.

(d) Parcel of Property Partially in a Development Zone. — For the purposes of this section, a parcel of property that is located partially within a development zone is considered entirely within the development zone if all of the following conditions are satisfied:

(1) At least fifty percent (50%) of the parcel is located within the development zone.

(2) The parcel was in existence and under common ownership prior to the most recent federal decennial census.

(3) The parcel is a portion of land made up of one or more tracts or tax parcels of land that is surrounded by a continuous perimeter boundary. (1998-55, s. 1; 1999-360, ss. 1, 2; 2001-414, s. 6; 2001-476, s. 4(a); 2002-172, s. 1.4; 2003-416, s. 2; 2004-203, s. 5(f); 2006-66, s. 24.5(a).)

Article Repealed Effective for Business Activities Occurring On or After January 1, 2007. — This Article is repealed effective for business activities that occur on or after January 1, 2007. See G.S. 105-129.2A(a), (a1), (a2) and (a3).

Editor's Note. — Session Laws 2002-172, s. 1.4, which was effective for taxable years beginning on or after January 1, 2003, and was reenacted by Session Laws 2003-416, s. 2, effective August 14, 2003, added subsection (d).

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 24.5(a), effective for taxable years beginning on or after January 1, 2004, inserted "either an economic development and training district as defined by G.S. 153A-317.12 or" in the introductory paragraph of subsection (a).

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

§ 105-129.3B. (See note for repeal) Agrarian growth zone designation.

(a) Agrarian Growth Zone Defined. — An agrarian growth zone is an area comprised of one or more contiguous census tracts, census block groups, or both, in the most recent federal decennial census that meets all conditions in this subsection. A county may have no more than one agrarian growth zone.

(1) All land within the zone is located in whole within a county that has no municipality with a population in excess of 10,000.

(2) Every census tract and census block group that composes part of the zone has more than twenty percent (20%) of its population below the poverty level according to the most recent federal decennial census.

(3) The area of the zone less the smallest census tract included in the zone does not exceed five percent (5%) of the total area of the county in which the zone is located.

(b) Designation. — Upon request of a local government, the Secretary of Commerce shall make a written determination whether an area is an agrarian growth zone that meets the conditions of subsection (a) of this section. A determination under this section is effective until December 31 of the year following the year in which the determination is made. The Department of Commerce shall publish annually a list of all agrarian growth zones with a description of their boundaries.

(c) Parcel of Property Partially in Agrarian Growth Zone. — For the purposes of this section, a parcel of property that is located partially within an agrarian growth zone is considered entirely within the zone if all of the following conditions are satisfied:

(1) At least fifty percent (50%) of the parcel is located within the zone.

(2) The parcel was in existence and under common ownership prior to the most recent federal decennial census.

(3) The parcel is a portion of land made up of one or more tracts or tax parcels of land that is surrounded by a continuous perimeter boundary.

(d) Relationship With Enterprise Tiers. — For the purpose of the wage standard requirement of G.S. 105-129.4, the credit for investing in machinery and equipment allowed in G.S. 105-129.9, and the credit for worker training allowed in G.S. 105-129.11, an agrarian growth zone is considered an enterprise tier one area. For all other purposes, an agrarian growth zone has the same enterprise tier designation as the county in which it is located. (2006-66, s. 24.16(a).)

Article Repealed Effective for Business Activities Occurring On or After January 1, 2007. — This Article is repealed effective for business activities that occur on or after January 1, 2007. See G.S. 105-129.2A(a), (a1), (a2) and (a3).

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 24.16(g), makes this section effective for taxable years beginning on or after January 1, 2006, and applies to business activities occurring on or after that date.

Session Laws 2006-66, s. 28.6 is a severability clause.

§ 105-129.4. (See note for repeal) Eligibility; forfeiture.

(a) Type of Business. — The following conditions apply in determining a taxpayer's eligibility for the credits in this Article:

(1) Central office or aircraft facility. — A taxpayer is eligible for the credits allowed by this Article if it operates a central office or aircraft facility that creates at least 40 new jobs and the jobs, investment, and activity with respect to which a credit is claimed are used in that office or facility.

(2) Single business. — A taxpayer is eligible for the credits allowed by this Article other than by G.S. 105-129.12 if the primary business of the taxpayer is one of the following types of businesses and the jobs, investment, and activity with respect to which a credit is claimed are used in that business:
   a. Air courier services.
   b. Data processing.

(3) Multiple business. — A taxpayer is eligible for the credits allowed by this Article other than by G.S. 105-129.12 if the primary business of the taxpayer is one of the following types of businesses and the jobs, investment, and activity with respect to which a credit is claimed are used in any of the following types of businesses:
   a. Manufacturing.
   b. Warehousing.
   c. Wholesale trade.

(4) Single establishment. — A taxpayer is eligible for the credits allowed by this Article other than by G.S. 105-129.12 if the primary business of the taxpayer or the primary activity of an establishment of the taxpayer is one of the following types of businesses and the jobs, investment, and activity with respect to which a credit is claimed are used in that business:
   a. Computer services.
   b. An electronic mail order house that creates at least 250 new jobs and is located in an enterprise tier one, two, or three area.

(5) Customer service center. — A taxpayer is eligible for the credits allowed by this Article other than by G.S. 105-129.12 if all of the following conditions are met:
   a. The taxpayer's primary business is as a telecommunications or financial services company, as defined by NAICS.
   b. The primary activity of an establishment of the taxpayer is a customer service center located in an enterprise tier one, two, or three area.
   c. The jobs, investment, and activity with respect to which a credit is claimed are used in that activity.

(6) Warehousing. — A taxpayer is eligible for the credits allowed by this Article other than by G.S. 105-129.12 if all of the following conditions are met:
   a. The primary activity of an establishment of the taxpayer is in warehousing.
   b. The warehousing establishment is located in an enterprise tier one, two, or three area and serves 25 or more establishments of the taxpayer in at least five different counties in one or more states.
   c. The jobs, investment, and activity with respect to which a credit is claimed are used in the warehousing establishment.

(7) Research and development. — For the purpose of determining eligibility under this subsection for the credit for research and development in G.S. 105-129.10, the following special rules apply:

a. If the primary activity of an establishment of the taxpayer in this State is computer services, the taxpayer's qualified research expenditures in this State are considered to be used in computer services.

b. For all other taxpayers, the taxpayer's qualified research expenditures in this State are considered to be used in the primary business of the taxpayer.

(a1) New Jobs Defined. — A central office or aircraft facility creates at least 40 new jobs if the taxpayer hires at least 40 additional full-time employees to fill new positions at the office either (i) within 12 months immediately following the date the taxpayer first uses the property as a central office or aircraft facility or (ii) within a 36-month period that includes the 24 months that immediately precede and the 12 months that immediately follow the first use of the property as a central office or aircraft facility property when the taxpayer uses temporary space for the central office or aircraft facility functions during completion of the central office or aircraft facility property. Other property creates at least 200 new jobs if the taxpayer hires at least 200 additional full-time employees to fill new positions at the location in a two-year period beginning when the property is first used in an eligible business. An electronic mail order house creates at least 250 new jobs if the taxpayer hires at least 250 additional full-time employees to fill new positions at the house in the two-year period ending on the last day of the taxable year the taxpayer first claims a credit under this Article. Jobs transferred from one area in the State to another area in the State are not considered new jobs for purposes of this subsection.

(a2) Expiration. — If, during the period that installments of a credit under this Article accrue, the taxpayer is no longer engaged in one of the types of business described in subsection (a) of this section, the credit expires. If, during the period that installments of a credit under this Article accrue, the number of jobs of an eligible business falls below the minimum number required under subsection (a) of this section, any credit associated with that business expires. When a credit expires, the taxpayer may not take any remaining installments of the credit. The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.5. A change in the enterprise tier designation of the location of an establishment does not result in expiration of a credit under this Article.

(b) Wage Standard. — A taxpayer is eligible for the credit for creating jobs in an enterprise tier three, four, or five area if, for the calendar year the jobs are created, the average wage of the jobs for which the credit is claimed meets the wage standard and the average wage of all jobs at the location with respect to which the credit is claimed meets the wage standard. No credit is allowed for jobs not included in the wage calculation. A taxpayer is eligible for the credit for investing in machinery and equipment, the credit for research and development, or the credit for investing in real property for a central office or aircraft facility in a tier three, four, or five area if, for the calendar year the taxpayer engages in the activity that qualifies for the credit, the average wage of all jobs at the location with respect to which the credit is claimed meets the wage standard. In making the wage calculation, the taxpayer must include any positions that were filled for at least 1,600 hours during the calendar year the taxpayer engages in the activity that qualifies for the credit even if those positions are not filled at the time the taxpayer claims the credit. For a taxpayer with a taxable year other than a calendar year, the taxpayer must use the wage standard for the calendar year in which the taxable year begins. No wage standard applies to credits for activities in an enterprise tier one or two area. For the purposes of this subsection, for a fiber, yarn, or thread mill that uses a sequential manufacturing process in which separate parts of the sequential manufacturing process are performed in different facilities within the same county, the term “location” may mean either the specific establishment or all facilities in the county in which parts of the process are performed.

Part-time jobs for which the taxpayer provides health insurance as provided in subsection (b2) of this section are considered to have an average weekly wage at least equal to the applicable percentage times the applicable average weekly wage for the county in which the jobs will be located. There may be a period of up to 100 days between the time at which an employee begins a part-time job and the time at which the taxpayer begins to provide health insurance for that employee.

Jobs meet the wage standard if they pay an average weekly wage that is at least equal to one hundred ten percent (110%) of the applicable average weekly wage for the county in which the jobs will be located, as computed by the Secretary of Commerce from data compiled by the Employment Security Commission for the most recent period for which data are available. The applicable average weekly wage is the lowest of the following: (i) the average wage for all insured private employers in the county, (ii) the average wage for all insured private employers in the State, and (iii) the average wage for all insured private employers in the county multiplied by the county income/wage adjustment factor. The county income/wage adjustment factor is the county income/wage ratio divided by the State income/wage ratio. The county income/wage ratio is average per capita income in the county divided by the annualized average wage for all insured private employers in the county. The State income/wage ratio is the average per capita income in the State divided by the annualized average wage for all insured private employers in the State. The Department of Commerce must annually publish the wage standard for each county.

(b1) Large Investment. — A taxpayer who is otherwise eligible for a tax credit under this Article becomes eligible for the large investment enhancements provided for credits under this Article if the Secretary of Commerce makes a written determination that the taxpayer is expected to purchase or lease, and place in service in connection with the eligible business within a two-year period, at least one hundred fifty million dollars ($150,000,000) worth of one or more of the following: real property, machinery and equipment, or central office or aircraft facility property. In the case of an interstate air courier that has or is constructing a hub in this State and in the case of an eligible major industry, this investment may be placed in service in connection with the eligible business within a seven-year period. If the taxpayer fails to make the required level of investment within the applicable period, the taxpayer forfeits the large investment enhancements as provided in subsection (d) of this section.

(b2) Health Insurance. — A taxpayer is eligible for a credit for creating jobs or for worker training under this Article if the taxpayer provides health insurance for the positions for which the credit is claimed when the jobs are created and each year it claims an installment or carryforward of the credit. A taxpayer is eligible for the other credits under this Article if the taxpayer provides health insurance for all of the full-time positions at the location with respect to which the credit is claimed when the taxpayer engages in the activity that qualifies for the credit and each year it claims an installment or carryforward of the credit. For the purposes of this subsection, a taxpayer provides health insurance if it pays at least fifty percent (50%) of the premiums for health care coverage that equals or exceeds the minimum provisions of the basic health care plan of coverage recommended by the Small Employer Carrier Committee pursuant to G.S. 58-50-125.

Each year that a taxpayer claims a credit or an installment or carryforward of a credit allowed under this Article, the taxpayer must provide with the tax return the taxpayer's certification that the taxpayer continues to provide health insurance for the jobs for which the credit was claimed or the full-time jobs at the location with respect to which the credit was claimed. If the taxpayer ceases to provide health insurance for the jobs during a taxable year, the credit expires and the taxpayer may not take any remaining installment or carryforward of the credit.

(b3) Environmental Impact. — A taxpayer is eligible for a credit allowed under this Article only if the taxpayer certifies that, at the time the taxpayer first claims the credit, the taxpayer has no pending administrative, civil, or criminal enforcement action based on alleged significant violations of any program implemented by an agency of the Department of Environment and Natural Resources, and has had no final determination of responsibility for any significant administrative, civil, or criminal violation of any program implemented by an agency of the Department of Environment and Natural Resources within the last five years. A significant violation is a violation or alleged violation that does not satisfy any of the conditions of G.S. 143-215.6B(d). The Secretary of Environment and Natural Resources must notify the Department of Revenue annually of every person that currently has any of these pending actions and every person that has had any of these final determinations within the last five years.

(b4) Safety and Health Programs. — A taxpayer is eligible for a credit allowed under this Article only if the taxpayer certifies that, as of the time the taxpayer first claims the credit, at the business location with respect to which the credit is claimed, the taxpayer has no citations under the Occupational Safety and Health Act that have become a final order within the past three years for willful serious violations or for failing to abate serious violations. For the purposes of this subsection, "serious violation" has the same meaning as in G.S. 95-127. The Secretary of Labor must notify the Department of Revenue annually of all employers who have had these citations become final orders within the past three years.

(b5) Substantial Investment in Other Property. — A taxpayer is eligible for the credit for substantial investment in other property under G.S. 105-129.12A with respect to a location only if the Secretary of Commerce makes a written determination that the taxpayer is expected to purchase or lease and use in an eligible business at that location within a three-year period at least ten million dollars ($10,000,000) of real property and that the location that is the subject of the credit will create at least 200 new jobs within two years of the time that the property is first used in an eligible business. If the taxpayer fails to timely make the required level of investment or fails to timely create the required number of new jobs, the taxpayer forfeits the credit as provided in subsection (d) of this section.

(b6) Overdue Tax Debts. — A taxpayer is not eligible for a credit allowed under this Article if, at the time the taxpayer claims the credit or an installment or carryforward of the credit, the taxpayer has received a notice of an overdue tax debt and that overdue tax debt has not been satisfied or otherwise resolved.

(b7) Major Computer Facilities. — A taxpayer that is otherwise eligible for a tax credit under this Article and who satisfies the conditions of G.S. 105-129.62 is eligible for the major computer facility enhancements provided for credits under this Article. The major computer facility enhancements are the following:

(1) The wage standard requirement does not apply to the activities of the taxpayer at the major computer facility.

(2) For the credit for creating jobs under G.S. 105-129.8, the amount of the credit is increased by four thousand dollars ($4,000) per job for jobs at the major computer facility.

(3) For the credit for investment in machinery and equipment under G.S 105-129.9, the applicable percentage is seven percent (7%) and the applicable threshold is zero dollars ($0.00) regardless of the enterprise tier designation of the county in which the major computer facility is located.

(4) For the credit for worker training under G.S. 105-129.11, the maximum amount of the credit per worker trained is one thousand dollar ($1,000) regardless of the enterprise tier designation of the county i which the major computer facility is located.

(5) For the credit for substantial investment in other property under G.S 105-129.12A, the taxpayer is eligible for the credit regardless of the enterprise tier designation of the county in which the major compute facility is located.

(c) Repealed by Session Laws 1998-55, s. 1, effective for taxable year beginning on or after January 1, 1999.

(d) Forfeiture. — A taxpayer forfeits a credit allowed under this Article if the taxpayer was not eligible for the credit for the calendar year in which the taxpayer engaged in the activity for which the credit was claimed. In addition a taxpayer forfeits a large investment enhancement of a tax credit if the taxpayer fails to timely make the required level of investment under subsection (b1) of this section. If an eligible major industry fails to timely make the required level of investment under G.S. 105-129.2(8a), the taxpayer forfeits al credits allowed under this Article that it would not otherwise have bee eligible for if it were not an eligible major industry. If a taxpayer that is subjec to the later repeal date of this Article under G.S. 105-129.2A(a3) fails to timel make the required level of investment or to timely create the required numbe of new jobs, the taxpayer forfeits all credits allowed under this Article that i would not otherwise have been eligible for if it were not subject to the late repeal date under G.S. 105-129.2A(a3). A taxpayer forfeits the credit fo substantial investment in other property allowed under G.S. 105-129.12A i the taxpayer fails to timely create the number of required new jobs or to timel make the required level of investment under subsection (b5) of this section. A taxpayer forfeits the technology commercialization credit allowed under G.S 105-129.9A if the taxpayer fails to make the level of investment required b subsection (e) of that section within the required period or if the taxpayer fail to meet the terms of its licensing agreement with a research university. If a taxpayer claimed a twenty percent (20%) technology commercialization credi under G.S. 105-129.9A(d) and fails to make the level of investment require under that subsection within the required period, but does make the level o investment required under subsection (e) of that section within the require period, the taxpayer forfeits one-fourth of the twenty percent (20%) credit.

A taxpayer that forfeits a credit under this Article is liable for all past taxe avoided as a result of the credit plus interest at the rate established under G.S 105-241.21, computed from the date the taxes would have been due if the credi had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited; a taxpayer that fails to pay the past taxes and interest by the due date is subject to the penalties provided in G.S. 105-236. I

Article 3A has a delayed repeal date. See notes.

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a taxpayer forfeits the credit for creating jobs, the technology commercialization credit, or the credit for investing in machinery and equipment, the taxpayer also forfeits any credit for worker training claimed for the jobs for which the credit for creating jobs was claimed or the jobs at the location with respect to which the technology commercialization credit or the credit for investing in machinery and equipment was claimed.

(e) Change in Ownership of Business. — As used in this subsection, the term "business" means a taxpayer or an establishment. The sale, merger, consolidation, conversion, acquisition, or bankruptcy of a business, or any transaction by which an existing business reformulates itself as another business, does not create new eligibility in a succeeding business with respect to credits for which the predecessor was not eligible under this Article. A successor business may, however, take any installment of or carried-over portion of a credit that its predecessor could have taken if it had a tax liability. The acquisition of a business is a new investment that creates new eligibility in the acquiring taxpayer under this Article if any of the following conditions are met:

(1) The business closed before it was acquired.

(2) The business was required to file a notice of plant closing or mass layoff under the federal Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2102, before it was acquired.

(3) The business was acquired by its employees directly or indirectly through an acquisition company under an employee stock option transaction or another similar mechanism. For the purpose of this subdivision, "acquired" means that as part of the initial purchase of a business by the employees, the purchase included an agreement for the employees through the employee stock option transaction or another similar mechanism to obtain one of the following:

  a. Ownership of more than fifty percent (50%) of the business.

  b. Ownership of not less than forty percent (40%) of the business within seven years if the business has tangible assets with a net book value in excess of one hundred million dollars ($100,000,000) and has the majority of its operations located in an enterprise tier one, two, or three area.

(f) Development Zone Project Credit. — Subsections (a) through (b4) of this section do not apply to the credit for development zone projects provided in G.S. 105-129.13.

(g) Advisory Ruling. — A taxpayer may request in writing from the Secretary of Revenue specific advice regarding eligibility for a credit under this Article. G.S. 105-264 governs the effect of this advice. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, ss. 1, 2; 1998-55, s. 1; 1999-305, s. 3; 1999-360, ss. 1, 2; 1999-369, s. 5.2; 2000-56, ss. 5(c), 6, 8(c); 2000-140, ss. 92.A(a),(b); 2001-414, s. 7; 2001-476, ss. 5(a), 6(a); 2002-72, s. 12; 2002-146, ss. 3, 4; 2002-172, ss. 1.2, 1.3(b); 2003-349, s. 8.1; 2003-416, s. 2; 2003-435, 2nd Ex. Sess., ss. 3.3, 3.4; 2004-170, ss. 10, 11; 2004-204, 1st Ex. Sess., s. 2; 2005-241, s. 2; 2006-66, s. 24.14(a); 2007-491, s. 44(1)a.)

Cross References. — As to tax incentives for major computer manufacturing facilities, see Article 3G of Chapter 105, G.S. 105-129.60 through G.S. 105-129.66.

Article Repealed Effective for Business Activities Occurring On or After January 1, 2007. — This Article is repealed effective for business activities that occur on or after January 1, 2007. See G.S. 105-129.2A(a), (a1), (a2) and (a3).

Editor's Note. — Session Laws 2002-146, s. 9, provides: "It is the intent of the General Assembly that the provisions of this act not be expanded. If a court of competent jurisdiction holds any provision of this act invalid, the section containing that provision is repealed.

Article 3A has a delayed repeal date. See notes.

The repeal of a section of this act under this section does not affect other provisions of this act that may be given affect without the invalid provision."

Session Laws 2002-172, ss. 1.2, 1.3(b), which amended this section, was effective for taxable years beginning on or after January 1, 2003, and was reenacted by Session Laws 2003-416, s. 2, effective August 14, 2003.

Session Laws 2003-349, which added subdivision (a)(7), s. 8.2, provides: "The General Assembly finds that the amendment to G.S. 105-129.4 made by this Part clarifies the intent of the existing law and does not represent a change in the law. Accordingly, G.S. 105-129.4(a)(7)a. applies to taxable years beginning on or after January 1, 2001, and G.S. 105-129.4(a)(7)b. applies to taxable years beginning on or after January 1, 1996."

Session Laws 2003-435, 2nd Ex. Sess., s. 3.8, provides: "It is the intent of the General Assembly that the provisions of this part [Part 3 of Session Laws 2003-435, 2nd Ex. Sess.] not be expanded. If a court of competent jurisdiction holds any provision of this part invalid, the section containing that provision is repealed. The repeal of a section of this part under this section does not affect other provisions of this part that may be given affect without the invalid provision."

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-491, s. 47 provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2005-241, s. 2, effective July 29, 2005, inserted the present fourth sentence of subsection (d).

Session Laws 2006-66, s. 24.14(a), effective for taxable years beginning on or after January 1, 1996, added the last sentence in the first paragraph of subsection (b).

Session Laws 2007-491, s. 44(1)a, effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" near the beginning of the second paragraph of subsection (d). For applicability, see Editor's note.

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

§ 105-129.5. (See note for repeal) Tax election; cap; carryforwards; limitations.

(a) Tax Election. — The credits provided in this Article are allowed against the franchise tax levied in Article 3 of this Chapter, the income taxes levied in Article 4 of this Chapter, and the gross premiums tax levied in Article 8B of this Chapter. The taxpayer may divide the technology commercialization credit allowed in G.S. 105-129.9A between the taxes against which it is allowed. The taxpayer shall elect the percentage of the credit that will be taken against each tax when filing the return on which the credit is first taken. This election is binding. The percentage of the credit elected to be taken against each tax may be carried forward only against the same tax.

The taxpayer must take any other credit allowed in this Article against only one of the taxes against which it is allowed. The taxpayer shall elect the tax against which a credit will be claimed when filing the return on which the first installment of the credit is claimed. This election is binding. Any carryforwards of the credit must be claimed against the same tax.

Article 3A has a delayed repeal date. See notes.

(b) Cap. — The credits allowed under this Article may not exceed fifty percent (50%) of the tax against which they are claimed for the taxable year, reduced by the sum of all other credits allowed against that tax, except tax payments made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of credit, including carryforwards, claimed by the taxpayer under this Article against each tax for the taxable year.

(c) Carryforward. — Any unused portion of a credit with respect to a large investment, with respect to the technology commercialization credit allowed in G.S. 105-129.9A, or with respect to substantial investment in other property under G.S. 105-129.12A may be carried forward for the succeeding 20 years. Any unused portion of a credit with respect to research and development activities under G.S. 105-129.10 may be carried forward for the succeeding 15 years. Any unused portion of a credit may be carried forward for the succeeding 10 years if, before the taxpayer claims the credit, the Secretary of Commerce makes a written determination that the taxpayer is expected to purchase or lease, and place in service in connection with the eligible business within a two-year period, at least fifty million dollars ($50,000,000) worth of one or more of the following: real property, machinery and equipment, or central office or aircraft facility property. In the case of an interstate air courier that has or is constructing a hub in this State and in the case of an eligible major industry, this investment may be placed in service in connection with the eligible business within a seven-year period. If the taxpayer fails to make the required level of investment within the applicable period, the taxpayer forfeits this enhanced carryforward period. Any unused portion of any other credit may be carried forward for the succeeding five years.

(d) Statute of Limitations. — Notwithstanding Article 9 of this Chapter, a taxpayer must claim a credit under this Article within six months after the date set by statute for the filing of the return, including any extensions of that date. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, s. 1; 1998-55, s. 1; 1999-305, s. 4; 1999-360, ss. 1, 2; 2000-56, s. 2; 2001-476, s. 7(b); 2002-146, s. 5; 2003-435, 2nd Ex. Sess., s. 3.5.)

Article Repealed Effective for Business Activities Occurring On or After January 1, 2007. — This Article is repealed effective for business activities that occur on or after January 1, 2007. See G.S. 105-129.2A(a), (a1), (a2) and (a3).

Editor's Note. — Session Laws 2001-476, s. 7(a), effective November 29, 2001, provides: "The General Assembly finds that the purpose of Article 3A of Chapter 105 of the General Statutes is to encourage the creation of new quality jobs and to encourage new investment in machinery and equipment, research and development, and real property. The General Assembly further finds that allowing taxpayers to file amended returns and retroactively claim credits under that Article does not further this purpose of encouraging job creation and new investment."

Session Laws 2002-146, s. 9, provides: "It is the intent of the General Assembly that the provisions of this act not be expanded. If a court of competent jurisdiction holds any provision of this act invalid, the section containing that provision is repealed. The repeal of a section of this act under this section does not affect other provisions of this act that may be given affect without the invalid provision."

Session Laws 2003-435, 2nd Ex. Sess., s. 3.8, provides: "It is the intent of the General Assembly that the provisions of this part [Part 3 of Session Laws 2003-435, 2nd Ex. Sess.] not be expanded. If a court of competent jurisdiction holds any provision of this part invalid, the section containing that provision is repealed. The repeal of a section of this part under this section does not affect other provisions of this part that may be given affect without the invalid provision."

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

§ 105-129.6. (See note for repeal) Fees and reports.

(a) Repealed by Session Laws 2001-476, s. 8(a), effective November 29, 2001.

(a1) Fee. — When filing a return for a taxable year in which the taxpayer engaged in activity for which the taxpayer is eligible for a credit under this Article, the taxpayer must pay the Department of Revenue a fee of five hundred dollars ($500.00) for each credit the taxpayer claims or intends to claim with respect to a location that is in an enterprise tier three, four, or five area, subject to a maximum fee of one thousand five hundred dollars ($1,500) per taxpayer per taxable year. This fee does not apply to any credit the taxpayer claims or intends to claim with respect to a location that is in a development zone or agrarian growth zone. If the taxpayer claims or intends to claim a credit that relates to locations in more than one enterprise tier area, the fee is based on the highest-numbered enterprise tier area.

The fee is due at the time the return is due for the taxable year in which the taxpayer engaged in the activity for which the taxpayer is eligible for a credit. No credit is allowed under this Article for a taxable year until all outstanding fees have been paid.

The Secretary of Revenue shall retain three-fourths of the proceeds of the fee imposed in this section for the costs of administering and auditing the credits allowed in this Article. The Secretary of Revenue shall credit the remaining proceeds of the fee imposed in this section to the Department of Commerce for the costs of administering this Article. The proceeds of the fee are receipts of the Department to which they are credited.

(b) Reports. — The Department of Revenue shall publish by May 1 of each year the following information itemized by credit and by taxpayer for the 12-month period ending the preceding December 31:

(1) The number of credits taken for each credit allowed in this Article.
(2) The number and enterprise tier area of new jobs with respect to which credits were generated and to which credits were taken.
(3) The cost and enterprise tier area of machinery and equipment with respect to which credits were generated and to which credits were taken.
(4) The number of new jobs created by businesses located in development zones, and the percentage of jobs at those locations that were filled by residents of the zones.
(5) The amount and enterprise tier area of worker training expenditures with respect to which credits were generated and to which credits were taken.
(6) The amount and enterprise tier area of new research and development expenditures with respect to which credits were generated and to which credits were taken.
(7) The cost and enterprise tier area of real property investment with respect to which credits were generated and to which credits were taken. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, s. 1; 1998-55, s. 1; 1999-360, ss. 1, 2; 2000-56, s. 1(a); 2001-476, s. 8(a); 2001-487, s. 123; 2004-170, s. 12; 2004-203, s. 40; 2005-429, s. 2.2; 2006-66, s. 24.16(c).)

Article Repealed Effective for Business Activities Occurring On or After January 1, 2007. — This Article is repealed effective for business activities that occur on or after January 1, 2007. See G.S. 105-129.2A(a), (a1), (a2) and (a3).

Editor's Note. — Session Laws 2005-429, s. 3, provides: "The Economic Development Oversight Committee shall study the issue of public disclosure as it relates to economic development efforts. Specifically, the Committee shall study ways of providing the public information about the employment levels, and any changes in employment levels, of businesses that receive economic development incentives from the State or local governments. The Committee

Article 3A has a delayed repeal date. See notes.

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may make an interim report on this study, including any recommendations for legislative proposals, to the 2006 Regular Session of the 2005 General Assembly and shall make a final report on this study to the 2007 General Assembly."

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2005-429, s. 2.2, effective January 1, 2007, substituted "May" for "April" in subsection (b), substituted "credits taken" for "claims" in subdivision (b)(1); and substituted "taken" for "claimed" throughout subsection (b).

Session Laws 2006-66, s. 24.16(c), effective for taxable years beginning on or after January 1, 2006, and applicable to business activities occurring on or after that date, substituted "or agrarian growth zone" for "as defined in G.S. 105-129.3A" at the end of the second sentence in subsection (a1).

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

§ 105-129.7. (See note for repeal) Substantiation.

(a) To claim a credit allowed by this Article, the taxpayer must provide any information required by the Secretary of Revenue. Every taxpayer claiming a credit under this Article shall maintain and make available for inspection by the Secretary of Revenue any records the Secretary considers necessary to determine and verify the amount of the credit to which the taxpayer is entitled. The burden of proving eligibility for the credit and the amount of the credit shall rest upon the taxpayer, and no credit shall be allowed to a taxpayer that fails to maintain adequate records or to make them available for inspection.

(b) Each taxpayer must provide with the tax return qualifying information for each credit claimed under this Article for the first taxable year the credit is claimed and for every year in which a subsequent installment or a carryforward of that credit is claimed. The qualifying information must be in the form prescribed by the Secretary, must cover each taxable year beginning with the first taxable year the credit is claimed, and must be signed and affirmed by the individual who signs the taxpayer's tax return. The information required by this subsection is information demonstrating that the taxpayer has met the conditions for qualifying for an initial credit and any installments and carryforwards, and includes the following:

(1) The physical location of the jobs and investment with respect to which the credit is claimed, including the enterprise tier designation of the location and whether it is in a development zone or agrarian growth zone. In addition, for each individual who fills a job at a location with respect to which a credit is claimed, the place where the individual resided before taking the job, including any enterprise tier designation of that place. In addition, for jobs that are located in a development zone, the number of those jobs that are filled by residents of the development zone.

(2) The type of business with respect to which the credit is claimed, as required by G.S. 105-129.4(a), and wage information described in G.S. 105-129.4(b).

(3) If the credit is claimed with respect to a large investment under G.S. 105-129.4(b1), is a credit with a carryforward period of 10 years under G.S. 105-129.5(c), or is a credit claimed under G.S. 105-129.12A, the amount of the investment requirement under those subsections that has been met to date.

(4) Qualifying information required for the credit for creating jobs allowed under G.S. 105-129.8, the credit for investing in machinery and equipment allowed under G.S. 105-129.9, the credit for worker train-

ing allowed under G.S. 105-129.11, the credit for investing in central office or aircraft facility property allowed in G.S. 105-129.12, the credit for substantial investment in other property under G.S. 105-129.12A, and any other credits allowed under this Article. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, s. 1; 1999-360, ss. 1, 2; 2000-56, s. 5(d); 2001-476, s. 9(a); 2006-66, s. 24.16(d).)

Article Repealed Effective for Business Activities Occurring On or After January 1, 2007. — This Article is repealed effective for business activities that occur on or after January 1, 2007. See G.S. 105-129.2A(a), (a1), (a2) and (a3).

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 24.16(d), effective for taxable years beginning on or after January 1, 2006, and applicable to business activities occurring on or after that date, inserted "zone or agrarian growth" at the end of the first sentence of subdivision (b)(1).

§ 105-129.8. (See note for repeal) Credit for creating jobs.

(a) Credit. — A taxpayer that meets the eligibility requirements set out in G.S. 105-129.4, has five or more full-time employees, and hires an additional full-time employee during the taxable year to fill a new position located in this State is allowed a credit for creating a new full-time job. The amount of the credit for each new full-time job created is set out in the table below and is based on the enterprise tier of the area in which the position is located. In addition, if the position is located in a development zone or agrarian growth zone, the amount of the credit is increased by four thousand dollars ($4,000) per job.

Area Enterprise Tier	*Amount of Credit*
Tier One	$12,500
Tier Two	4,000
Tier Three	3,000
Tier Four	1,000
Tier Five	500

(a1) Positions. — A position is located in an area if more than fifty percent (50%) of the employee's duties are performed in the area. The number of new positions a taxpayer fills during the taxable year is determined by subtracting the highest number of full-time employees the taxpayer had in this State at any time during the 12-month period preceding the beginning of the taxable year from the number of full-time employees the taxpayer has in this State at the end of the taxable year.

(a2) Installments. — The credit may not be taken in the taxable year in which the additional employee is hired. Instead, the credit must be taken in equal installments over the four years following the taxable year in which the additional employee was hired and is conditioned on the taxpayer's continued employment in this State of the number of full-time employees the taxpayer had upon hiring the employee that caused the taxpayer to qualify for the credit.

If, in one of the four years in which the installment of a credit accrues, the number of the taxpayer's full-time employees in this State falls below the number of full-time employees the taxpayer had in this State in the year in which the taxpayer qualified for the credit, the credit expires and the taxpayer may not take any remaining installment of the credit. The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.5.

(a3) Transferred Jobs. — Jobs transferred from one area in the State to another area in the State are not considered new jobs for purposes of this section. If, in one of the four years in which the installment of a credit accrues, the position filled by the employee is moved to an area in a higher- or lower-numbered enterprise tier, or is moved from a development zone or agrarian growth zone to an area that is not a development zone or agrarian growth zone, the remaining installments of the credit must be calculated as if the position had been created initially in the area to which it was moved.

(b) Repealed by Session Laws 1989, c. 111, s. 1.

(b1), (c) Repealed by Session Laws 1996, Second Extra Session, c. 13, s. 3.3.

(d) Planned Expansion. — A taxpayer that signs a letter of commitment with the Department of Commerce to create at least twenty new full-time jobs in a specific area within two years of the date the letter is signed qualifies for the credit in the amount allowed by this section based on the area's enterprise tier and development zone or agrarian growth zone designation for that year even though the employees are not hired that year. In the case of an interstate air courier that has or is constructing a hub in this State and in the case of an eligible major industry, the applicable time period is seven years. The credit shall be available in the taxable year after at least twenty employees have been hired if the hirings are within the applicable commitment period. The conditions outlined in subsection (a) apply to a credit taken under this subsection except that if the area is redesignated to a higher-numbered enterprise tier or loses its development zone or agrarian growth zone designation after the year the letter of commitment was signed, the credit is allowed based on the area's enterprise tier and development zone or agrarian growth zone designation for the year the letter was signed. If the taxpayer does not hire the employees within the applicable period, the taxpayer does not qualify for the credit. However, if the taxpayer qualifies for a credit under subsection (a) in the year any new employees are hired, the taxpayer may take the credit under that subsection.

(e), (f) Repealed by Session Laws 1996, Second Extra Session, c. 13, s. 3.3. (1987, c. 568, ss. 1, 2; 1989, c. 111, ss. 1, 2; c. 751, ss. 7(6), 7(7), 8(10), 8(11); c. 753, s. 4.1(a)-(d); 1989 (Reg. Sess., 1990), c. 814, s. 14; 1991, c. 517, ss. 1-3; 1991 (Reg. Sess., 1992), c. 959, ss. 20, 21; 1993, c. 45, ss. 1, 2; c. 485, ss. 7, 11; 1995, c. 370, ss. 5, 6; 1996, 2nd Ex. Sess., c. 13, ss. 3.2-3.4; 1997-277, s. 1; 1998-55, s. 1; 1999-360, s. 1; 2000-56, s. 8(a); 2000-140, s. 92.A(b); 2001-414, s. 8; 2002-146, s. 6; 2003-435, 2nd Ex. Sess., s. 3.6; 2004-170, s. 43(a); 2005-435, s. 28; 2006-66, s. 24.16(e).)

Article Repealed Effective for Business Activities Occurring On or After January 1, 2007. — This Article is repealed effective for business activities that occur on or after January 1, 2007. See G.S. 105-129.2A(a), (a1), (a2) and (a3).

Editor's Note. — Session Laws 2002-146, s. 9, provides: "It is the intent of the General Assembly that the provisions of this act not be expanded. If a court of competent jurisdiction holds any provision of this act invalid, the section containing that provision is repealed. The repeal of a section of this act under this section does not affect other provisions of this act that may be given affect without the invalid provision."

Session Laws 2003-435, 2nd Ex. Sess., s. 3.8, provides: "It is the intent of the General Assembly that the provisions of this part [Part 3 of Session Laws 2003-435, 2nd Ex. Sess.] not be expanded. If a court of competent jurisdiction holds any provision of this part invalid, the section containing that provision is repealed. The repeal of a section of this part under this section does not affect other provisions of this part that may be given affect without the invalid provision."

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws

2005-435, s. 28, effective September 27, 2005, in subsection (a2), inserted "taxpayer's" preceding "continued employment" and substituted "in this State" for "by the taxpayer" thereafter, in the last sentence; in the second paragraph inserted "in this State" preceding "falls below the number of full-time employees the taxpayer had" and inserted "in this State" thereafter in the first sentence.

Session Laws 2006-66, s. 24.16(e), effective for taxable years beginning on or after January 1, 2006, and applicable to business activities occurring on or after that date, inserted "or agrarian growth zone" following "development zone" throughout subsections (a), (a3) and (d).

§ 105-129.9. (See note for repeal) Credit for investing in machinery and equipment.

(a) General Credit. — If a taxpayer that has purchased or leased eligible machinery and equipment places them in service in this State during the taxable year, the taxpayer is allowed a credit equal to the applicable percentage of the excess of the eligible investment amount over the applicable threshold. Machinery and equipment are eligible if they are capitalized by the taxpayer for tax purposes under the Code and not leased to another party. In addition, in the case of a large investment, machinery and equipment that are not capitalized by the taxpayer are eligible if the taxpayer leases them from another party. The credit may not be taken for the taxable year in which the machinery and equipment are placed in service but shall be taken in equal installments over the seven years following the taxable year in which they are placed in service. The applicable percentage is as follows:

Area Enterprise Tier	*Applicable Percentage*
Tier One	7%
Tier Two	7%
Tier Three	6%
Tier Four	5%
Tier Five	4%

(a1) Technology Commercialization Credit. — If a taxpayer is eligible for the credit allowed in this section with respect to eligible machinery and equipment and qualifies for one of the credits allowed in G.S. 105-129.9A with respect to the same machinery and equipment, the taxpayer may choose to take one of those credits instead of the credit allowed in this section. A taxpayer may take the credit allowed in this section or one of the credits allowed in G.S. 105-129.9A during a taxable year with respect to eligible machinery and equipment, but may not take more than one of these credits with respect to the same machinery and equipment.

(b) Eligible Investment Amount. — The eligible investment amount is the lesser of (i) the cost of the eligible machinery and equipment and (ii) the amount by which the cost of all of the taxpayer's eligible machinery and equipment that are in service in this State on the last day of the taxable year exceeds the cost of all of the taxpayer's eligible machinery and equipment that were in service in this State on the last day of the base year. The base year is that year, of the three immediately preceding taxable years, in which the taxpayer had the most eligible machinery and equipment in service in this State.

(c) Threshold. — The applicable threshold is the appropriate amount set out in the following table based on the enterprise tier where the eligible machinery and equipment are placed in service during the taxable year. If the taxpayer places eligible machinery and equipment in service at more than one establishment in an enterprise tier during the taxable year, the threshold applies

Article 3A has a delayed repeal date. See notes.

separately to the eligible machinery and equipment placed in service at each establishment. If the taxpayer places eligible machinery and equipment in service at an establishment over the course of a two-year period, the applicable threshold for the second taxable year is reduced by the eligible investment amount for the previous taxable year.

Area Enterprise Tier	*Threshold*
Tier One	$ -0-
Tier Two	100,000
Tier Three	200,000
Tier Four	1,000,000
Tier Five	2,000,000

(d) Expiration. — As used in this subsection, the term "disposed of" means disposed of, taken out of service, or moved out of State.

If, in one of the seven years in which the installment of a credit accrues, the machinery and equipment with respect to which the credit was claimed are disposed of, the credit expires and the taxpayer may not take any remaining installment of the credit for that machinery and equipment unless the cost of that machinery and equipment is offset in the same taxable year by the taxpayer's new investment in eligible machinery and equipment placed in service in the same enterprise tier, as provided in this subsection. If, during the taxable year the taxpayer disposed of the machinery and equipment for which installments remain, there has been a net reduction in the cost of all the taxpayer's eligible machinery and equipment that are in service in the same enterprise tier as the machinery and equipment that were disposed of, and the amount of this reduction is greater than twenty percent (20%) of the cost of the machinery and equipment that were disposed of, then the taxpayer forfeits the remaining installments of the credit for the machinery and equipment that were disposed of. If the amount of the net reduction is equal to twenty percent (20%) or less of the cost of the machinery and equipment that were disposed of, or if there is no net reduction, then the taxpayer does not forfeit the remaining installments of the expired credit. In determining the amount of any net reduction during the taxable year, the cost of machinery and equipment the taxpayer placed in service during the taxable year and for which the taxpayer claims a credit under Article 3B of this Chapter may not be included in the cost of all the taxpayer's eligible machinery and equipment that are in service. If in a single taxable year machinery and equipment with respect to two or more credits in the same tier are disposed of, the net reduction in the cost of all the taxpayer's eligible machinery and equipment that are in service in the same tier is compared to the total cost of all the machinery and equipment for which credits expired in order to determine whether the remaining installments of the credits are forfeited.

The expiration of a credit does not prevent the taxpayer from taking the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.5.

If, in one of the seven years in which the installment of a credit accrues, the machinery and equipment with respect to which the credit was claimed are moved to an area in a higher-numbered enterprise tier, or are moved from a development zone or agrarian growth zone to an area that is not a development zone or agrarian growth zone, the remaining installments of the credit are allowed only to the extent they would have been allowed if the machinery and equipment had been placed in service initially in the area to which they were moved.

(e) Planned Expansion. — A taxpayer that signs a letter of commitment with the Department of Commerce to place specific eligible machinery and

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equipment in service in an area within two years after the date the letter is signed may, in the year the eligible machinery and equipment are placed in service in that area, calculate the credit for which the taxpayer qualifies based on the area's enterprise tier and development zone or agrarian growth zone designation for the year the letter was signed. In the case of an interstate air courier that has or is constructing a hub in this State and in the case of an eligible major industry, the applicable time period is seven years. All other conditions apply to the credit, but if the area has been redesignated to a higher-numbered enterprise tier or has lost its development zone or agrarian growth zone designation after the year the letter of commitment was signed, the credit is allowed based on the area's enterprise tier and development zone or agrarian growth zone designation for the year the letter was signed. If the taxpayer does not place part or all of the specified eligible machinery and equipment in service within the applicable period, the taxpayer does not qualify for the benefit of this subsection with respect to the machinery and equipment not placed in service within the applicable period. However, if the taxpayer qualifies for a credit in the year the eligible machinery and equipment are placed in service, the taxpayer may take the credit for that year as if no letter of commitment had been signed pursuant to this subsection. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, s. 1; 1998-55, s. 1; 1999-305, s. 1; 1999-360, ss. 1, 2; 2000-56, s. 8(b); 2000-140, s. 92.A(b); 2000-173, s. 1(a); 2001-476, s. 10(a); 2002-146, s. 7; 2002-172, s. 1.1; 2003-416, s. 2; 2003-435, 2nd Ex. Sess., s. 3.7; 2004-170, s. 13; 2006-66, s. 24.16(f).)

Article Repealed Effective for Business Activities Occurring On or After January 1, 2007. — This Article is repealed effective for business activities that occur on or after January 1, 2007. See G.S. 105-129.2A(a), (a1), (a2) and (a3).

Editor's Note. — Session Laws 2002-146, s. 9, provides: "It is the intent of the General Assembly that the provisions of this act not be expanded. If a court of competent jurisdiction holds any provision of this act invalid, the section containing that provision is repealed. The repeal of a section of this act under this section does not affect other provisions of this act that may be given affect without the invalid provision."

Session Laws 2002-172, s. 1.6, provides: "In addition to heightening the incentive effect of the William S. Lee Quality Jobs and Business Expansion Act in lower-tiered counties, the changes in Section 1.1 of this act [which amended G.S. 105-129.9(a) and (c)] are intended to reduce the cost of the Act and make more revenues available to the State of North Carolina in future years. It is the intent of the General Assembly in making these changes to provide a source of funds that could be used in future years to support other, more targeted economic development programs aimed at helping create new jobs in North Carolina."

Session Laws 2003-435, 2nd Ex. Sess., s. 3.8, provides: "It is the intent of the General Assembly that the provisions of this part [Part 3 of Session Laws 2003-435, 2nd Ex. Sess.] not be expanded. If a court of competent jurisdiction holds any provision of this part invalid, the section containing that provision is repealed. The repeal of a section of this part under this section does not affect other provisions of this part that may be given affect without the invalid provision."

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 24.16(f), effective for taxable years beginning on or after January 1, 2006, and applicable to business activities occurring on or after that date, inserted "or agrarian growth zone" following "development zone" in the third paragraph of subsection (d) and throughout subsection (e).

§ 105-129.9A. (See note for repeal) Technology commercialization credit.

(a) Credit. — If a taxpayer that has purchased or leased eligible machinery and equipment places it in service in this State during the taxable year, the taxpayer may qualify for a credit as provided in this section. If the taxpayer is also eligible for the credit allowed under G.S. 105-129.9 with respect to the eligible machinery and equipment, the taxpayer may choose instead of the credit allowed under G.S. 105-129.9 with respect to the machinery and equipment to take one of the credits under this section for which the taxpayer qualifies. The twenty percent (20%) credit is a credit equal to twenty percent (20%) of the excess of the eligible investment amount over the applicable threshold for the taxable year. The fifteen percent (15%) credit is a credit equal to fifteen percent (15%) of the excess of the eligible investment amount over the applicable threshold for the taxable year.

Except as provided in this section, the provisions of G.S. 105-129.9 apply to the credits allowed under this section. As used in this section, the term "research university" means an institution of higher education classified as a Research I university or a Research II university in the most recent edition of "A Classification of Institutions of Higher Education," the official report of The Carnegie Foundation for the Advancement of Teaching.

A credit allowed under this section must be taken for the taxable year in which the machinery and equipment are placed in service. A taxpayer may take the twenty percent (20%) credit allowed under this section, the fifteen percent (15%) credit allowed under this section, or the credit allowed in G.S. 105-129.9 during a taxable year with respect to eligible machinery and equipment, but may not take more than one of these credits with respect to the same machinery and equipment.

(b) Eligible Investment Amount. — In calculating the eligible investment amount under this section, for the purpose of determining the taxpayer's machinery and equipment in service in this State during the taxable year and the three immediately preceding taxable years, the following exceptions apply:

(1) Machinery and equipment that were transferred to another taxpayer during the three-year period are considered the taxpayer's machinery and equipment if they are still in service in this State during the taxable year, and the taxpayer to whom they were transferred is ineligible under G.S. 105-129.4(e) to claim a new credit for the investment under this Article.

(2) Machinery and equipment that were taken out of service during the three-year period are considered the taxpayer's machinery and equipment in service if all of the following conditions are met:

  a. The machinery and equipment were taken out of service by the taxpayer or by the person to whom the taxpayer transferred them.

  b. The machinery and equipment were taken out of service at a location separate from any location with respect to which the taxpayer claims a credit under this section.

  c. The machinery and equipment were used in a business that was not and is not competitive with any business with respect to which the taxpayer claimed a credit under this section. For the purpose of this subdivision, two businesses are not competitive if both of the following conditions are met:

    1. Their products and services lack reasonable interchangeability of use by the customer, based on use but without regard to quality, price, condition, or availability.

    2. Their products and services lack reasonable interchangeability of production in that the businesses could not readily

switch production capabilities from one product or service to the other.

(c) Documentation. — If the taxpayer claims the exception provided in subdivision (b)(2) of this section, the taxpayer must first request a ruling by the Department of Revenue as to whether the taxpayer meets all of the conditions of subdivision (b)(2) of this section.

(d) Twenty Percent Credit. — A taxpayer qualifies for a twenty percent (20%) credit under this section if it meets all of the following conditions:

(1) The eligible machinery and equipment are directly related to production based on technology developed by and licensed from a research university or are used to produce resources essential to the taxpayer's production based on technology developed by and licensed from a research university.

(2) The eligible machinery and equipment are placed in service in a tier one, two, or three enterprise area.

(3) The eligible investment amount is at least ten million dollars ($10,000,000) for the taxable year.

(4) The Secretary of Commerce has made a written determination that the taxpayer is expected to invest at least one hundred fifty million dollars ($150,000,000) in eligible machinery and equipment in a tier one, two, or three enterprise area by the end of the fourth year after the year in which the taxpayer first places eligible machinery and equipment in service in the enterprise area.

(5) No more than nine years have passed since the first taxable year the taxpayer claimed a credit under this section with respect to the same location.

(e) Fifteen Percent Credit. — A taxpayer qualifies for a fifteen percent (15%) credit under this section if it meets all of the following conditions:

(1) The eligible machinery and equipment are directly related to production based on technology developed by and licensed from a research university, or are used to produce resources essential to the taxpayer's production based on technology developed by and licensed from a research university.

(2) The eligible machinery and equipment are placed in service in a tier one, two, or three enterprise area.

(3) The eligible investment amount is at least ten million dollars ($10,000,000) for the taxable year.

(4) The Secretary of Commerce has made a written determination that the taxpayer is expected to invest at least one hundred million dollars ($100,000,000) in eligible machinery and equipment in a tier one, two, or three enterprise area by the end of the fourth year after the year in which the taxpayer first places eligible machinery and equipment in service in the enterprise area.

(5) No more than nine years have passed since the first taxable year the taxpayer claimed a credit under this section with respect to the same location. (1999-305, s. 2; 2001-476, s. 11(a).)

Article Repealed Effective for Business Activities Occurring On or After January 1, 2007. — This Article is repealed effective for business activities that occur on or after January 1, 2007. See G.S. 105-129.2A(a), (a1), (a2) and (a3).

§ 105-129.10. (Repealed effective for taxable years beginning on or after January 1, 2006) Credit for research and development.

(a) General Credit. — A taxpayer that claims for the taxable year a federal income tax credit under section 41(a) of the Code for increasing research activities is allowed a credit equal to five percent (5%) of the State's apportioned share of the taxpayer's expenditures for increasing research activities. The State's apportioned share of a taxpayer's expenditures for increasing research activities is the excess of the taxpayer's qualified research expenses for the taxable year over the base amount, as determined under section 41 of the Code, multiplied by a percentage equal to the ratio of the taxpayer's qualified research expenses in this State for the taxable year to the taxpayer's total qualified research expenses for the taxable year.

(b) Alternative Credit. — A taxpayer that claims the alternative incremental credit under section 41(c)(4) of the Code for increasing research activities is allowed a credit equal to twenty-five percent (25%) of the State's apportioned share of the federal credit claimed. The State's apportioned share of the federal credit claimed is the amount of the alternative incremental credit the taxpayer claimed under section 41(c)(4) of the Code for the taxable year multiplied by a percentage equal to the ratio of the taxpayer's qualified research expenses in this State for the taxable year to the taxpayer's total qualified research expenses for the taxable year. For the purpose of this subsection, the amount of the alternative incremental credit claimed by a taxpayer is determined without regard to any reduction elected under section 280C(c) of the Code.

(c) Definitions. — As used in this section, the terms "qualified research expenses" and "base amount" have the meaning provided in section 41 of the Code. Notwithstanding G.S. 105-228.90(b), as used in this section, the term "Code" means the Internal Revenue Code as enacted as of January 1, 1999.

(d) The credits allowed in this section and the credit allowed in Article 3F of this Chapter are exclusive. A taxpayer may elect to take only one of the three credits with respect to its research activities in a taxable year. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, § 1; 1998-55, s. 1; 1999-360, ss. 1, 2; 2000-173, s. 1(a); 2004-124, s. 32D.1.)

Article Repealed Effective for Business Activities Occurring On or After January 1, 2007. — This Article is repealed effective for business activities that occur on or after January 1, 2007. See G.S. 105-129.2A(a), (a1), (a2) and (a3).

§ 105-129.11. (See note for repeal) Credit for worker training.

(a) Credit. — A taxpayer that provides worker training for five or more of its eligible employees during the taxable year is allowed a credit equal to the wages paid to the eligible employees during the training. Wages paid to an employee performing his or her job while being trained are not eligible for the credit. For positions located in an enterprise tier one area, the credit may not exceed one thousand dollars ($1,000) per employee trained during the taxable year. For other positions, the credit may not exceed five hundred dollars ($500.00) per employee trained during the taxable year. A position is located in an area if more than fifty percent (50%) of the employee's duties are performed in the area.

(b) Eligibility. — An employee is eligible if the employee is in a full-time position not classified as exempt under the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1) and meets one or more of the following conditions:

Article 3A has a delayed repeal date. See notes.

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(1) The employee occupies a job for which the taxpayer is eligible to claim an installment of the credit for creating jobs.

(2) The employee is being trained to operate machinery and equipment for which the taxpayer is eligible to claim an installment of the credit for investing in machinery and equipment. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, s. 1; 1998-55, s. 1; 1999-360, s. 1; 2000-173, s. 1(a).)

Article Repealed Effective for Business Activities Occurring On or After January 1, 2007. — This Article is repealed effective for business activities that occur on or after January 1, 2007. See G.S. 105-129.2A(a), (a1), (a2) and (a3).

Editor's note. — Session Laws 1996, Second Extra Session, c. 13, s. 10.2(3), made this section effective for taxable years beginning on or after January 1, 1997, and applicable to training expenditures made on or after July 1, 1997.

Session Laws 1996, Second Extra Session, c. 13, s. 1, provides that this act shall be known as the William S. Lee Quality Jobs and Business Expansion Act.

§ 105-129.12. (See note for repeal) Credit for investing in central office or aircraft facility property.

(a) Credit. — If a taxpayer that has purchased or leased real property in this State begins to use the property as a central office or aircraft facility during the taxable year, the taxpayer is allowed a credit equal to seven percent (7%) of the eligible investment amount. The eligible investment amount is the lesser of (i) the cost of the property and (ii) the amount by which the cost of all of the property the taxpayer is using in this State as central office or aircraft facilities on the last day of the taxable year exceeds the cost of all of the property the taxpayer was using in this State as central office or aircraft facilities on the last day of the base year. The base year is that year, of the three immediately preceding taxable years, in which the taxpayer was using the most property in this State as central office or aircraft facilities. In the case of property that is leased, the cost of the property is not determined as provided in G.S. 105-129.2 but is considered to be the taxpayer's lease payments over a seven-year period, plus any expenditures made by the taxpayer to improve the property before it is used as the taxpayer's central office or aircraft facility if the expenditures are not reimbursed or credited by the lessor. The maximum credit allowed a taxpayer under this section for property used as a central office or aircraft facility is five hundred thousand dollars ($500,000). The entire credit may not be taken for the taxable year in which the property is first used as a central office or aircraft facility but shall be taken in equal installments over the seven years following the taxable year in which the property is first used as a central office or aircraft facility. The basis in any real property for which a credit is allowed under this section shall be reduced by the amount of credit allowable.

(b) Mixed Use Property. — If the taxpayer uses only part of the property as the taxpayer's central office or aircraft facility, the amount of the credit allowed under this section is reduced by multiplying it by a fraction the numerator of which is the square footage of the property used as the taxpayer's central office or aircraft facility and the denominator of which is the total square footage of the property.

(c) Expiration. — If, in one of the seven years in which the installment of a credit accrues, the property with respect to which the credit was claimed is no longer used as a central office or aircraft facility, the credit expires and the taxpayer may not take any remaining installment of the credit. If, in one of the seven years in which the installment of a credit accrues, part of the property with respect to which the credit was claimed is no longer used as a central office or aircraft facility, the remaining installments of the credit shall be reduced by multiplying it by the fraction described in subsection (b) of this section.

In each of these cases, the taxpayer may nonetheless take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.5. (1997-277, s. 1; 1998-55, s. 1; 1999-360, s. 1; 2000-56, s. 5(e); 2001-476, s. 12(a).)

Article Repealed Effective for Business Activities Occurring On or After January 1, 2007. — This Article is repealed effective for business activities that occur on or after January 1, 2007. See G.S. 105-129.2A(a), (a1), (a2) and (a3).

§ 105-129.12A. (See note for repeal) Credit for substantial investment in other property.

(a) Credit. — If a taxpayer that has purchased or leased real property in an enterprise tier one or two area begins to use the property in an eligible business during the taxable year, the taxpayer is allowed a credit equal to thirty percent (30%) of the eligible investment amount if all of the eligibility requirements of G.S. 105-129.4 are met. For the purposes of this section, property is located in an enterprise tier one or two area if the area the property is located in was an enterprise tier one or two area at the time the taxpayer applied for the determination required under G.S. 105-129.4(b5). The eligible investment amount is the lesser of (i) the cost of the property and (ii) the amount by which the cost of all of the real property the taxpayer is using in this State in an eligible business on the last day of the taxable year exceeds the cost of all of the real property the taxpayer was using in this State in an eligible business on the last day of the base year. The base year is that year, of the three immediately preceding taxable years, in which the taxpayer was using the most real property in this State in an eligible business. In the case of property that is leased, the cost of the property is not determined as provided in G.S. 105-129.2 but is considered to be the taxpayer's lease payments over a seven-year period, plus any expenditures made by the taxpayer to improve the property before it is used by the taxpayer if the expenditures are not reimbursed or credited by the lessor. The entire credit may not be taken for the taxable year in which the property is first used in an eligible business but shall be taken in equal installments over the seven years following the taxable year in which the property is first used in an eligible business. When part of the property is first used in an eligible business in one year and part is first used in an eligible business in a later year, separate credits may be claimed for the amount of property first used in an eligible business in each year. The basis in any real property for which a credit is allowed under this section shall be reduced by the amount of credit allowable.

(b) Mixed Use Property. — If the taxpayer uses only part of the property in an eligible business, the amount of the credit allowed under this section is reduced by multiplying it by a fraction, the numerator of which is the square footage of the property used in an eligible business and the denominator of which is the total square footage of the property.

(c) Expiration. — If, in one of the seven years in which the installment of a credit accrues, the property with respect to which the credit was claimed is no longer used in an eligible business, the credit expires and the taxpayer may not take any remaining installment of the credit. If, in one of the seven years in which the installment of a credit accrues, part of the property with respect to which the credit was claimed is no longer used in an eligible business, the remaining installments of the credit shall be reduced by multiplying it by the fraction described in subsection (b) of this section. If, in one of the years in which the installment of a credit accrues and by which the taxpayer is required to have created 200 new jobs at the property, the total number of employees the taxpayer employs at the property with respect to which the credit is claimed is less than 200, the credit expires and the taxpayer may not take any remaining installment of the credit.

In each of these cases, the taxpayer may nonetheless take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.5.

(d) No Double Credit. — A taxpayer may not claim a credit under this section with respect to real property for which a credit is claimed under G.S. 105-129.12. (2001-476, s. 13(a); 2002-72, s. 13.)

Article Repealed Effective for Business Activities Occurring On or After January 1, 2007. — This Article is repealed effective for business activities that occur on or after January 1, 2007. See G.S. 105-129.2A(a), (a1), (a2) and (a3).

Editor's note. — Session Laws 2001-476, s. 13(b), provided: "This section is effective for taxable years beginning on or after January 1, 2002, and applies to property that is first used in an eligible business on or after that date."

§ 105-129.13. (See note for repeal) Credit for development zone projects.

(a) Credit. — A taxpayer who contributes cash or property to a development zone agency for an improvement project in a development zone is allowed a credit equal to twenty-five percent (25%) of the value of the contribution. A contribution is for an improvement project for the purposes of this section if the agency receiving the contribution contracts in writing to use the contribution for the project and agrees in the contract to repay to the taxpayer, with interest, any part of the contribution not used for the project. The credit may not be taken for the year in which the contribution is made but must be taken for the taxable year beginning during the calendar year in which the application for the credit becomes effective as provided in this section.

(b) Definitions. — The following definitions apply in this section:

(1) Community development corporation. — A nonprofit corporation that meets all of the following conditions:
  a. It is chartered pursuant to Chapter 55A of the General Statutes and is tax-exempt pursuant to section 501(c)(3) of the Code.
  b. Its primary mission is to develop and improve low-income communities and neighborhoods through economic and related development.
  c. Its activities and decisions are initiated, managed, and controlled by the constituents of those local communities.
  d. Its primary function is to act as deal maker and packager of projects and activities that will increase its constituency's opportunities to become owners, managers, and producers of small businesses, to obtain affordable housing, and to obtain jobs designed to produce positive cash flow and curb blight in the targeted community.

(2) Community development purpose. — A purpose for which a city is authorized to expend funds under G.S. 160A-456, 160A-457, and 160A-457.2.

(3) Control. — A person controls an entity if the person owns, directly or indirectly, more than ten percent (10%) of the voting securities of that

entity. As used in this subdivision, the term "voting security" means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive upon its exercise, a security that confers such a right to vote. A general partnership interest is a voting security.

(4) Development zone agency. — Any of the following agencies that the Department of Commerce certifies will undertake an improvement project in a development zone:

a. A community-based development organization qualified under 24 C.F.R. § 570.204 to receive community development block grant funds under the Housing and Community Development Act of 1974, as amended, 42 U.S.C. § 5301, et seq., to carry out a neighborhood revitalization project, a community economic development project, or an energy conservation project.

b. A community action agency that has been officially designated as such pursuant to section 210 of the Economic Opportunity Act of 1964, Public Law 88-452, 78 Stat. 508 and which has not lost its designation as a result of a failure to comply with the provisions of that act.

c. A community development corporation.

d. A community development financial institution certified by the United States Department of the Treasury under the Community Development Banking and Financial Institutions Act of 1994, 12 U.S.C. § 4701, et seq.

e. A community housing development organization qualified under the HOME Investment Partnerships Act, 42 U.S.C. §§ 12701, 12704, and 24 C.F.R. § 92.2.

f. A local housing authority created under Article 1 of Chapter 157 of the General Statutes.

(5) Improvement project. — A project to construct or improve real property for community development purposes or to acquire real property and convert it for community development purposes. Construction or improvement includes services provided by a development zone agency directly related to the construction or improvement, and project development fees charged by a developer for the construction or improvement.

(c) Certification. — Before certifying that a development zone agency will undertake an improvement project in a development zone, the Secretary of Commerce must require the agency to provide sufficient documentation to establish the identity of the agency, the nature of the project, and that the project is for a community development purpose and is located in a development zone. The Secretary of Commerce shall not certify a development zone agency under this section if the agency, any of the agency's officers or directors, or any partner of the agency has ever used any part of a contribution made under this section for any purpose other than an improvement project.

(d) Limitations. — A taxpayer who claims a credit under this subsection must identify in the application the development zone agencies to which the taxpayer made contributions and the amount contributed to each. No credit is allowed for a contribution if the taxpayer has one of the relationships defined in section 267(b) of the Code with the development zone agency or if the taxpayer controls, is controlled by, or is under common control with an affiliate of the development zone agency. No credit is allowed to the extent the taxpayer receives anything of value in exchange for the contribution.

Article 3A has a delayed repeal date. See notes.

(e) Application. — To be eligible for the tax credit provided in this section, the taxpayer must file an application for the credit with the Secretary of Revenue on or before April 15 of the year following the calendar year in which the contribution was made. The Secretary may grant extensions of this deadline, as the Secretary finds appropriate, upon the request of the taxpayer, except that the application may not be filed after September 15 of the year following the calendar year in which the contribution was made. An application is effective for the year in which it is timely filed. The application must be on a form prescribed by the Secretary and must include any supporting documentation that the Secretary may require. If a contribution for which a credit is applied for was of property rather than cash, the taxpayer must include with the application a certified appraisal of the value of the property contributed. There is no fee for an application under this section.

(f) Ceiling. — The total amount of all tax credits allowed to taxpayers under this section for contributions made in a calendar year may not exceed four million dollars ($4,000,000). The Secretary of Revenue must calculate the total amount of tax credits claimed from the applications filed under this section. If the total amount of tax credits claimed for contributions made in a calendar year exceeds four million dollars ($4,000,000), the Secretary must allow a portion of the credits claimed by allocating a total of four million dollars ($4,000,000) in tax credits in proportion to the size of the credit claimed by each taxpayer. If a credit is reduced pursuant to this subsection, the Secretary must notify the taxpayer of the amount of the reduction of the credit on or before December 31 of the year the application was filed. The Secretary's allocations based on applications filed pursuant to this section are final and will not be adjusted to account for credits applied for but not claimed.

(g) Forfeiture. — A taxpayer forfeits a credit allowed under this section to the extent the development zone agency uses the taxpayer's contribution for any purpose other than an improvement project. Each development zone agency certified by the Department of Commerce must file with the Department of Commerce annual financial statements audited in accordance with generally accepted accounting principles and in accordance with Government Audit Standards developed by the Comptroller General of the United States. The annual statements are required each time the agency receives a contribution eligible for the credit allowed under this section until the entire contribution has been used for improvement projects. If the Department of Commerce determines that a development zone agency has used part or all of a contribution for any purpose other than an improvement project, the Department must notify the Secretary of Revenue of the forfeiture, the taxpayer who made the contribution, and the amount forfeited. (1999-360, ss. 1, 2; 2000-56, s. 1(b); 2001-414, s. 9; 2001-476, s. 14(a).)

Article Repealed Effective for Business Activities Occurring On or After January 1, 2007. — This Article is repealed effective for business activities that occur on or after January 1, 2007. See G.S. 105-129.2A(a), (a1), (a2) and (a3).

§ **105-129.14:** Reserved for future codification purposes.

Article 3B.

Business And Energy Tax Credits.

§ 105-129.15. Definitions.

The following definitions apply in this Article:

(1) Business property. — Tangible personal property that is used by the taxpayer in connection with a business or for the production of income and is capitalized by the taxpayer for tax purposes under the Code. The term does not include, however, a luxury passenger automobile taxable under section 4001 of the Code or a watercraft used principally for entertainment and pleasure outings for which no admission is charged.

(2) Cost. — In the case of property owned by the taxpayer, cost is determined pursuant to regulations adopted under section 1012 of the Code, subject to the limitation on cost provided in section 179 of the Code. In the case of property the taxpayer leases from another, cost is value as determined pursuant to G.S. 105-130.4(j)(2).

(3) Recodified as § 105-129.15(5).

(4) Hydroelectric generator. — A machine that produces electricity by water power or by the friction of water or steam.

(4a) Repealed by Session Laws 2002-87, s. 3, effective August 22, 2002.

(5) Purchase. — Defined in section 179 of the Code.

(6) Renewable biomass resources. — Organic matter produced by terrestrial and aquatic plants and animals, such as standing vegetation, aquatic crops, forestry and agricultural residues, spent pulping liquor, landfill wastes, and animal wastes.

(7) Renewable energy property. — Any of the following machinery and equipment or real property:

a. Biomass equipment that uses renewable biomass resources for biofuel production of ethanol, methanol, and biodiesel; anaerobic biogas production of methane utilizing agricultural and animal waste or garbage; or commercial thermal or electrical generation. The term also includes related devices for converting, conditioning, and storing the liquid fuels, gas, and electricity produced with biomass equipment.

b. Hydroelectric generators located at existing dams or in free-flowing waterways, and related devices for water supply and control, and converting, conditioning, and storing the electricity generated.

c. Solar energy equipment that uses solar radiation as a substitute for traditional energy for water heating, active space heating and cooling, passive heating, daylighting, generating electricity, distillation, desalination, detoxification, or the production of industrial or commercial process heat. The term also includes related devices necessary for collecting, storing, exchanging, conditioning, or converting solar energy to other useful forms of energy.

d. Wind equipment required to capture and convert wind energy into electricity or mechanical power, and related devices for converting, conditioning, and storing the electricity produced.

(8) Renewable fuel. — Either of the following:

a. Biodiesel, as defined in G.S. 105-449.60.

b. Ethanol either unmixed or in mixtures with gasoline that are seventy percent (70%) or more ethanol by volume. (1996, 2nd Ex. Sess., c. 13, s. 3.12; 1997-277, s. 3; 1998-55, s. 2; 1999-342, s. 2; 1999-360, s. 1; 2000-173, s. 1(a); 2001-431, s. 1; 2002-87, s. 3; 2004-153, s. 1; 2005-413, s. 4; 2006-162, s. 23.)

Editor's Note. — Session Laws 2000-173, s. 1(a) amended Session Laws 1996, Second Extra Session, c. 13, s. 10.2(3), as amended by Session Laws 1999-360, s. 1, to provide for repeal of this Article as provided within the Article. G.S. 105-129.15A, the sunset provision for Article 3B of Chapter 105, was subsequently repealed by Session Laws 2005-413, s. 6.

Session Laws 1999-342, s. 2 amended the heading of Article 3B to read "Business and Energy Tax Credits." Session Laws 1999-360, s. 10 amended the heading to read "Business Tax Credits." The article heading is set out as amended by Session Laws 1999-342, s. 2 at the direction of the Revisor of Statutes.

Subdivisions (4) to (7) were designated as such by the Revisor of Statutes, the designation in Session Laws 1999-342, s. 2 having been subdivisions (3) to (6).

Effect of Amendments. — Session Laws 2005-413, s. 4, as amended by Session Laws 2006-162, s. 23, effective for taxable years beginning on or after January 1, 2006, inserted "spent pulping liquor" preceding "landfill wastes" in subdivision (6); and deleted "from renewable energy crops or wood waste materials" from the end of the first sentence in subdivision (7)a.

§§ 105-129.15A, 105-129.16: Repealed by Session Laws 2005-413, ss. 6 and 7, effective September 20, 2005.

§ 105-129.16A. Credit for investing in renewable energy property.

(a) Credit. — If a taxpayer that has constructed, purchased, or leased renewable energy property places it in service in this State during the taxable year, the taxpayer is allowed a credit equal to thirty-five percent (35%) of the cost of the property. In the case of renewable energy property that serves a single-family dwelling, the credit must be taken for the taxable year in which the property is placed in service. For all other renewable energy property, the entire credit may not be taken for the taxable year in which the property is placed in service but must be taken in five equal installments beginning with the taxable year in which the property is placed in service.

(b) Expiration. — If, in one of the years in which the installment of a credit accrues, the renewable energy property with respect to which the credit was claimed is disposed of, taken out of service, or moved out of State, the credit expires and the taxpayer may not take any remaining installment of the credit. The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.17. No credit is allowed under this section to the extent the cost of the renewable energy property was provided by public funds.

(c) Ceilings. — The credit allowed by this section may not exceed the applicable ceilings provided in this subsection.

(1) Nonresidential Property. — A ceiling of two million five hundred thousand dollars ($2,500,000) per installation applies to renewable energy property placed in service for any purpose other than residential.

(2) Residential Property. — The following ceilings apply to renewable energy property placed in service for residential purposes:

a. One thousand four hundred dollars ($1,400) per dwelling unit for solar energy equipment for domestic water heating, including pool heating.

b. Three thousand five hundred dollars ($3,500) per dwelling unit for solar energy equipment for active space heating, combined active space and domestic hot water systems, and passive space heating.

c. Ten thousand five hundred dollars ($10,500) per installation for any other renewable energy property for residential purposes.

(d) No Double Credit. — A taxpayer that claims any other credit allowed under this Chapter with respect to renewable energy property may not take the credit allowed in this section with respect to the same property. A taxpayer may not take the credit allowed in this section for renewable energy property the taxpayer leases from another unless the taxpayer obtains the lessor's written certification that the lessor will not claim a credit under this Chapter with respect to the property.

(e) Sunset. — This section is repealed effective for renewable energy property placed into service on or after January 1, 2011. (1999-342, s. 2; 2005-413, s. 5.)

Effect of Amendments. — Session Laws 2005-413, s. 5, effective for taxable years beginning on or after January 1, 2006, substituted "two million five hundred thousand dollars ($2,500,000)" for "two hundred fifty thousand dollars ($250,000)" in subdivision (c)(1); added "including pool heating" to the end of subdivision (c)(2)a.; added subsection (e); and made a minor punctuation change.

§ 105-129.16B: Recodified as G.S. 105-129.41 by Session Laws 2002-87, s. 2, as amended by Session Laws 2003-416, s. 1, effective August 22, 2002, and applicable to credits for buildings for which a federal tax credit is first claimed for a taxable year beginning on or after January 1, 2002.

§ 105-129.16C. (Repealed for taxable years beginning on or after January 1, 2006) Credit for investing in dry-cleaning equipment that does not use a hazardous substance.

(a) Credit. — If a taxpayer that has purchased or leased qualified dry-cleaning equipment, places it in service in this State for commercial purposes during the taxable year, the taxpayer is allowed a credit equal to twenty percent (20%) of the cost of the equipment. To support the credit allowed by this section, the taxpayer must file with the tax return for the taxable year in which the credit is claimed a certification by the Department of Environment and Natural Resources that the equipment purchased or leased by the taxpayer is qualified dry-cleaning equipment.

(b) Restrictions. — No credit is allowed under this section to the extent the cost of the equipment was paid with public funds. A taxpayer that claims any other credit allowed under this Chapter with respect to qualified dry-cleaning equipment may not take the credit allowed in this section with respect to the same equipment.

(c) Definitions. — The following definitions apply only in this section:

(1) Hazardous solvent. — A solvent, any portion of which consists of a chlorine-based solvent, a hydrocarbon-based solvent, a hazardous substance as defined in G.S. 130A-310(2), or any substance determined by the Administrator of the Environmental Protection Agency or the Director of the National Institute of Occupational Safety and Health to possess carcinogenic potential to humans.

(2) Qualified dry-cleaning equipment. — Equipment that is designed and used primarily to dry-clean clothing and other fabric and does not use any hazardous solvent or any other substance that the Department of Environment and Natural Resources determines to pose a threat to human health or the environment.

(d) Sunset. — This section is repealed for taxable years beginning on or after January 1, 2006. (2000-160, s. 1; 2005-413, s. 8.)

Editor's Note. — Session Laws 2000-160, s. 1, makes this section effective for taxable years beginning on or after July 1, 2001.

Effect of Amendments. — Session Laws 2005-413, s. 8, effective September 20, 2005, added subsection (d).

§ 105-129.16D. (Repealed effective for facilities placed in service on or after January 1, 2011) Credit for constructing renewable fuel facilities.

(a) Dispensing Credit. — A taxpayer that constructs and installs and places in service in this State a qualified commercial facility for dispensing renewable fuel is allowed a credit equal to fifteen percent (15%) of the cost to the taxpayer of constructing and installing the part of the dispensing facility, including pumps, storage tanks, and related equipment, that is directly and exclusively used for dispensing or storing renewable fuel. A facility is qualified if the equipment used to store or dispense renewable fuel is labeled for this purpose and clearly identified as associated with renewable fuel.

The entire credit may not be taken for the taxable year in which the facility is placed in service but must be taken in three equal annual installments beginning with the taxable year in which the facility is placed in service. If, in one of the years in which the installment of a credit accrues, the portion of the facility directly and exclusively used for dispensing or storing renewable fuel is disposed of or taken out of service, the credit expires and the taxpayer may not take any remaining installment of the credit. The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.17.

(b) Production Credit. — A taxpayer that constructs and places in service in this State a commercial facility for processing renewable fuel is allowed a credit equal to twenty-five percent (25%) of the cost to the taxpayer of constructing and equipping the facility. The entire credit may not be taken for the taxable year in which the facility is placed in service but must be taken in seven equal annual installments beginning with the taxable year in which the facility is placed in service. If, in one of the years in which the installment of a credit accrues, the facility with respect to which the credit was claimed is disposed of or taken out of service, the credit expires and the taxpayer may not take any remaining installment of the credit. The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.17.

(b1) Alternative Production Credit. — In lieu of the credit allowed under subsection (b) of this section, a taxpayer that constructs and places in service in this State three or more commercial facilities for processing renewable fuel and that invests a total amount of at least four hundred million dollars ($400,000,000) in the facilities is allowed a credit equal to thirty-five percent (35%) of the cost to the taxpayer of constructing and equipping the facilities. In order to claim the credit, the taxpayer must obtain a written determination from the Secretary of Commerce that the taxpayer is expected to invest within a five-year period a total amount of at least four hundred million dollars ($400,000,000) in three or more facilities. The credit must be taken in seven equal annual installments beginning with the taxable year in which the first facility is placed in service. If, in one of the years in which the installment of credit accrues, a facility with respect to which the credit was claimed is disposed of or taken out of service and the investment requirements of this subsection are no longer satisfied, the credit expires and the taxpayer may take any remaining installment of the credit only to the extent allowed under subsection (b) of this section. The taxpayer may, however, take the portion of an installment under this subsection that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.17. Notwithstanding the provisions of G.S. 105-129.17, a taxpayer may carry forward unused portions of the credit allowed under this subsection for the succeeding 10 years.

If a taxpayer that claimed a credit under this subsection fails to meet the requirements of this subsection but meets the requirements of subsection (b) of this section, the taxpayer forfeits the difference between the alternative credit claimed under this subsection and the credit allowed under subsection (b) of this section. A taxpayer that forfeits part of the alternative credit under this subsection is liable for the additional taxes avoided plus interest at the rate established under G.S. 105-241.1(i), computed from the date the additional taxes would have been due if the credit had not been allowed. The additional taxes and interest are due 30 days after the date the credit is forfeited. A taxpayer that fails to pay the additional taxes and interest by the due date is subject to penalties provided in G.S. 105-236.

(c) No Double Credit. — A taxpayer may not claim the credits allowed under subsections (b) and (b1) of this section with respect to the same facility. A taxpayer that claims any other credit allowed under this Chapter with respect to the costs of constructing and installing a facility may not take the credit allowed in this section with respect to the same costs.

(d) Sunset. — This section is repealed effective for facilities placed in service on or after January 1, 2011. (2004-153, s. 2; 2006-66, s. 24.7(a); 2006-259, s. 19.5(a); 2007-323, s. 31.9(a).)

Editor's Note. — Session Laws 2004-153, s. 3, made this section effective for taxable years beginning on or after January 1, 2005.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

G.S. 105-241.1(i), referred to in subsection (b1), was repealed by Session Laws 2007-491, s. 2. For present similar provision, see G.S. 105-241.21.

Effect of Amendments. — Session Laws 2006-66, s. 24.7(a), effective for taxable years beginning on or after January 1, 2006, added subsection (b1); added the first sentence in subsection (c); and substituted "January 1, 2011" for "January 1, 2008" in subsection (d).

Session Laws 2006-259, s. 19.5(a), effective for taxable years beginning on or after January 1, 2006, in the last sentence of subsection (b1), deleted "(a)" following "105-129.17" and added "only and the taxpayer may carry forward unused portions of the credit allowed under this subsection for the succeeding 10 years."

Session Laws 2007-323, s. 31.9(a), effective July 1, 2007, and effective for taxable years beginning on or after January 1, 2007, in subsection (b1), in the first paragraph, in the third sentence, deleted "not" preceding "take" and added "only to the extent allowed under subsection (b) of this section," deleted the former fifth sentence which read: "If a credit allowed under this subsection expires, a taxpayer is not eligible for a credit under subsection (b) of this section with respect to the same property." and deleted "a taxpayer may claim the credit allowed under this subsection against the income tax imposed under Article 4 of this Chapter only and the" preceding "taxpayer may carry" in the last sentence, and added the second paragraph.

§ 105-129.16E. (Effective for taxable years beginning on or after January 1, 2007, and expires for taxable years beginning on or after January 1, 2009) Credit for small business employee health benefits.

(a) Credit. — A small business that provides health benefits for all of its eligible employees during the taxable year is allowed a credit to offset its costs in providing health benefits for its eligible employees. For the purposes of this subsection, a taxpayer provides health benefits if it pays at least fifty percent (50%) of the premiums for health care coverage that equals or exceeds the minimum provisions of the basic health care plan of coverage recommended by the Small Employer Carrier Committee pursuant to G.S. 58-50-125 or if its employees have qualifying existing coverage.

The credit is equal to a dollar amount per eligible employee whose total wages or salary received from the business does not exceed forty thousand dollars ($40,000) on an annual basis. The dollar amount is two hundred fifty dollars ($250.00), not to exceed the taxpayer's costs of providing health benefits for the employee during the taxable year.

(b) Allocation. — If the taxpayer is an individual who is a nonresident or a part-year resident, the taxpayer must reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate. If the taxpayer is not an individual and is required to apportion its multistate business income to this State, the taxpayer must reduce the amount of the credit by multiplying it by the apportionment fraction used to apportion its apportionable income to this State.

(c) Definitions. — The following definitions apply in this section:

(1) Eligible employee. — Defined in G.S. 58-50-110.

(2) Qualifying existing coverage. — Defined in G.S. 58-50-130(a)(4a).

(3) Small business. — A taxpayer that employs no more than 25 eligible employees throughout the taxable year.

(d) Sunset. — This section expires for taxable years beginning on or after January 1, 2009. (2006-66, s. 24.4(a); 2007-527, s. 5.)

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 24.4(b), makes this section effective for taxable years beginning on or after January 1, 2007.

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2007-527, s. 5, effective August 31, 2007, substituted "apportionable income" for "business income" in subsection (b).

§ 105-129.16F. (Effective for taxable years beginning on or after January 1, 2008, and repealed for taxable years beginning on or after January 1, 2010) Credit for biodiesel producers.

(a) Credit. — A biodiesel provider that produces at least 100,000 gallons of biodiesel during the taxable year is allowed a credit equal to the per gallon excise tax the producer paid under Article 36C of this Chapter on the biodiesel. For the purposes of this section, "biodiesel" is liquid fuel derived in whole from agricultural products, animal fats, or wastes from agricultural products or animal fats. The credit does not apply to tax paid on diesel fuel included in a biodiesel blend. The credit may not exceed five hundred thousand dollars ($500,000) and is subject to the limitations of G.S. 105-129.17.

(b) Sunset. — This section is repealed for taxable years beginning on or after January 1, 2010. (2006-66, s. 24.8(a).)

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 24.8(b), makes this section effective for taxable years beginning on or after January 1, 2008.

Session Laws 2006-66, s. 28.6 is a severability clause.

§ 105-129.16G. Work Opportunity Tax Credit.

A taxpayer who is allowed a federal tax credit under Part IV, Subpart F of the Code for the taxable year is allowed a credit against the tax imposed by this Part. The credit is equal to six percent (6%) of the amount of credit allowed under the Code. (2007-323, s. 31.21(a).)

Editor's Note. — Session Laws 2007-323, s. 31.21(b), made this section effective January 1, 2007, and effective for taxable years beginning on or after January 1, 2007.

§ 105-129.16H. (Effective for taxable years beginning on or after January 1, 2008) Credit for donating funds to a nonprofit organization to enable the nonprofit to acquire renewable energy property.

(a) Credit. — A taxpayer who donates money to a tax-exempt nonprofit organization for the purpose of providing funds for the organization to construct, purchase, or lease renewable energy property is allowed a credit under this section if the nonprofit organization uses the donation for its intended purpose. A tax-exempt nonprofit organization is an organization that is exempt from tax under section 501(c)(3) of the Code.

The amount of the credit allowed in this section is the taxpayer's share of the credit the nonprofit organization could claim under G.S. 105-129.16A if the nonprofit organization were subject to tax. The taxpayer's share of the credit is calculated by dividing the taxpayer's donation by the cost of the renewable energy property constructed, purchased, or leased by the nonprofit organization and placed in service during the taxable year and then multiplying this percentage by the amount of the credit the nonprofit organization could claim if it were subject to tax. A taxpayer must take the credit allowed by this section in the year in which the property is placed in service. The installment requirements in G.S. 105-129.16A for nonresidential property do not apply to the credit allowed in this section.

(b) Records. — A nonprofit organization must keep a record of all donations it receives for the purpose of providing funds for the organization to construct, purchase, or lease renewable energy property and of the amount of the donations used for this purpose. If a nonprofit organization places renewable energy property in service that is purchased in whole or in part from donations made for this purpose, the nonprofit organization must give each taxpayer who made a donation a statement setting out the amount of the credit for which the taxpayer qualifies under this section. The statement must describe the renewable energy property placed in service and state the cost of the property, the amount of the credit the nonprofit organization could claim under G.S. 105-129.16A if it were subject to tax, and the taxpayer's share of the credit allowed in this section. If the donations made for the renewable energy property exceed the cost of the property, the nonprofit organization must prorate each taxpayer's share of the credit. The sum of the credits allowed under this section to taxpayers who make donations to a nonprofit organization may not exceed the amount of the credit the nonprofit organization could claim under G.S. 105-129.16A if it were subject to tax.

(c) No Double Benefit. — A taxpayer who claims a credit under this section based on a donation to a nonprofit organization is not allowed to deduct this donation as a charitable contribution. (2007-397, s. 13(a).)

Editor's Note. — Session Laws 2007-397, s. 13(e), made this section effective for taxable years beginning on or after January 1, 2008.

Session Laws 2007-397, s. 13(a), enacted this section as G.S. 105-129.16G. It has been renumbered as G.S. 105-129.16H at the direction of the Revisor of Statutes.

Session Laws 2007-397, s. 15, contains a severability clause.

§ 105-129.17. Tax election; cap.

(a) Tax Election. — The credits allowed in this Article are allowed against the franchise tax levied in Article 3 of this Chapter or the income taxes levied in Article 4 of this Chapter. The taxpayer must elect the tax against which a credit will be claimed when filing the return on which the first installment of the credit is claimed. This election is binding. Any carryforwards of a credit must be claimed against the same tax.

(b) Cap. — The credits allowed in this Article may not exceed fifty percent (50%) of the tax against which they are claimed for the taxable year, reduced by the sum of all other credits allowed against that tax, except tax payments made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of credit, including carryforwards, claimed by the taxpayer under this Article against each tax for the taxable year. Any unused portion of the credits may be carried forward for the succeeding five years. (1996, 2nd Ex. Sess., c. 13, s. 3.12; 1997-277, s. 3; 1999-342, s. 2; 1999-360, ss. 1, 13; 2000-140, ss. 63(a), 88; 2001-431, s. 3; 2002-87, s. 5.)

§ 105-129.18. Substantiation.

To claim a credit allowed by this Article, the taxpayer must provide any information required by the Secretary of Revenue. Every taxpayer claiming a credit under this Article must maintain and make available for inspection by the Secretary of Revenue any records the Secretary considers necessary to determine and verify the amount of the credit to which the taxpayer is entitled. The burden of proving eligibility for a credit and the amount of the credit rests upon the taxpayer, and no credit may be allowed to a taxpayer that fails to maintain adequate records or to make them available for inspection. (1996, 2nd Ex. Sess., c. 13, s. 3.12; 1997-277, s. 3; 1999-342, s. 2; 1999-360, ss. 1, 14; 2000-140, ss. 63(b), 88.)

§ 105-129.19. Reports.

The Department of Revenue must publish by May 1 of each year the following information for the 12-month period ending the preceding December 31:

(1) The number of taxpayers that took the credits allowed in this Article.

(2) The cost of business property and renewable energy property with respect to which credits were taken.

(2a) Repealed by Session Laws 2002-87, s. 6, effective August 22, 2002.

(3) The total cost to the General Fund of the credits taken. (1996, 2nd Ex. Sess., c. 13, s. 3.12; 1997-277, s. 3; 1999-342, s. 2; 1999-360, ss. 1, 15; 2000-140, ss. 63(c), 88; 2001-414, s. 10; 2002-87, s. 6; 2005-429, s. 2.3.)

Editor's Note. — Session Laws 2005-429, s. 3, provides: "The Economic Development Oversight Committee shall study the issue of public disclosure as it relates to economic development efforts. Specifically, the Committee shall study ways of providing the public information about the employment levels, and any changes in employment levels, of businesses that receive economic development incentives from the State or local governments. The Committee may make an interim report on this study, including any recommendations for legislative proposals, to the 2006 Regular Session of the 2005 General Assembly and shall make a final report on this study to the 2007 General Assembly."

Effect of Amendments. — Session Laws 2005-429, s. 2.3, effective January 1, 2007, rewrote the introductory paragraph and made minor stylistic changes throughout.

§§ 105-129.20 through 105-129.24: Reserved for future codification purposes.

Article 3C.

Tax Incentives For Recycling Facilities.

§ 105-129.25. Definitions.

The following definitions apply in this Article:

(1) Reserved.
(2) Reserved.
(3) Large recycling facility. — A recycling facility that qualifies under G.S. 105-129.26(b).
(4) Machinery and equipment. — Engines, machinery, tools, and implements used or designed to be used in the business for which the credit is claimed. The term does not include real property as defined in G.S. 105-273 or rolling stock as defined in G.S. 105-333.
(5) Major recycling facility. — A recycling facility that qualifies under G.S. 105-129.26(a).
(6) Owner. — A person who owns or leases a recycling facility.
(7) Post-consumer waste material. — Any product that was generated by a business or consumer, has served its intended end use, and has been separated from the solid waste stream for the purpose of recycling. The term includes material acquired by a recycling facility either directly or indirectly, such as through a broker or an agent.
(8) Purchase. — Defined in section 179 of the Code.
(9) Recycling facility. — A manufacturing plant at least three-fourths of whose products are made of at least fifty percent (50%) post-consumer waste material measured by weight or volume. The term includes real and personal property located at or on land in the same county and reasonably near the plant site and used to perform business functions related to the plant or to transport materials and products to or from the plant. The term also includes utility infrastructure and transportation infrastructure to and from the plant. (1998-55, s. 12.)

§ 105-129.26. Qualification; forfeiture.

(a) Major Recycling Facility. — A recycling facility qualifies for the tax benefits provided in this Article and in Article 5 of this Chapter for major recycling facilities if it meets all of the following conditions:

(1) The facility is located in an area that, at the time the owner began construction of the facility, was an enterprise tier one area pursuant to G.S. 105-129.3.
(2) The Secretary of Commerce has certified that the owner will, by the end of the fourth year after the year the owner begins construction of

the recycling facility, invest at least three hundred million dollars ($300,000,000) in the facility and create at least 250 new, full-time jobs at the facility.

(3) The jobs at the recycling facility meet the wage standard in effect pursuant to G.S. 105-129.4(b) as of the date the owner begins construction of the facility.

(b) Large Recycling Facility. — A recycling facility qualifies for the tax credit provided in G.S. 105-129.27 for large recycling facilities if it meets all of the following conditions:

(1) The facility is located in an area that, at the time the owner began construction of the facility, was an enterprise tier one area pursuant to G.S. 105-129.3.

(2) The Secretary of Commerce has certified that the owner will, by the end of the second year after the year the owner begins construction of the recycling facility, invest at least one hundred fifty million dollars ($150,000,000) in the facility and create at least 155 new, full-time jobs at the facility.

(3) The jobs at the recycling facility meet the wage standard in effect pursuant to G.S. 105-129.4(b) as of the date the owner begins construction of the facility.

(c) Forfeiture. — If the owner of a large or major recycling facility fails to make the required minimum investment or create the required number of new jobs within the period certified by the Secretary of Commerce under this section, the recycling facility no longer qualifies for the applicable recycling facility tax benefits provided in this Article and in Article 5 of this Chapter and forfeits all tax benefits previously received under those Articles. Forfeiture does not occur, however, if the failure was due to events beyond the owner's control. Upon forfeiture of tax benefits previously received, the owner is liable under Part 1 of Article 4 of this Chapter for a tax equal to the amount of all past taxes under Articles 3, 4, and 5 previously avoided as a result of the tax benefits received plus interest at the rate established in G.S. 105-241.21, computed from the date the taxes would have been due if the tax benefits had not been received. The tax and interest are due 30 days after the date of the forfeiture. An owner that fails to pay the tax and interest is subject to the penalties provided in G.S. 105-236.

(d) Substantiation. — To claim a credit allowed by this Article, the owner must provide any information required by the Secretary of Revenue. Every owner claiming a credit under this Article shall maintain and make available for inspection by the Secretary of Revenue any records the Secretary considers necessary to determine and verify the amount of the credit to which the owner is entitled. The burden of proving eligibility for the credit and the amount of the credit shall rest upon the owner, and no credit shall be allowed to an owner that fails to maintain adequate records or to make them available for inspection.

(e) Reports. — The Department of Commerce and the Department of Revenue shall jointly publish by May 1 of each year the following information itemized by taxpayer for the 12-month period ending the preceding December 31:

(1) The number and location of large and major recycling facilities qualified under this Article.

(2) The number of new jobs created by each recycling facility.

(3) The amount of investment in each recycling facility.

(4) The amount of credits taken under this Article. (1998-55, s. 12; 2005-429, s. 2.4; 2007-491, s. 44(1)a.)

Editor's Note. — Session Laws 2005-429, s. 3, provides: "The Economic Development Oversight Committee shall study the issue of public disclosure as it relates to economic development efforts. Specifically, the Committee shall study ways of providing the public information about the employment levels, and any changes in employment levels, of businesses that receive economic development incentives from the State or local governments. The Committee may make an interim report on this study, including any recommendations for legislative proposals, to the 2006 Regular Session of the 2005 General Assembly and shall make a final report on this study to the 2007 General Assembly."

Session Laws 2007-491, s. 47 provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2005-429, s. 2.4, effective January 1, 2007, rewrote subsection (e) and subdivision (e)(4).

Session Laws 2007-491, s. 44(1)a, effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in the third sentence of subsection (c). For applicability, see Editor's note.

§ 105-129.27. Credit for investing in large or major recycling facility.

(a) Credit. — An owner that purchases or leases machinery and equipment for a major recycling facility in this State during the taxable year is allowed a credit equal to fifty percent (50%) of the amount payable by the owner during the taxable year to purchase or lease the machinery and equipment. An owner that purchases or leases machinery and equipment for a large recycling facility in this State during the taxable year is allowed a credit equal to twenty percent (20%) of the amount payable by the owner during the taxable year to purchase or lease the machinery and equipment.

(b) Taxes Credited. — The credit provided in this section is allowed against the franchise tax levied in Article 3 of this Chapter and the income tax levied in Part 1 of Article 4 of this Chapter. Any other nonrefundable credits allowed the owner are subtracted before the credit allowed by this section.

(c) Carryforwards. — The credit provided in this section may not exceed the amount of tax against which it is claimed for the taxable year, reduced by the sum of all other credits allowed against that tax, except tax payments made by or on behalf of the owner. Any unused portion of the credit may be carried forward for the succeeding 25 years.

(d) Change in Ownership of Facility. — The sale, merger, consolidation, conversion, acquisition, or bankruptcy of a recycling facility, or any transaction by which the facility is reformulated as another business, does not create new eligibility in a succeeding owner with respect to a credit for which the predecessor was not eligible under this section. A successor business may, however, take any carried-over portion of a credit that its predecessor could have taken if it had a tax liability.

(e) Forfeiture. — If any machinery or equipment for which a credit was allowed under this section is not placed in service within 30 months after the credit was allowed, the credit is forfeited. A taxpayer that forfeits a credit under this section is liable for all past taxes avoided as a result of the credit plus interest at the rate established under G.S. 105-241.21, computed from the date the taxes would have been due if the credit had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited; a taxpayer that fails to pay the past taxes and interest by the due date is subject to the penalties provided in G.S. 105-236.

(f) No Double Credit. — A recycling facility that is eligible for the credit allowed in this section is not allowed the credit for investing in machinery and equipment provided in G.S. 105-129.9. (1998-55, s. 12; 1999-369, s. 5.3; 2007-491, s. 44(1)a.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 44(1)a, effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in the second sentence of subsection (e). For applicability, see Editor's note.

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

§ 105-129.28. (Repealed effective January 1, 2008. See note) Credit for reinvestment.

(a) Credit. — A major recycling facility that is accessible by neither ocean barge nor ship and that transports materials to the facility or products away from the facility is allowed a credit against the tax imposed by Part 1 of Article 4 of this Chapter equal to its additional transportation and transloading expenses incurred with respect to the materials and products due to its inability to use ocean barges or ships. The additional expenses for which credit is allowed are expenses due to using river barges and expenses due to having to use another mode of transportation because the quantity that is transported by river barge is insufficient to meet the facility's needs. In order to claim the credit allowed by this section, the facility must provide the Secretary of Commerce audited documentation of the amount of its additional transportation and transloading expenses incurred during the taxable year.

(b) Cap. — The credit allowed to a major recycling facility under this section for the taxable year may not exceed the applicable annual cap provided in the following table:

Taxable Year	*Cap*
1998	$ 150,000
1999	$ 640,000
2000	$ 3,860,000
2001	$ 8,050,000
2002	$ 9,550,000
2003	$ 10,100,000
2004-2007	$ 10,400,000

(c) Reduction. — For the first ten taxable years after the owner begins transporting materials and products to and from the major recycling facility, the credit allowed by this section must be reduced by the amount of credit allowed in previous years that was used for a purpose other than an allowable purpose under subsection (d) of this section, as certified by the Secretary of Commerce.

§ 105-129.28 has a delayed repeal date. See notes.

(d) Use of Credited Amount. — For the first ten taxable years after the owner begins construction of the major recycling facility, the owner must use the amount of credit allowed under this section to pay for (i) investment in rail or roads associated with the facility, (ii) investment in water system infrastructure designed to reduce the expense of transporting materials and products to and from the recycling facility, and (iii) investment in land and infrastructure for other industrial sites located in the same county as the recycling facility. If the owner determines that there are no reasonable economic opportunities in a given year to use the total amount of credit for the expenditures described above, the owner may use the excess for investment at or in connection with the recycling facility above the initial required investment of three hundred million dollars ($300,000,000).

Expenses incurred for the purposes allowed in this subsection during a taxable year in the ten-year period may be counted toward a credit allowed in a later taxable year in the ten-year period. If the owner is not able to use the full amount of the credit during a taxable year for any of the purposes allowed by this subsection, the excess may be used for these purposes in subsequent taxable years.

The owner must provide the Secretary of Commerce with annual audited documentation demonstrating that the amount of credit received under this section during the previous twelve-month period has not been used for a purpose inconsistent with this subsection. If the Secretary of Commerce determines that the owner has used any of the credit for a purpose that is inconsistent with the requirements of this subsection, the Secretary of Commerce shall certify the amount so used to the Secretary of Revenue and the credit allowed the owner under this section for the following taxable year shall be reduced by that amount in accordance with subsection (c) of this section.

After the end of the ten-year period, the amount of any credit allowed under this section that has not yet been used may be used for investment at or in connection with the recycling facility above the initial required investment of three hundred million dollars ($300,000,000).

(e) Credit Refundable. — If the credit allowed by this section exceeds the amount of tax imposed by Part 1 of Article 4 of this Chapter for the taxable year reduced by the sum of all credits allowable, the Secretary shall refund the excess to the taxpayer. The refundable excess is governed by the provisions governing a refund of an overpayment by the taxpayer of the tax imposed in Part 1 of Article 4 of this Chapter. In computing the amount of tax against which multiple credits are allowed, nonrefundable credits are subtracted before refundable credits. (1998-55, s. 12.)

Editor's Note. — Session Laws 1998-55, s. 19 provides in part that this section, as enacted by Session Laws 1998-55, s. 12, is repealed effective for taxable years beginning on or after January 1, 2008. This section does not affect the rights or liabilities of the State, a taxpayer, or another person arising under G.S. 105-129.28 before the effective date of its repeal; nor does it affect the right to any refund or credit of a tax that accrued under G.S. 105-129.28 before the effective date of its repeal.

Further, the purpose of this ten-year sunset provision is to allow a determination to be made whether any major recycling facility continues to experience additional transportation and transloading expenses due to its inability to use ocean barges or ships. It is the expectation and intent that the General Assembly will postpone the sunset of G.S. 105-129.28 if it is determined that any major recycling facility continues to experience these additional transportation and transloading expenses as of 2008.

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

§§ 105-129.29 through 105-129.34: Reserved for future codification purposes.

ARTICLE 3D.

Historic Rehabilitation Tax Credits.

§ 105-129.35. Credit for rehabilitating income-producing historic structure.

(a) Credit. — A taxpayer who is allowed a federal income tax credit under section 47 of the Code for making qualified rehabilitation expenditures for a certified historic structure located in this State is allowed a credit equal to twenty percent (20%) of the expenditures that qualify for the federal credit. If the certified historic structure is a facility that at one time served as a State training school for juvenile offenders, the amount of the credit is equal to forty percent (40%) of the expenditures that qualify for the federal credit. To claim the credit allowed by this subsection, the taxpayer must provide a copy of the certification obtained from the State Historic Preservation Officer verifying that the historic structure has been rehabilitated in accordance with this subsection.

(b) Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this section may allocate the credit among any of its owners in its discretion as long as an owner's adjusted basis in the pass-through entity, as determined under the Code, at the end of the taxable year in which the certified historic structure is placed in service, is at least forty percent (40%) of the amount of credit allocated to that owner. Owners to whom a credit is allocated are allowed the credit as if they had qualified for the credit directly. A pass-through entity and its owners must include with their tax returns for every taxable year in which an allocated credit is claimed a statement of the allocation made by the pass-through entity and the allocation that would have been required under G.S. 105-131.8 or G.S. 105-269.15.

(c) Definitions. — The following definitions apply in this section:

(1) Certified historic structure. — Defined in section 47 of the Code.

(2) Pass-through entity. — Defined in G.S. 105-228.90.

(3) Qualified rehabilitation expenditures. — Defined in section 47 of the Code.

(4) State Historic Preservation Officer. — Defined in G.S. 105-129.36. (1993, c. 527, ss. 1, 2; 1997-139, ss. 1, 2; 1998-98, ss. 36, 69; 1999-389, ss. 2, 5, 6; 2001-476, s. 19(a); 2003-284, s. 35A.1; 2003-415, ss. 1, 2; 2003-416, s. 4(c); 2004-170, s. 14; 2006-40, s. 2; 2007-461, s. 1.)

Editor's Note. — Session Laws 1999-389, s. 6, provides that Article 3D of Chapter 105 of the General Statutes, as amended by this act, incorporates both G.S. 105-130.42 and G.S. 105-151.23.

Session Laws 1999-389, s. 9, as amended by Session Laws 2001-476, s. 19(a), and as amended by Session Laws 2003-415, s. 1, provides that G.S. 105-129.35(b), as amended by Session Laws 1999-389, is repealed effective January 1, 2008, for property placed in service on or after that date. Session Laws 2007-461, s. 1, effective August 28, 2007, removed the sunset provision applicable to subsection (b).

Effect of Amendments. — Session Laws 2006-40, s. 2, effective for taxable years beginning on or after January 1, 2006, and applicable to eligible sites placed into service on or after July 1, 2006, added the second sentence in subsection (a).

§ 105-129.36. Credit for rehabilitating nonincome-producing historic structure.

(a) Credit. — A taxpayer who is not allowed a federal income tax credit under section 47 of the Code and who makes rehabilitation expenses for a State-certified historic structure located in this State is allowed a credit equal to thirty percent (30%) of the rehabilitation expenses. If the certified historic structure is a facility that at one time served as a State training school for juvenile offenders, the amount of the credit is equal to forty percent (40%) of the expenditures that qualify for the federal credit. To qualify for the credit, the taxpayer's rehabilitation expenses must exceed twenty-five thousand dollars ($25,000) within a 24-month period. To claim the credit allowed by this subsection, the taxpayer must provide a copy of the certification obtained from the State Historic Preservation Officer verifying that the historic structure has been rehabilitated in accordance with this subsection.

(b) Definitions. — The following definitions apply in this section:

(1) Certified rehabilitation. — Repairs or alterations consistent with the Secretary of the Interior's Standards for Rehabilitation and certified as such by the State Historic Preservation Officer.

(2) Rehabilitation expenses. — Expenses incurred in the certified rehabilitation of a certified historic structure and added to the property's basis. The term does not include the cost of acquiring the property, the cost attributable to the enlargement of an existing building, the cost of sitework expenditures, or the cost of personal property.

(3) State-certified historic structure. — A structure that is individually listed in the National Register of Historic Places or is certified by the State Historic Preservation Officer as contributing to the historic significance of a National Register Historic District or a locally designated historic district certified by the United States Department of the Interior.

(4) State Historic Preservation Officer. — The Deputy Secretary of Archives and History or the Deputy Secretary's designee who acts to administer the historic preservation programs within the State.

(c) Recodified as G.S. 105-129.36A by Session Laws 2003-284, s. 35A.2, effective July 15, 2003. (1993, c. 527, ss. 1, 2; 1997-139, ss. 1, 2; 1998-98, ss. 36, 69; 1999-389, ss. 3, 5, 6; 2002-159, s. 35(e); 2003-284, ss. 35A.2, 35A.3; 2006-40, ss. 3, 4.)

Editor's Note. — Session Laws 1999-389, s. 6, provides that Article 3D of Chapter 105 of the General Statutes, as amended by this act, incorporates both G.S. 105-130.42 and G.S. 105-151.23.

Subdivisions (b)(1) to (b)(3) were designated as such by the Revisor of Statutes, the designations in Session Laws 1999-389, s. 5 having been subdivisions (b)(2), (b)(3), and (b)(3a).

Effect of Amendments. — Session Laws 2006-40, ss. 3 and 4, effective for taxable years beginning on or after January 1, 2006, and applicable to eligible sites placed into service on or after July 1, 2006, added the second sentence in subsection (a) and substituted "Officer" for "Officer prior to the commencement of the work" in subdivision (b)(1).

§ 105-129.36A. Rules; fees.

(a) Rules. — The North Carolina Historical Commission, in consultation with the State Historic Preservation Officer, may adopt rules needed to administer the certification process required by this section.

(b) Fees.— The North Carolina Historical Commission, in consultation with the State Historic Preservation Officer, may adopt a schedule of fees for providing certifications required by this Article. In establishing the fee schedule, the Commission shall consider the administrative and personnel costs incurred by the Department of Cultural Resources. An application fee may not exceed one percent (1%) of the completed qualifying rehabilitation expenditures. The proceeds of the fees are receipts of the Department of Cultural Resources and must be used for performing its duties under this Article. (1993, c. 527, ss. 1, 2; 1997-139, ss. 1, 2; 1998-98, ss. 36, 69; 1999-389, ss. 3, 5, 6; 2002-159, s. 35(e); 2003-284, s. 35A.2.)

Editor's Note. — Session Laws 1999-389, s. 6, provides that Article 3D of Chapter 105 of the General Statutes, as amended by this act, incorporates both G.S. 105-130.42 and G.S. 105-151.23.

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

§ 105-129.37. Tax credited; credit limitations.

(a) Tax Credited. — The credits provided in this Article are allowed against the income taxes levied in Article 4 of this Chapter.

(b) Credit Limitations. — The entire credit may not be taken for the taxable year in which the property is placed in service but must be taken in five equal installments beginning with the taxable year in which the property is placed in service. Any unused portion of the credit may be carried forward for the succeeding five years. A credit allowed under this Article may not exceed the amount of the tax against which it is claimed for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer.

(c) Forfeiture for Disposition. — A taxpayer who is required under section 50 of the Code to recapture all or part of the federal credit for rehabilitating an income-producing historic structure located in this State forfeits the corresponding part of the State credit allowed under G.S. 105-129.35 with respect to that historic structure. If the credit was allocated among the owners of a pass-through entity, the forfeiture applies to the owners in the same proportion that the credit was allocated.

(d) Forfeiture for Change in Ownership. — If an owner of a pass-through entity that has qualified for the credit allowed under G.S. 105-129.35 disposes of all or a portion of the owner's interest in the pass-through entity within five years from the date the rehabilitated historic structure is placed in service and the owner's interest in the pass-through entity is reduced to less than two-thirds of the owner's interest in the pass-through entity at the time the historic structure was placed in service, the owner forfeits a portion of the credit. The amount forfeited is determined by multiplying the amount of credit by the percentage reduction in ownership and then multiplying that product by the forfeiture percentage. The forfeiture percentage equals the recapture percentage found in the table in section 50(a)(1)(B) of the Code. The remaining allowable credit is allocated equally among the five years in which the credit is claimed.

(e) Exceptions to Forfeiture. — Forfeiture as provided in subsection (d) of this section is not required if the change in ownership is the result of any of the following:

(1) The death of the owner.
(2) A merger, consolidation, or similar transaction requiring approval by the shareholders, partners, or members of the taxpayer under applicable State law, to the extent the taxpayer does not receive cash or tangible property in the merger, consolidation, or other similar transaction.

(f) Liability From Forfeiture. — A taxpayer or an owner of a pass-through entity that forfeits a credit under this section is liable for all past taxes avoided as a result of the credit plus interest at the rate established under G.S. 105-241.21, computed from the date the taxes would have been due if the credit had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited. A taxpayer or owner of a pass-through entity that fails to pay the taxes and interest by the due date is subject to the penalties provided in G.S. 105-236. (1993, c. 527, ss. 1, 2; 1997-139, ss. 1, 2; 1998-98, ss. 36, 69; 1999-389, ss. 4, 5, 6; 2007-491, s. 44(1)a.)

Editor's Note. — Session Laws 1999-389, s. 6, provides that Article 3D of Chapter 105 of the General Statutes, as amended by this act, incorporates both G.S. 105-130.42 and G.S. 105-151.23.

Session Laws 2007-491, s. 47 provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 44(1)a, effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in the first sentence of subsection (f). For applicability, see Editor's note.

§ 105-129.38. Reports.

The Department of Revenue must publish by May 1 of each year the following information for the 12-month period ending the preceding December 31:

(1) The number of taxpayers that took the credits allowed in this Article.
(2) The amount of rehabilitation expenses and qualified rehabilitation expenditures with respect to which credits were taken.
(3) The total cost to the General Fund of the credits taken. (2005-429, s. 2.5.)

Effect of Amendments. — Session Laws 2005-429, s. 4, makes this section effective January 1, 2007.

§ 105-129.39: Reserved for future codification purposes.

ARTICLE 3E.

Low-Income Housing Tax Credits.

(See Editor's note for repeal of this Article.)

§ 105-129.40. (See Editor's note for repeal) Scope and definitions.

(a) Scope. — G.S. 105-129.41 applies to buildings that are awarded a federal credit allocation before January 1, 2003. G.S. 105-129.42 applies to buildings that are awarded a federal credit allocation on or after January 1, 2003.

(b) Definitions. — The definitions in section 42 of the Code and the following definitions apply in this Article:

(1) Housing Finance Agency. — The North Carolina Housing Finance Agency established in G.S. 122A-4.

(2) Pass-through entity. — Defined in G.S. 105-228.90. (2002-87, s. 1; 2003-416, s. 3.)

Article Has a Delayed Repeal Date. — For repeal of this Article, see G.S. 105-129.45.

§ 105-129.41. (See note for repeal) Credit for low-income housing awarded a federal credit allocation before January 1, 2003.

(a) Credit. — A taxpayer that is allowed for the taxable year a federal income tax credit for low-income housing under section 42 of the Code with respect to a qualified North Carolina low-income building, is allowed a credit under this Article equal to a percentage of the total federal credit allowed with respect to that building. For the purposes of this section, the total federal credit allowed is the total allowed during the 10-year federal credit period plus the disallowed first-year credit allowed in the 11th year. For the purposes of this section, the total federal credit is calculated based on qualified basis as of the end of the first year of the credit period and is not recalculated to reflect subsequent increases in qualified basis. For buildings that meet condition (c)(1) or (c)(1a) of this section, the credit percentage is seventy-five percent (75%). For other buildings, the credit percentage is twenty-five percent (25%).

(a1) Tax Election. — The credit allowed in this section is allowed against the franchise tax levied in Article 3 of this Chapter, the income taxes levied in Article 4 of this Chapter, or the gross premiums tax levied in Article 8B of this Chapter. The taxpayer must elect the tax against which the credit will be claimed when filing the return on which the first installment of the credit is claimed. This election is binding. Any carryforwards of the credit must be claimed against the same tax.

(a2) Cap. — The credit allowed in this section may not exceed fifty percent (50%) of the tax against which it is claimed for the taxable year, reduced by the sum of all other credits made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of credit, including carryforwards, claimed by the taxpayer under this section against each tax for the taxable year. Any unused portion of the credit may be carried forward for the succeeding five years.

(b) Timing. — The credit must be taken in equal installments over the five years beginning in the first taxable year in which the federal credit is claimed for that building. During the first taxable year in which the credit allowed under this section may be taken with respect to a building, the amount of the installment must be multiplied by the applicable fraction under section 42(f)(2)(A) of the Code. Any reduction in the amount of the first installment as a result of this multiplication is carried forward and may be taken in the first taxable year after the fifth installment is allowed under this section.

(b1) Allocation. — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this section may allocate the credit among any of its owners in its discretion as long as an owner's adjusted basis in the pass-through entity, as determined under the Code at the end of the taxable year in which the federal credit is first claimed, is at least forty percent (40%) of the amount of credit allocated to that owner. Owners to whom a credit is allocated are allowed the credit as if they had qualified for the credit directly. A pass-through entity and its owners must include with their tax returns for every taxable year in which an allocated credit is claimed a statement of the allocation made by the pass-through entity and the allocation that would have been required under G.S. 105-131.8 or G.S. 105-269.15.

(c) Qualifying Buildings. — As used in this section the term "qualified North Carolina low-income building" means a qualified low-income building that was allocated a federal credit under section 42(h)(1) of the Code, was not allowed a federal credit under section 42(h)(4) of the Code, and meets any of the following conditions:

(1) It is located in an area that, at the time the federal credit is allocated to the building, is a tier one or two enterprise area, as defined in G.S. 105-129.3.

(1a) **(Expires January 1, 2005)** It is located in a county that, at the time the federal credit is allocated to the building, has been designated as having sustained severe or moderate damage from a hurricane or a hurricane-related disaster, according to the Federal Emergency Management Agency impact map, revised on September 25, 1999. Those counties are Bertie, Beaufort, Bladen, Brunswick, Carteret, Columbus, Craven, Dare, Duplin, Edgecombe, Greene, Halifax, Hertford, Jones, Lenoir, Martin, Nash, New Hanover, Northampton, Onslow, Pasquotank, Pender, Pitt, Washington, Wayne, and Wilson Counties.

(2) It is located in an area that, at the time the federal credit is allocated to the building, is a tier three or four enterprise area, and forty percent (40%) of its residential units are both rent-restricted and occupied by individuals whose income is fifty percent (50%) or less of area median gross income as defined in the Code.

(3) It is located in an area that, at the time the federal credit is allocated to the building, is a tier five enterprise area, and forty percent (40%) of its residential units are both rent-restricted and occupied by individuals whose income is thirty-five percent (35%) or less of area median gross income as defined in the Code.

(d) Expiration. — If, in one of the five years in which an installment of the credit under this section accrues, the taxpayer is no longer eligible for the corresponding federal credit with respect to the same qualified North Carolina low-income building, then the credit under this section expires and the taxpayer may not take any remaining installment of the credit. If, in one of the five years in which an installment of the credit under this section accrues, the building no longer qualifies as a low-income building under subdivision (2) or (3) of subsection (c) of this section because less than forty percent (40%) of its residential units are both rent-restricted and occupied by individuals who meet the income requirements, then the credit under this section expires and the taxpayer may not take any remaining installments of the credit. The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S 105-129.17.

(e) Forfeiture for Disposition. — If the taxpayer is required under section 42(j) of the Code to recapture all or part of a federal credit under that section with respect to a qualified North Carolina low-income building, the taxpayer must report the recapture event to the Secretary and to the Housing Finance Agency. The taxpayer forfeits the corresponding part of the credit allowed under this section with respect to that qualified North Carolina low-income building. If the credit was allocated among the owners of a pass-through entity the forfeiture applies to the owners in the same proportion that the credit was allocated. This subsection does not apply when the recapture of part or all of the federal credit is the result of an event that occurs after the credit period described in subsection (b) of this section.

(f) Forfeiture for Change in Ownership. — If an owner of a pass-through entity that has qualified for the credit allowed under this section disposes of all or a portion of the owner's interest in the pass-through entity within five years from the date the federal credit is first claimed and the owner's interest in the pass-through entity is reduced to less than two-thirds of the owner's interest in the pass-through entity at the time the federal credit is first claimed, the owner must report the change to the Secretary and to the Housing Finance Agency The owner forfeits a portion of the credit. The amount forfeited is determined by multiplying the amount of credit by the percentage reduction in ownership and then multiplying that product by the forfeiture percentage. The forfeiture percentage equals the recapture percentage found in the table in section 50(a)(1)(B) of the Code. The remaining allowable credit is allocated equally among the five years in which the credit is claimed. Forfeiture as provided in this subsection is not required if the change in ownership is the result of any of the following:

(1) The death of the owner.
(2) A merger, consolidation, or similar transaction requiring approval by the shareholders, partners, or members of the taxpayer under applicable State law, to the extent the taxpayer does not receive cash or tangible property in the merger, consolidation, or other similar transaction.

(g) Liability From Forfeiture. — A taxpayer or an owner of a pass-through entity that forfeits a credit under this section is liable for all past taxes avoided as a result of the credit plus interest at the rate established under G.S. 105-241.21, computed from the date the taxes would have been due if the credit had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited. A taxpayer or owner of a pass-through entity that fails to pay the taxes and interest by the due date is subject to the penalties provided in G.S. 105-236. (1999-360, s. 11; 2000-56, s. 7; 2000-140, s. 88; 2001-431, s. 2; 2002-87, s. 2; 2003-416, s. 1; 2007-491, s. 44(1)a.)

Article Has a Delayed Repeal Date. — For delayed repeal of Article 3E, see G.S. 105-129.45.

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1999-360, s. 11 having been G.S. 105-129.16A.

Session Laws 2000-56, s. 10(f), as amended by Session Laws 2002-126, s. 30H, makes the amendment to subsection (d) by s. 7 of the act effective for taxable years beginning on or after January 1, 2000, and makes the amendment to subsection (a) and the addition of subdivision (c)(1a) effective for taxable years beginning on or after January 1, 2001, and applicable to buildings to which federal credits are allocated on or after January 1, 2000. Session Laws 2000-56, s. 10(f) had provided for the expiration of the amendment to subsection (a) by that act, and for the expiration of subdivision (c)(1a) on January 1, 2005. However, Session Laws 2002-87, s. 2 apparently superseded the sunset date as to subsection (a) by striking through the statutory language of the second version, but in subdivision (c)(1a) simply deleted the editorially inserted parenthetical reflecting the sunset date. At the direction of the Revisor of Statutes, subdivision (c)(1a) is set out as above.

Session Laws 2002-87, s. 1, which enacted Article 3E, G.S. 105-129.40 et seq., originally designated this section as "Reserved."

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 44(1)a, effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in the first sentence of subsection (g). For applicability, see Editor's note.

§ 105-129.42. (See note for repeal) Credit for low-income housing awarded a federal credit allocation on or after January 1, 2003.

(a) Definitions. — The following definitions apply in this section:

(1) Qualified Allocation Plan. — The plan governing the allocation of federal low-income housing tax credits for a particular year, as approved by the Governor after a public hearing and publication in the North Carolina Register.

(2) Qualified North Carolina low-income housing development. — A qualified low-income project or building that is allocated a federal tax credit under section 42(h)(1) of the Code and is described in subsection (c) of this section.

(3) Qualified residential unit. — A housing unit that meets the requirements of section 42 of the Code.

(b) Credit. — A taxpayer who is allocated a federal low-income housing tax credit under section 42 of the Code to construct or substantially rehabilitate a qualified North Carolina low-income housing development is allowed a credit equal to a percentage of the development's qualified basis, as determined pursuant to section 42 of the Code. For the purpose of this section, qualified basis is calculated based on the information contained in the carryover allocation and is not recalculated to reflect subsequent increases or decreases. No credit is allowed for a development that uses tax-exempt bond financing.

(c) Developments and Amounts. — The following table sets out the housing developments that are qualified North Carolina low-income housing developments and are allowed a credit under this section. The table also sets out the percentage of the development's qualified basis for which a credit is allowed. The designation of a county or city as Low Income, Moderate Income, or High Income and determinations of affordability are made by the Housing Finance Agency in accordance with the Qualified Allocation Plan in effect as of the time the federal credit is allocated. A change in the income designation of a county or city after a federal credit is allocated does not affect the percentage of the

Article 3E has a delayed repeal date. See notes.

developer's qualified basis for which a credit is allowed. The affordability requirements set out in the chart apply for the duration of the federal tax credit compliance period. If in any year a taxpayer fails to meet these affordability requirements, the credit is forfeited under subsection (h) of this section.

Type of Development	Percentage of Basis for Which Credit is Allowed
Forty percent (40%) of the qualified residential units are affordable to households whose income is fifty percent (50%) or less of area median income and the units are in a Low-Income county or city.	Thirty percent (30%)
Fifty percent (50%) of the qualified residential units are affordable to households whose income is fifty percent (50%) or less of the area median income and the units are in a Moderate-Income county or city.	Twenty percent (20%)
Fifty percent (50%) of the qualified residential units are affordable to households whose income is forty percent (40%) or less of the area median income and the units are in a High-Income county or city.	Ten percent (10%)
Twenty-five percent (25%) of the qualified residential units are affordable to households whose income is thirty percent (30%) or less of the area median income and the units are in a High-Income county or city.	Ten percent (10%)

(d) Election. — When a taxpayer to whom a federal low-income housing credit is allocated submits to the Housing Finance Agency a request to receive a carryover allocation for that credit, the taxpayer must elect a method for receiving the tax credit allowed by this section. A taxpayer may elect to receive the credit in the form of either a direct tax refund or a loan generated by transferring the credit to the Housing Finance Agency. Neither a direct tax refund nor a loan received as the result of the transfer of the credit is considered taxable income under this Chapter.

Under the direct tax refund method, a taxpayer elects to apply the credit allowed by this section to the taxpayer's liability under Article 4 of this Chapter. If the credit allowed by this section exceeds the amount of tax imposed by Article 4 for the taxable year, reduced by the sum of all other credits allowable, the Secretary must refund the excess. In computing the amount of tax against which multiple credits are allowed, nonrefundable credits are subtracted before this credit. The provisions that apply to an overpayment of tax apply to the refundable excess of a credit allowed under this section.

Under the loan method, a taxpayer elects to transfer the credit allowed by this section to the Housing Finance Agency and receive a loan from that Agency for the amount of the credit. The terms of the loan are specified by the Housing Finance Agency in accordance with the Qualified Allocation Plan.

(e) Exception When No Carryover. — If a taxpayer does not submit to the Housing Finance Agency a request to receive a carryover allocation, the taxpayer must elect the method for receiving the credit allowed by this section when the taxpayer submits to the Agency federal Form 8609. A taxpayer to

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whom this subsection applies claims the credit for the taxable year in which the taxpayer submits federal Form 8609.

(f) Pass-Through Entity. — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this Article does not distribute the credit among any of its owners. The pass-through entity is considered the taxpayer for purposes of claiming the credit allowed by this Article. If a return filed by a pass-through entity indicates that the entity is paying tax on behalf of the owners of the entity, the credit allowed under this Article does not affect the entity's payment of tax on behalf of its owners.

(g) Return and Payment. — A taxpayer may claim the credit allowed by this section on a return filed for the taxable year in which the taxpayer receives a carryover allocation of a federal low-income housing credit. The return must state the name and location of the qualified low-income housing development for which the credit is claimed.

If a taxpayer chooses the loan method for receiving the credit allowed under this section, the Secretary must transfer to the Housing Finance Agency the amount of credit allowed the taxpayer. The Agency must loan the taxpayer the amount of the credit on terms consistent with the Qualified Allocation Plan. The Housing Finance Agency is not required to make a loan to a qualified North Carolina low-income housing development until the Secretary transfers the credit amount to the Agency.

If the taxpayer chooses the direct tax refund method for receiving the credit allowed under this section, the Secretary must transfer to the Housing Finance Agency the refundable excess of the credit allowed the taxpayer. The Agency holds the refund due the taxpayer in escrow, with no interest accruing to the taxpayer during the escrow period. The Agency must release the refund to the taxpayer upon the occurrence of the earlier of the following:

(1) The Agency determines that the taxpayer has complied with the Qualified Allocation Plan and has completed at least fifty percent (50%) of the activities included in the development's qualified basis.
(2) Within 30 days after the date the development is placed in service.

(h) Forfeiture. — A taxpayer that receives a credit under this section must immediately report any recapture event under section 42 of the Code to the Housing Finance Agency. If the taxpayer or any of its owners are required under section 42(j) of the Code to recapture all or part of a federal credit with respect to a qualified North Carolina low-income development, the taxpayer forfeits the corresponding part of the credit allowed under this section. This requirement does not apply in the following circumstances:

(1) When the recapture of part or all of the federal credit is the result of an event that occurs in the sixth or a subsequent calendar year after the calendar year in which the development was awarded a federal credit allocation.
(2) The taxpayer elected to transfer the credit allowed by this section to the Housing Finance Agency.

(i) Liability From Forfeiture. — A taxpayer that forfeits all or part of the credit allowed under this section is liable for all past taxes avoided and any refund claimed as a result of the credit plus interest at the rate established under G.S. 105-241.21. The interest is computed from the date the Secretary transferred the credit amount to the Housing Finance Agency. The past taxes, refund, and interest are due 30 days after the date the credit is forfeited. A taxpayer that fails to pay the taxes, refund, and interest by the due date is subject to the penalties provided in G.S. 105-236. (2002-87, s. 1; 2003-416, ss. 6-8; 2004-110, s. 4.2; 2007-491, s. 44(1)a.)

Article Has a Delayed Repeal Date. — For delayed repeal of Article 3E, see G.S. 105-129.45.

Editor's Note. — Session Laws 2004-110, s. 8.1, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before the effective date of its amendment or repeal; nor does this act affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 44(1)a, effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in the first sentence of subsection (i). For applicability, see Editor's note.

§ 105-129.43. (See note for repeal) Substantiation.

A taxpayer allowed a credit under this Article must maintain and make available for inspection any information or records required by the Secretary of Revenue or the Housing Finance Agency. The burden of proving eligibility for a credit and the amount of the credit rests upon the taxpayer. (2002-87, s. 1.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3E, see G.S. 105-129.45.

§ 105-129.44. (See note for repeal.) Report.

The Department of Revenue must publish by May 1 of each year the following information for the 12-month period ending the preceding December 31:

(1) The number of taxpayers that took the credit allowed in this Article.

(2) The location of each qualified North Carolina low-income building or housing development for which a credit was taken.

(3) The total cost to the General Fund of the credits taken. (2002-87, s. 1; 2005-429, s. 2.6.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3E, see G.S. 105-129.45.

Editor's Note. — Session Laws 2005-429, s. 3, provides: "The Economic Development Oversight Committee shall study the issue of public disclosure as it relates to economic development efforts. Specifically, the Committee shall study ways of providing the public information about the employment levels, and any changes in employment levels, of businesses that receive economic development incentives from the State or local governments. The Committee may make an interim report on this study, including any recommendations for legislative proposals, to the 2006 Regular Session of the

Article 3E has a delayed repeal date. See notes.

2005 General Assembly and shall make a final report on this study to the 2007 General Assembly."

Effect of Amendments. — Session Laws 2005-429, s. 2.6, effective January 1, 2007, rewrote the introductory language and made minor stylistic changes throughout.

§ 105-129.45. Sunset.

This Article is repealed effective January 1, 2010. The repeal applies to developments to which federal credits are allocated on or after January 1, 2010. (2002-87, s. 1; 2004-110, s. 4.1.)

Editor's Note. — Session Laws 2004-110, s. 8.1, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before the effective date of its amendment or repeal; nor does this act affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

§§ 105-129.46 through 105-129.49: Reserved for future codification purposes.

ARTICLE 3F.

Research and Development.

(See note for repeal of Article)

§ 105-129.50. (See note for repeal) Definitions.

The definitions in section 41 of the Code apply in this Article. In addition, the following definitions apply in this Article:

(1) through (3): Reserved.

(4) North Carolina university research expenses. — Any amount the taxpayer paid or incurred to a research university for qualified research performed in this State or basic research performed in this State.

(5) Period of measurement. — Defined in the Small Business Size Regulations of the federal Small Business Administration.

(6) Qualified North Carolina research expenses. — Qualified research expenses, other than North Carolina university research expenses, for research performed in this State.

(7) Receipts. — Defined in the Small Business Size Regulations of the federal Small Business Administration.

(8) Related person. — Defined in G.S. 105-163.010.

(9) Research university. — An institution of higher education that meets one or both of the following conditions:

   a. It is classified as one of the following in the most recent edition of "A Classification of Institutions of Higher Education", the official report of The Carnegie Foundation for the Advancement of Teaching:

      1. Doctoral/Research Universities, Extensive or Intensive.
      2. Masters Colleges and Universities, I or II.
      3. Baccalaureate Colleges, Liberal Arts or General.

   b. It is a constituent institution of The University of North Carolina.

(10) Small business. — A business whose annual receipts, combined with the annual receipts of all related persons, for the applicable period of

measurement did not exceed one million dollars ($1,000,000). (2004-124, s. 32D.2.)

Article has a Delayed Repeal Date. — For repeal of this Article, see G.S. 105-129.51(b).

Editor's note. — Session Laws 2004-124, s. 32D.5, made this Article effective for business activities occurring on or after May 1, 2005.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.5, contains a severability clause.

§ 105-129.51. (See notes) Administration; sunset.

(a) A taxpayer is eligible for the credit allowed in this Article if it satisfies the requirements of G.S. 105-129.83(c), (d), (e), and (f) relating to wage standard, health insurance, environmental impact, and safety and health programs, respectively.

(b) This Article is repealed for taxable years beginning on or after January 1, 2009.

(c) Repealed by Session Laws 2004-124, s. 32D.4, effective for taxable years beginning on or after January 1, 2006. (2004-124, ss. 32D.2, s. 32D.4; 2006-252, s. 2.20.)

Article has a Delayed Repeal Date — For repeal of this Article, see G.S. 105-129.51(b).

Editor's note. — Session Laws 2004-124, s. 32D.5, made this Article effective for business activities occurring on or after May 1, 2005.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Effect of Amendments. — Session Laws 2004-124, s. 32D.4, effective for taxable years beginning on or after January 1, 2006, repealed subsection (c).

Session Laws 2006-252, s. 2.20, effective January 1, 2007, substituted "G.S. 105-129.83(c), (d), (e), and (f)" for "G.S. 105-129.4(b), (b2), (b3), and (b4)" in subsection (a).

§ 105-129.52. (See notes) Tax election; cap.

(a) Tax Election. — The credit allowed in this Article is allowed against the franchise tax levied in Article 3 of this Chapter or the income taxes levied in Article 4 of this Chapter. The taxpayer must elect the tax against which a credit will be claimed when filing the return on which the credit is first claimed. This election is binding. Any carryforwards of a credit must be claimed against the same tax.

(b) Cap. — A credit allowed in this Article may not exceed fifty percent (50%) of the amount of tax against which it is claimed for the taxable year, reduced by the sum of all other credits allowed against that tax, except tax payments made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of credit, including carryforwards, claimed by the taxpayer under this Article against each tax for the taxable year. Any unused portion of a credit allowed in this Article may be carried forward for the succeeding 15 years. (2004-124, s. 32D.2.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3F, see G.S. 105-129.51(b).

Editor's note. — Session Laws 2004-124, s. 32D.5, made this Article effective for business activities occurring on or after May 1, 2005.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.5, contains a severability clause.

§ 105-129.53. (See notes) Substantiation.

To claim a credit allowed by this Article, the taxpayer must provide any information required by the Secretary. Every taxpayer claiming a credit under this Article must maintain and make available for inspection by the Secretary any records the Secretary considers necessary to determine and verify the amount of the credit to which the taxpayer is entitled. The burden of proving eligibility for a credit and the amount of the credit rests upon the taxpayer, and no credit may be allowed to a taxpayer that fails to maintain adequate records or to make them available for inspection. (2004-124, s. 32D.2.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3F, see G.S. 105-129.51(b).

Editor's note. — Session Laws 2004-124, s. 32D.5, made this Article effective for business activities occurring on or after May 1, 2005.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.5, contains a severability clause.

§ 105-129.54. (See notes) Reports.

The Department of Revenue must publish by May 1 of each year the following information itemized by taxpayer for the 12-month period ending the preceding December 31:

(1) The number of taxpayers that took a credit allowed in this Article, itemized by the categories of small business, low-tier, other, and university research.
(2) The amount of each credit taken in each category.
(3) The total cost to the General Fund of the credits taken. (2004-124, s. 32D.2; 2005-429, s. 2.7.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3F, see G.S. 105-129.51(b).

Editor's note. — Session Laws 2004-124, s. 32D.5, made this Article effective for business activities occurring on or after May 1, 2005.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-429, s. 3, provides: "The Economic Development Oversight Committee shall study the issue of public disclosure as it relates to economic development efforts. Specifically, the Committee shall study ways of providing the public information about the employment levels, and any changes in employment levels, of businesses that receive economic development incentives from the State or local governments. The Committee may make an interim report on this study, including any recommendations for legislative proposals, to the 2006 Regular Session of the 2005 General Assembly and shall make a final report on this study to the 2007 General Assembly."

Effect of Amendments. — Session Laws 2005-429, s. 2.6, effective January 1, 2007, in the introductory language, substituted "publish" for "report to the Revenue Laws Study Committee and the Fiscal Research Division of the General Assembly" and "December 31" for "April 1"; substituted "took" for "claimed" in subdivision (1); and substituted "taken" for "claimed" in subdivisions (2) and (3).

Article 3F has a delayed repealed date. See notes.

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§ 105-129.55. (See notes) Credit for North Carolina research and development.

(a) Qualified North Carolina Research Expenses. — A taxpayer that has qualified North Carolina research expenses for the taxable year is allowed a credit equal to a percentage of the expenses, determined as provided in this subsection. Only one credit is allowed under this subsection with respect to the same expenses. If more than one subdivision of this subsection applies to the same expenses, then the credit is equal to the higher percentage, not both percentages combined. If part of the taxpayer's qualified North Carolina research expenses qualifies under subdivision (2) of this subsection and the remainder qualifies under subdivision (3) of this subsection, the applicable percentages apply separately to each part of the expenses.

(1) Small business. — If the taxpayer was a small business as of the last day of the taxable year, the applicable percentage is three and one-quarter percent (3.25%).

(2) Low-tier research. — For expenses with respect to research performed in a development tier one area, the applicable percentage is three and one-quarter percent (3.25%).

(3) Other research. — For expenses not covered under subdivision (1) or (2) of this subsection, the percentages provided in the table below apply to the taxpayer's qualified North Carolina research expenses during the taxable year at the following levels:

Expenses Over	**Up To**	**Rate**
-0-	$50 million	1.25%
$50 million	$200 million	2.25%
$200 million	—	3.25%

(b) North Carolina University Research Expenses. — A taxpayer that has North Carolina university research expenses for the taxable year is allowed a credit equal to twenty percent (20%) of the expenses. (2004-124, s. 32D.2; 2006-252, s. 2.1; 2007-323, s. 31.8(a).)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3F, see G.S. 105-129.51(b).

Editor's note. — Session Laws 2004-124, s. 32D.5, made this Article effective for business activities occurring on or after May 1, 2005.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-252, s. 2.1, effective January 1, 2007, substituted "a development tier one" for "an enterprise tier one, two, or three" in subdivision (a)(2).

Session Laws 2007-323, s. 31.8(a), effective for taxable years beginning on or after January 1, 2007, in subsection (a), substituted "three and one-quarter percents (3.25%)" for "three percent (3%)" at the end of subdivisions (a)(1) and (a)(2), and, in the table in subdivision (a)(3), substituted "(1.25%)" for "(1%)," "(2.25%)" for "(2%)," and "(3.25%)" for "(3%)"; and substituted "twenty percent (20%)" for "fifteen percent (15%)" in subsection (b).

§§ 105-129.56 through 105-129.59: Reserved for future codification purposes.

ARTICLE 3G.

Tax Incentives for Major Computer Manufacturing Facilities.

(See note for repeal of the Article.)

§ 105-129.60. (For delayed repeal, see note) Legislative findings.

The General Assembly finds that:

(1) It is the policy of the State to stimulate economic activity and to create and maintain sustainable jobs for the citizens of the State in strategically important industries.

(2) Both short-term and long-term economic trends at the regional, State, national, and international levels have made the successful implementation of the State's economic development policies and programs both more critical and more challenging; in particular, national trade policies and the resulting impact on domestic competitiveness have made the retention of manufacturing jobs more difficult at a time of transition in the national, State, and regional economies.

(3) Manufacturing employment in the State has been disproportionately affected by trade policies and global economic trends, resulting in the loss of jobs by many in the State's capable industrial workforce.

(4) Computer manufacturing and distribution has been an important industry for the State and has prospered in this State due to our strong and productive workforce, focused worker training programs, research capabilities, tradition of innovation, and concentration of companies.

(5) The computer manufacturing and distribution industry will remain a vital part of the world's, nation's, and State's future economy as society becomes more dependent on advanced computer technology.

(6) It is the intent of the State to encourage the sustainability of this industry cluster in this State and to encourage the maintenance and growth of computer manufacturing and distribution employment in the State through tax policies, investments in training capacity, and other policies and programs.

(7) The State must be an innovative leader in creating policies and programs that encourage the maintenance of manufacturing jobs in this country and State and in the development of efforts to support manufacturers during the transitional period as they adapt to rapidly changing global conditions. (2004-204, 1st Ex. Sess., s. 1.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3G, see G.S. 105-129.66.

Editor's note. — Session Laws 2004-204, s. 5, made this Article effective for business activities occurring on or after November 1, 2004, and for taxable years beginning on or after January 1, 2005.

§ 105-129.61. (For delayed repeal, see note) Definitions.

The following definitions apply in this Article:

(1) Computer manufacturing. — Defined in G.S. 105-164.14.

(2) Facility. — A single building or structure or a group of buildings or structures that are located on a single parcel of land or on contiguous parcels of land under common ownership and any other related real property contained on the parcel or parcels.

(3) Full-time job. — A permanent position that requires at least 1,600 hours of work per year and is intended to be held by one employee during the entire year.

(4) Increased employment level. — The total number of new full-time jobs and new permanent part-time jobs converted into full-time equivalences created by the taxpayer at the facility with respect to which the credit is claimed, either directly or indirectly through a related entity or strategic partner, as of December 31 as compared to the employment level of the taxpayer as of December 31 in the year in which the taxpayer begins construction of the facility with respect to which the credit is claimed or as of the date the Secretary makes the written determination required under G.S. 105-129.62, whichever is earlier. Jobs transferred from one area in the State to another area in the State are not considered new jobs for the purposes of this Article and may not be included in the increased employment level.

(5) Related entity. — An entity for which the taxpayer possesses directly or indirectly at least eighty percent (80%) of the control and value.

(6) Strategic partner. — A business that is engaged in activities at the facility that directly contribute to the manufacture and distribution of computers and computer peripherals and with whom the taxpayer has contracted to provide those activities at the facility in direct support of its manufacturing and distribution activities.

(7) Successor in business. — A corporation that through amalgamation, merger, acquisition, consolidation, or other legal succession becomes invested with the rights and assumes the burdens of the predecessor corporation and continues the computer manufacturing and distribution business.

(8) Unit output. — The total number of computers and computer peripherals produced, assembled, or manufactured at the facility during the taxable year. (2004-204, 1st Ex. Sess., s. 1.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3G, see G.S. 105-129.66.

§ 105-129.62. (For delayed repeal, see note) Eligibility.

(a) Determination by Secretary of Commerce. — A taxpayer is eligible for the credit allowed under this Article with respect to a facility in this State only if the Secretary of Commerce makes a written determination that the taxpayer has or is expected to have an increased employment level at the facility of at least 1,200 within five years after the time that the facility is first used as a computer manufacturing and distribution facility and that the taxpayer, either directly or indirectly through a related entity or strategic partner, has invested or is expected to invest at least one hundred million dollars ($100,000,000) in private funds to construct a computer manufacturing and distribution facility over a five-year period. For the purposes of this Article, costs of construction may include costs of acquiring and improving land for the facility, costs for renovations or repairs to existing buildings, and costs of equipping or reequipping the facility.

Article 3G has a delayed date. See note.

(b) Health Insurance. — A taxpayer is eligible for the credit allowed under this Article with respect to a facility in this State only if the taxpayer and the taxpayer's related entities and strategic partners whose employees are included in the taxpayer's increased employment level provide health insurance for all of the full-time jobs at the facility with respect to which the credit is claimed each year it claims a credit or carryforward of a credit. For the purposes of this subsection, an entity provides health insurance if it pays at least fifty percent (50%) of the premiums for health care coverage that equals or exceeds the minimum provisions of the basic health care plan of coverage recommended by the Small Employer Carrier Committee pursuant to G.S. 58-50-125.

Each year that a taxpayer claims a credit or carryforward of a credit allowed under this Article, the taxpayer must provide with the tax return the taxpayer's certification that the taxpayer and the taxpayer's related entities and strategic partners whose employees are included in the taxpayer's increased employment level continue to provide health insurance for all the full-time jobs at the facility with respect to which the credit is claimed. If the taxpayer, or a related entity or strategic partner of the taxpayer whose employees are included in the increased employment level of the taxpayer, ceases to provide health insurance for the jobs during a taxable year, the credit expires and the taxpayer may not take any remaining carryforward of the credit.

(c) Environmental Impact. — A taxpayer is eligible for the credit allowed under this Article with respect to a facility in this State only if as of the last day of the taxable year for which a credit or carryforward is claimed the taxpayer and the taxpayer's related entities and strategic partners whose employees are included in the taxpayer's increased employment level have no pending administrative, civil, or criminal enforcement actions based on alleged significant violations of any program implemented by an agency of the Department of Environment and Natural Resources, and have had no final determination of responsibility for any significant administrative, civil, or criminal violation of any program implemented by an agency of the Department of Environment and Natural Resources within the last five years. For the taxpayer's related entities and strategic partners, this subsection applies only to the activities of the related entity or strategic partner at the facility with respect to which a credit is claimed. A significant violation is a violation or alleged violation that does not satisfy any of the conditions of G.S. 143-215.6B(d). Upon request, the Secretary of Environment and Natural Resources must notify the Department of Revenue of whether a person currently has any of these pending actions or has had any of these final determinations within the last five years.

(d) Safety and Health Programs. — A taxpayer is eligible for the credit allowed under this Article with respect to a facility in this State only if as of the last day of the taxable year for which a credit or carryforward is claimed the taxpayer and the taxpayer's related entities and strategic partners whose employees are included in the taxpayer's increased employment level have no citations under the Occupational Safety and Health Act at the facility with respect to which the credit is claimed that have become a final order within the past three years for willful serious violations or for failing to abate serious violations. For the purposes of this subsection, "serious violation" has the same meaning as in G.S. 95-127. Upon request, the Secretary of Labor must notify the Department of Revenue of whether a person has had these citations become final orders within the past three years.

(e) Overdue Tax Debts. — A taxpayer is eligible for the credit allowed under this Article with respect to a facility only if as of the last day of the taxable year for which a credit or carryforward is claimed the taxpayer and the taxpayer's related entities and strategic partners whose employees are included in the taxpayer's increased employment level have no overdue tax debts that have not been satisfied or otherwise resolved.

(f) Relationship With Related Entities and Strategic Partners. — A taxpayer must obtain the written consent of related entities and strategic partners to include jobs created by those entities in the taxpayer's increased employment level. If a taxpayer fails to obtain this written consent, the taxpayer may not include jobs created by the applicable business in its increased employment level. This consent, once granted, is irrevocable. A job may not be included in the increased employment level of more than one entity. The taxpayer is responsible for providing all information needed to verify eligibility for the credit, including information relating to the related entities or strategic partners of the taxpayer. (2004-204, 1st Ex. Sess., s. 1; 2005-435, s. 29(a), (b), (c).)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3G, see G.S. 105-129.66.

Effect of Amendments. — Session Laws 2005-435, ss. 29.(a) through 29.(c), effective September 27, 2005, substituted "Article" for "section" in the introductory language of subsections (c) through (e).

§ 105-129.63. (For delayed repeal, see note) Determination by the Secretary of Commerce.

The taxpayer must apply to the Secretary of Commerce for the determination required under G.S. 105-129.62. The application must be made under oath and must provide any information the Secretary requires in order to make the determination. The determination by the Secretary of Commerce is a factual determination. The Secretary must make this determination in any case in which the taxpayer can demonstrate performance or can provide a credible plan for performance.

If the taxpayer fails to create the required number of new jobs or to make the required investment, the information provided by the taxpayer on the application proves to have been false at the time it was given, and the person making the application knew or should have known that the information was false, the taxpayer forfeits any credits claimed under this Article with respect to the facility. A taxpayer that forfeits a credit under this Article is liable for all past taxes avoided as a result of the credit plus interest at the rate established under G.S. 105-241.21, computed from the date the taxes would have been due if the credit had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited; a taxpayer that fails to pay the past taxes and interest by the due date is subject to the penalties provided in G.S. 105-236. (2004-204, 1st Ex. Sess., s. 1; 2005-435, s. 29(d); 2007-491, s. 44(1)a.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3G, see G.S. 105-129.66.

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections

11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2005-435, s. 29(d), effective September 27, 2005, 2006, substituted "Article" for "section" in the second sentence of the second paragraph.

Session Laws 2007-491, s. 44(1)a, effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in the next-to-last sentence of the second paragraph. For applicability, see Editor's note.

§ 105-129.64. (For delayed repeal, see note) Credit for major computer manufacturing facilities.

(a) General Credit. — A taxpayer that meets the eligibility requirements of G.S. 105-129.62 is eligible for a credit against the taxes imposed by Articles 3 and 4 of this Chapter. For taxable years beginning with the 2006 taxable year, the amount of the credit allowable in a year is determined based on the taxable year, the unit output of the facility, the production factor, and the increased employment level at the facility in the current taxable year and previous taxable years.

(b) 2005 Taxable Year. — For taxable years beginning on or after January 1, 2005, but before January 1, 2006, the amount of the credit is equal to ten million dollars ($10,000,000) if the taxpayer, either directly or through a related entity, has invested at least twenty-five million dollars ($25,000,000) in private funds by the end of the taxable year to construct a computer manufacturing and distribution facility in this State.

(c) 2006-2009 Taxable Years. — For taxable years beginning on or after January 1, 2006, but before January 1, 2010, the maximum amount of the credit is ten million dollars ($10,000,000). The amount of the credit that may be claimed is determined by multiplying the employment level adjustment factor by the lesser of ten million dollars ($10,000,000) and the product of the unit output of the facility and the applicable production factor listed in subsection (f) of this section. For the purposes of this subsection, the employment level adjustment factor is the lesser of one and the number derived by dividing the taxpayer's increased employment level for the year by the applicable target increased employment level provided in the table below:

Year	Target Increased Employment Level
2006	600
2007	1,000
2008	1,100
2009	1,500

(d) 2010-2014 Taxable Years. — For taxable years beginning on or after January 1, 2010, but before January 1, 2015, the maximum amount of the credit is fifteen million dollars ($15,000,000) if the taxpayer has in any year attained an increased employment level of 1,500. Otherwise the maximum amount of the credit is ten million dollars ($10,000,000). The amount of the credit is determined as follows:

(1) If the taxpayer has ever attained an increased employment level of at least 1,500, the amount of the credit that may be claimed is the lesser of fifteen million dollars ($15,000,000) and the amount determined by multiplying the unit output of the facility by the applicable production factor listed in subsection (f) of this section. If the taxpayer's increased employment level has decreased by more than forty percent (40%)

Article 3G has a delayed repeal date. See note.

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from that of the previous taxable year, the amount of the credit that may be claimed must be reduced by multiplying the amount determined under this subdivision by a fraction, the numerator of which is the taxpayer's increased employment level for the taxable year and the denominator of which is 1,500.

(2) If the taxpayer has never attained an increased employment level of at least 1,500, the amount of the credit that may be claimed is equal to the employment level adjustment factor multiplied by the lesser of ten million dollars ($10,000,000) and the product of the unit output of the facility and the applicable production factor listed in subsection (f) of this section. For the purposes of this subdivision, the employment level adjustment factor is the lesser of one and the number derived by dividing the taxpayer's increased employment level for the year by 1,500.

(e) 2015-2019 Taxable Years. — For taxable years beginning on or after January 1, 2015, but before January 1, 2020, the maximum amount of the credit is twenty million dollars ($20,000,000) if the taxpayer has in any year attained an increased employment level of 2,500. If the taxpayer has in any year attained an increased employment level of at least 1,500, but in no year has attained an increased employment level of at least 2,500, the maximum amount of the credit is fifteen million dollars ($15,000,000). Otherwise the maximum amount of the credit is ten million dollars ($10,000,000). The amount of the credit is determined as follows:

(1) If the taxpayer has ever attained an increased employment level of at least 2,500 and the taxpayer's increased employment level for the current year is at least 1,500, the amount of the credit is the lesser of twenty million dollars ($20,000,000) and the amount determined by multiplying the unit output of the facility by the applicable production factor listed in subsection (f) of this section.

(2) If the taxpayer has ever attained an increased employment level of at least 1,500 but has never attained an increased employment level of at least 2,500, or if the taxpayer has ever attained an increased employment level of at least 2,500 and the taxpayer's current increased employment level is less than 1,500, the amount of the credit that may be claimed is the lesser of fifteen million dollars ($15,000,000) and the amount determined by multiplying the unit output of the facility by the applicable production factor listed in subsection (f) of this section. If the taxpayer's increased employment level has decreased by more than forty percent (40%) from that of the previous taxable year and (i) the increased employment level of the previous year was 1,500 or less or (ii) the increased employment level of the current year is 900 or less, the amount of the credit that may be claimed must be reduced by multiplying the amount determined under this subdivision by a fraction, the numerator of which is the taxpayer's increased employment level for the taxable year and the denominator of which is 1,500.

(3) If the taxpayer has never attained an increased employment level of at least 1,500, the amount of the credit that may be claimed is equal to the employment level adjustment factor multiplied by the lesser of ten million dollars ($10,000,000) and the product of the unit output of the facility and the applicable production factor listed in subsection (f) of this section. For the purposes of this subdivision, the employment level adjustment factor is the lesser of one and the number derived by dividing the taxpayer's employment level for the year by 1,500.

(f) Production Factor. — For taxable years beginning on or after January 1, 2006, but before January 1, 2007, the production factor is fifteen dollars ($15.00). For all other taxable years, the production factor is six dollars and twenty-five cents ($6.25).

(g) Expiration. — If the taxpayer fails to attain an increased employment level of at least 1,200, either directly or in conjunction with its strategic partners and related entities, within five years after beginning construction of the facility with respect to which a credit is claimed or the taxpayer fails to invest at least one hundred million dollars ($100,000,000) in private funds to construct a computer manufacturing and distribution facility over a five-year period, the taxpayer may not take any further credits under this Article with respect to that facility. Failure to attain an increased employment level of 1,200 within the five years or to invest at least one hundred million dollars ($100,000,000) in private funds to construct the facility does not result in forfeiture of credits previously taken under this section unless the provisions of G.S. 105-129.63 apply. (2004-204, 1st Ex. Sess., s. 1.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3G, see G.S. 105-129.66.

§ 105-129.65. (For delayed repeal, see note) Allocation; cap; makeup; and carryforward.

(a) Allocation. — The credit allowed by this Article may be taken against the franchise taxes levied under Article 3 of this Chapter and the income taxes levied under Article 4 of this Chapter. When the taxpayer claims a credit under this Article, the taxpayer must elect the percentage of the credit to be applied against the taxes levied under Article 3 of this Chapter with any remaining percentage to be applied against the taxes levied under Article 4 of this Chapter. This election is not binding for the year in which it is made or for any carryforwards of that credit. A taxpayer may elect a different allocation for each year in which the taxpayer qualifies for a credit.

(b) Cap. — The amount of credit claimed in a taxable year under this Article may not exceed the lesser of the amount determined under G.S. 105-129.64 and the total amount of tax imposed under Articles 3 and 4 of this Chapter, reduced by the sum of all other credits allowed against those taxes, except tax payments made by or on behalf of the taxpayer. Credits that may eliminate only a portion of the taxpayer's liability must be taken before credits that may eliminate all of a taxpayer's liability, which in turn must be taken before any credits that are refundable. This limitation applies to the cumulative amount of the credit allowed in any tax year, including carryforwards claimed by the taxpayer under this Article for previous tax years.

(c) Makeup. — In any year in which the amount of the credit calculated based on output exceeds the applicable cap under G.S. 105-129.64, the excess credit may be credited to a make up account. Amounts credited to the make up account may remain in the account for seven years or until they are used as provided in this subsection, whichever is earlier. In any year in which the amount of the credit calculated based on output is less than the applicable cap under G.S. 105-129.64, the taxpayer may increase the credit allowed for that taxable year to the cap amount, as adjusted by any applicable employment level adjustment factor, by using excess credit available in the make up account. A successor in business may take the amounts available in a make up account of a predecessor corporation as if they were excess credits available in a make up account of the successor in business.

Article 3G has a delayed repeal date. See note.

(d) Carryforward. — Any unused portion of a credit allowed under this Article may be carried forward for the next succeeding 25 years. A successor in business may take the carryforwards of a predecessor corporation as if they were carryforwards of a credit allowed to the successor in business. (2004-204, 1st Ex. Sess., s. 1.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3G, see G.S. 105-129.66.

§ 105-129.65A. (For delayed repeal, see note) Reports.

The Department of Revenue must publish by May 1 of each year the following information itemized by taxpayer for the 12-month period ending the preceding December 31:

(1) The number of taxpayers taking a credit allowed in this Article.

(2) The number of new jobs created with respect to which credits were taken.

(3) The amount of investment in real property and machinery and equipment with respect to which credits were taken.

(4) The total cost to the General Fund of the credits taken. (2005-429, s. 2.8.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3G, see G.S. 105-129.66.

Editor's Note. — Session Laws 2005-429, s. 3, provides: "The Economic Development Oversight Committee shall study the issue of public disclosure as it relates to economic development efforts. Specifically, the Committee shall study ways of providing the public information about the employment levels, and any changes in employment levels, of businesses that receive economic development incentives from the State or local governments. The Committee may make an interim report on this study, including any recommendations for legislative proposals, to the 2006 Regular Session of the 2005 General Assembly and shall make a final report on this study to the 2007 General Assembly."

Effect of Amendments. — Session Laws 2005-429, s. 4, made this section effective January 1, 2007.

§ 105-129.66. Sunset.

This Article is repealed for business activities occurring in taxable years beginning on or after January 1, 2020. (2004-204, 1st Ex. Sess., s. 1.)

ARTICLE 3H.

Mill Rehabilitation Tax Credit.

(See G.S. 105-129.75 for repeal of the Article.)

§ 105-129.70. (See note for repeal) Definitions.

The following definitions apply in this Article:

(1) Certified historic structure. — Defined in section 47 of the Code.

(2) Certified rehabilitation. — Defined in G.S. 105-129.36.

(3) Cost certification. — The certification obtained by the State Historic Preservation Officer from the taxpayer of the amount of the qualified rehabilitation expenditures or the rehabilitation expenses incurred with respect to an eligible site.

Article 3H has a delayed repeal date. See note.

(3a) Development tier area. — Defined in G.S. 143B-437.08.

(4) Eligibility certification. — The certification obtained from the State Historic Preservation Officer that the applicable facility comprises an eligible site and that the rehabilitation is a certified rehabilitation.

(5) Eligible site. — A site located in this State that satisfies all of the following conditions:

a. It was used as a manufacturing facility or for purposes ancillary to manufacturing, as a warehouse for selling agricultural products, or as a public or private utility.

b. It is a certified historic structure or a State-certified historic structure.

c. It has been at least eighty percent (80%) vacant for a period of at least two years immediately preceding the date the eligibility certification is made.

d. The cost certification documents that the qualified rehabilitation expenditures for a site for which a taxpayer is allowed a credit under section 47 of the Code or the rehabilitation expenses for a site for which the taxpayer is not allowed a credit under section 47 of the Code exceed three million dollars ($3,000,000) for the site as a whole.

(6) Repealed by Session Laws 2006-252, s. 2.22, effective January 1, 2007.

(7) Pass-through entity. — Defined in G.S. 105-228.90.

(8) Qualified rehabilitation expenditures. — Defined in section 47 of the Code.

(9) Rehabilitation expenses. — Defined in G.S. 105-129.36.

(10) State-certified historic structure. — Defined in G.S. 105-129.36.

(11) State Historic Preservation Officer. — Defined in G.S. 105-129.36. (2006-40, s. 1; 2006-252, s. 2.22.)

Article has Delayed Repeal Date. — For repeal of this Article, see G.S. 105-129.75.

Editor's Note. — Session Laws 2006-40, s. 5, made this Article effective for taxable years beginning on or after January 1, 2006, and applicable to eligible sites placed into service on or after July 1, 2006.

Effect of Amendments. — Session Laws 2006-252, s. 2.22, effective January 1, 2007, added subdivision (3a) and deleted subdivision (6), which read: "Enterprise tier area. — Defined in G.S. 105-129.3."

§ 105-129.71. (See note for repeal) Credit for income-producing rehabilitated mill property.

(a) Credit. — A taxpayer who is allowed a credit under section 47 of the Code for making qualified rehabilitation expenditures with respect to an eligible site is allowed a credit equal to a percentage of the expenditures that qualify for the federal credit. The credit may be claimed in the year in which the eligible site is placed into service. When the eligible site is placed into service in two or more phases in different years, the amount of credit that may be claimed in a year is the amount based on the qualified rehabilitation expenditures associated with the phase placed into service during that year. In order to be eligible for a credit allowed by this Article, the taxpayer must provide to the Secretary a copy of the eligibility certification and the cost certification. The amount of the credit is as follows:

(1) For an eligible site located in a development tier one or two area, determined as of the date of certification, the amount of the credit is equal to forty percent (40%) of the qualified rehabilitation expenditures.

Article 3H has a delayed repeal date. See note.

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(2) For an eligible site located in a development tier three area, determined as of the date of certification, the amount of the credit is equal to thirty percent (30%) of the qualified rehabilitation expenditures.

(b) Allocation. — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this section may allocate the credit among any of its owners in its discretion as long as an owner's adjusted basis in the pass-through entity, as determined under the Code, at the end of the taxable year in which the eligible site is placed in service, is at least forty percent (40%) of the amount of credit allocated to that owner. Owners to whom a credit is allocated are allowed the credit as if they had qualified for the credit directly. A pass-through entity and its owners must include with their tax returns for every taxable year in which an allocated credit is claimed a statement of the allocation made by the pass-through entity and the allocation that would have been required under G.S. 105-131.8 or G.S. 105-269.15.

(c) Forfeiture for Change in Ownership. — If an owner of a pass-through entity that has qualified for the credit allowed under this section disposes of all or a portion of the owner's interest in the pass-through entity within five years from the date the eligible site is placed in service and the owner's interest in the pass-through entity is reduced to less than two-thirds of the owner's interest in the pass-through entity at the time the eligible site was placed in service, the owner forfeits a portion of the credit. The amount forfeited is determined by multiplying the amount of credit by the percentage reduction in ownership and then multiplying that product by the forfeiture percentage. The forfeiture percentage equals the recapture percentage found in the table in section 50(a)(1)(B) of the Code.

(d) Exceptions to Forfeiture. — Forfeiture as provided in subsection (c) of this section is not required if the change in ownership is the result of any of the following:

(1) The death of the owner.

(2) A merger, consolidation, or similar transaction requiring approval by the shareholders, partners, or members of the taxpayer under applicable State law, to the extent the taxpayer does not receive cash or tangible property in the merger, consolidation, or other similar transaction.

(e) Liability from Forfeiture. — A taxpayer or an owner of a pass-through entity that forfeits a credit under this section is liable for all past taxes avoided as a result of the credit plus interest at the rate established under G.S. 105-241.21, computed from the date the taxes would have been due if the credit had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited. A taxpayer or owner of a pass-through entity that fails to pay the taxes and interest by the due date is subject to the penalties provided in G.S. 105-236. (2006-40, s. 1; 2006-252, s. 2.23; 2006-259, s. 47.5; 2007-491, s. 44(1)a.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3H, see G.S. 105-129.75.

Editor's note. — Session Laws 2006-40, s. 5, made this Article effective for taxable years beginning on or after January 1, 2006, and applicable to eligible sites placed into service on or after July 1, 2006.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2006-252, s. 2.23, as amended by Session Laws 2006-259, s. 47.5, effective January 1, 2007, substituted "a development tier one or two" for "an enterprise tier one, two, or three" in subdivision (a)(1) and "a development tier three" for "an enterprise tier four or five" in subdivision (a)(2).

Session Laws 2007-491, s. 44(1)a, effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in the first sentence of subsection (e). For applicability, see Editor's note.

§ 105-129.72. (See note for repeal) Credit for nonincome-producing rehabilitated mill property.

(a) Credit. — A taxpayer who is not allowed a federal income tax credit under section 47 of the Code and who makes rehabilitation expenses with respect to an eligible site is allowed a credit equal to a percentage of the rehabilitation expenses. The entire credit may not be taken for the taxable year in which the property is placed in service, but must be taken in five equal installments beginning with the taxable year in which the property is placed in service. When the eligible site is placed into service in two or more phases in different years, the amount of credit that may be claimed in a year is the amount based on the rehabilitation expenses associated with the phase placed into service during that year. In order to be eligible for a credit allowed by this Article, the taxpayer must provide to the Secretary a copy of the eligibility certification and the cost certification. For an eligible site located in a development tier one or two area, determined as of the date of certification, the amount of the credit is equal to forty percent (40%) of the rehabilitation expenses. No credit is allowed for a site located in a development tier three area.

(b) Allocation. — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this section may allocate the credit among any of its owners in its discretion as long as an owner's adjusted basis in the pass-through entity, as determined under the Code, at the end of the taxable year in which the eligible site is placed in service, is at least forty percent (40%) of the amount of credit allocated to that owner. Owners to whom a credit is allocated are allowed the credit as if they had qualified for the credit directly. A pass-through entity and its owners must include with their tax returns for every taxable year in which an allocated credit is claimed a statement of the allocation made by the pass-through entity and the allocation that would have been required under G.S. 105-131.8 or G.S. 105-269.15.

(c) Forfeiture for Change in Ownership. — If an owner of a pass-through entity that has qualified for the credit allowed under this section disposes of all or a portion of the owner's interest in the pass-through entity within five years from the date the eligible site is placed in service and the owner's interest in the pass-through entity is reduced to less than two-thirds of the owner's interest in the pass-through entity at the time the eligible site was placed in service, the owner forfeits a portion of the credit. The amount forfeited is determined by multiplying the amount of credit by the percentage reduction in ownership and then multiplying that product by the forfeiture percentage. The forfeiture percentage equals the recapture percentage found in the table in section 50(a)(1)(B) of the Code. The remaining allocable credit is allocated equally among the five years in which the credit is claimed.

(d) Exceptions to Forfeiture. — Forfeiture as provided in subsection (c) of this section is not required if the change in ownership is the result of any of the following:

(1) The death of the owner.

(2) A merger, consolidation, or similar transaction requiring approval by the shareholders, partners, or members of the taxpayer under applicable State law, to the extent the taxpayer does not receive cash or tangible property in the merger, consolidation, or other similar transaction.

(e) Liability from Forfeiture. — A taxpayer or an owner of a pass-through entity that forfeits a credit under this section is liable for all past taxes avoided as a result of the credit plus interest at the rate established under G.S. 105-241.21, computed from the date the taxes would have been due if the credit had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited. A taxpayer or owner of a pass-through entity that fails to pay the taxes and interest by the due date is subject to the penalties provided in G.S. 105-236. (2006-40, s. 1; 2006-252, s. 2.24; 2007-491, s. 44(1)a.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3H, see G.S. 105-129.75.

Editor's Note. — Session Laws 2006-40, s. 5, made this Article effective for taxable years beginning on or after January 1, 2006, and applicable to eligible sites placed into service on or after July 1, 2006.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2006-252, s. 2.24, effective January 1, 2007, in subsection (a), substituted "a development tier one or two" for "an enterprise tier one, two, or three" in the next-to-last sentence and "a development tier three" for "an enterprise tier four or five" in the last sentence.

Session Laws 2007-491, s. 44(1)a, effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in the first sentence of subsection (e). For applicability, see Editor's note.

§ 105-129.73. (See note for repeal) Tax credited; cap.

(a) Taxes Credited. — The credits allowed by this Article may be claimed against the franchise tax imposed under Article 3 of this Chapter, the income taxes imposed under Article 4 of this Chapter, or the gross premiums tax imposed under Article 8B of this Chapter. The taxpayer may take the credits allowed by this Article against only one of the taxes against which it is allowed. The taxpayer must elect the tax against which a credit will be claimed when filing the return on which it is claimed. This election is binding. Any carryforwards of the credit must be claimed against the same tax.

Article 3H has a delayed repeal date. See note.

(b) Cap. — A credit allowed under this Article may not exceed the amount of the tax against which it is claimed for the taxable year reduced by the sum of all credits allowed, except payment of tax made by or on behalf of the taxpayer. Any unused portion of the credit may be carried forward for the succeeding nine years. (2006-40, s. 1.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3H, see G.S. 105-129.75.

Session Laws 2006-40, s. 5, made this Article effective for taxable years beginning on or after January 1, 2006, and applicable to eligible sites placed into service on or after July 1, 2006.

§ 105-129.74. (See note for repeal) Coordination with Article 3D of this Chapter.

A taxpayer that claims a credit under this Article may not also claim a credit under Article 3D of this Chapter with respect to the same activity. The rules and fee schedule adopted under G.S. 105-129.36A apply to this Article. (2006-40, s. 1.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3H, see G.S. 105-129.75.

Editor's note. — Session Laws 2006-40, s. 5, made this Article effective for taxable years beginning on or after January 1, 2006, and applicable to eligible sites placed into service on or after July 1, 2006.

§ 105-129.75. Sunset.

This Article expires for qualified rehabilitation expenditures and rehabilitation expenses incurred on or after January 1, 2011. (2006-40, s. 1.)

Editor's Note. — Session Laws 2006-40, s. 5, made this Article effective for taxable years beginning on or after January 1, 2006, and applicable to eligible sites placed into service on or after July 1, 2006.

Article 3I.

§§ 105-129.76 through 105-129.79: Reserved for future codification purposes.

Article 3J.

Tax Credits for Growing Businesses.

(Effective for taxable years beginning on or after January 1, 2007. See G.S. 105-129.82(a) for repeal of Article.)

§ 105-129.80. (See notes) Legislative findings.

The General Assembly finds that:

(1) It is the policy of the State of North Carolina to stimulate economic activity and to create new jobs for the citizens of the State by

encouraging and promoting the expansion of existing business and industry within the State and by recruiting and attracting new business and industry to the State.

(2) Both short-term and long-term economic trends at the State, national and international levels have made the successful implementation o the State's economic development policy and programs both more critical and more challenging, and the decline in the State's traditional industries, and the resulting adverse impact upon the State and its citizens, have been exacerbated in recent years by adverse national and State economic trends that contribute to the reduction in the State's industrial base and that inhibit the State's ability to sustain or attract new and expanding businesses.

(3) The economic condition of the State is not static, and recent changes in the State's economic condition have created economic distress that requires a reevaluation of certain existing State programs and the enactment of a new program as provided in this Article that is designed to stimulate new economic activity and to create new jobs within the State.

(4) The enactment of this Article is necessary to stimulate the economy and create new jobs in North Carolina, and this Article will promote the general welfare and confer, as its primary purpose and effect benefits on citizens throughout the State through the creation of new jobs, an enlargement of the overall tax base, an expansion and diversification of the State's industrial base, and an increase in revenue to the State and its political subdivisions.

(5) The purpose of this Article is to stimulate economic activity and to create new jobs within the State.

(6) The State is in need of a focused tax credit program that encourages and facilitates economic growth and development within the State.

(7) The resources of the State are not evenly distributed throughout the State and different communities have different abilities and needs in attracting and maintaining new and expanding business and industry. (2006-252, s. 1.1.)

Article has Delayed Repeal Date. — For repeal of this Article, see G.S. 105-129.82(a).

Editor's Note. — Session Laws 2006-252, s. 1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

Session Laws 2006-252, s. 1.4, provides: "The Department of Commerce shall, in consultation with the North Carolina Rural Center, Inc. and lower-tiered counties, develop additional strategies to enhance economic growth and development in economically distressed areas. The Department shall report on the results of this study to the Joint Legislation Economic Development Oversight Committee by January 1, 2007. For the purposes of this section, 'economically distressed areas' means enterprise tier one areas as defined in G.S. 105-129.3."

§ 105-129.81. (See notes) Definitions.

The following definitions apply in this Article:

(1) Agrarian growth zone. — Defined in G.S. 143B-437.010.

(2) Air courier services. — The furnishing of air delivery of individually addressed letters and packages for compensation, in interstate commerce, except by the United States Postal Service.

(3) Aircraft maintenance and repair. — The provision of specialized maintenance or repair services for commercial aircraft or the rebuilding of commercial aircraft.

(4) Business property. — Tangible personal property that is used in a business and capitalized under the Code.

(5) Company headquarters. — A corporate, subsidiary, or regional managing office, as defined by NAICS in United States industry 551114, that is responsible for strategic or organizational planning and decision making for the business on an international, national, or multistate regional basis.

(6) Cost. — In the case of property owned by the taxpayer, cost is determined pursuant to regulations adopted under section 1012 of the Code. In the case of property the taxpayer leases from another, cost is value as determined pursuant to G.S. 105-130.4(j)(2).

(7) Customer service call center. — The provision of support service by a business to its customers by telephone or other electronic means to support products or services of the business. For the purposes of this definition, an establishment is primarily engaged in providing support services by telephone or other electronic means only if at least sixty percent (60%) of its calls are incoming or at least sixty percent (60%) of its other electronic communications are initiated by its customers.

(8) Development tier. — The classification assigned to an area pursuant to G.S. 143B-437.08.

(9) Electronic shopping and mail order houses. — An industry in electronic shopping and mail order houses industry group 4541 as defined by NAICS.

(10) Establishment. — Defined in 29 C.F.R. § 1904.46, as it existed on January 1, 2002.

(11) Full-time job. — A position that requires at least 1,600 hours of work per year and is intended to be held by one employee during the entire year. A full-time employee is an employee who holds a full-time job.

(12) Hub. — Defined in G.S. 105-164.3.

(13) Information technology and services. — An industry in one of the following:
   a. Internet service providers, Web search portals, and data processing subsector 518 as defined by NAICS.
   b. Software publishers industry group 5112 as defined by NAICS.
   c. Computer systems design and related services industry group 5415 as defined by NAICS.

(14) Long-term unemployed worker. — An individual that has been totally unemployed for at least the preceding 26 consecutive weeks as evidenced by records maintained by the Employment Security Commission.

(15) Manufacturing. — An industry in manufacturing sectors 31 through 33, as defined by NAICS, but not including quick printing or retail bakeries.

(16) Motorsports facility. — A motorsports racetrack classified in the United States racetrack national industry 711212, as defined by NAICS.

(17) Motorsports racing team. — A professional racing team primarily engaged in the research and development, design, manufacture, repair, maintenance, and operation of motor vehicles used in live motorsports racing events before a paying audience.

(18) NAICS. — The North American Industry Classification System adopted by the United States Office of Management and Budget as of December 31, 2002.

(19) New job. — A full-time job that represents a net increase in the number of the taxpayer's employees statewide. A new employee is an employee who holds a new job. The term does not include a job currently located in this State that is transferred to the business from a related member of the business.
(20) Overdue tax debt. — Defined in G.S. 105-243.1.
(21) Purchase. — Defined in section 179 of the Code.
(22) Related member. — Defined in G.S. 105-130.7A.
(23) Research and development. — An industry in scientific research and development services industry group 5417 as defined by NAICS.
(24) Urban progress zone. — The classification assigned to an area pursuant to G.S. 143B-437.09.
(25) Warehousing. — An industry in warehousing and storage subsector 493 as defined by NAICS.
(26) Wholesale trade. — An industry in wholesale trade sector 42 as defined by NAICS. (2006-252, s. 1.1; 2007-484, s. 33(b).)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3J, see G.S. 105-129.82(a).

Editor's note. — Session Laws 2006-252, s. 1.1, enacted subdivisions (2) and (3) as subdivisions (3) and (2), respectively. They were redesignated at the direction of the Revisor of Statutes to preserve alphabetical order.

Session Laws 2006-252, s. 1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

Effect of Amendments. — Session Laws 2007-484, s. 33(a), effective July 1, 2007, substituted "G.S. 143B-437.010" for "G.S. 143B-437.10" in subdivision (1).

§ 105-129.82. (See note) Sunset; studies.

(a) Sunset. — This Article is repealed effective for business activities that occur on or after January 1, 2011.

(b) Equity Study. — The Department of Commerce shall study the effect of the tax incentives provided in this Article on tax equity. This study shall include the following:
(1) Reexamining the formula in G.S. 143B-437.08 used to define development tiers, to include consideration of alternative measures for more equitable treatment of counties in similar economic circumstances.
(2) Considering whether the assignment of tiers and the applicable thresholds are equitable for smaller counties.
(3) Compiling any available data on whether expanding North Carolina businesses receive fewer benefits than out-of-State businesses that locate to North Carolina.

(c) Impact Study. — The Department of Commerce shall study the effectiveness of the tax incentives provided in this Article. This study shall include:
(1) Studying the distribution of tax incentives across new and expanding businesses and industries.
(2) Examining data on economic recruitment for the period from 2005 through the most recent year for which data are available by county, by industry type, by size of investment, and by number of jobs, and other relevant information to determine the pattern of business locations and expansions before and after the enactment of this Article.
(3) Measuring the direct costs and benefits of the tax incentives.
(4) Compiling available information on the current use of incentives by other states and whether that use is increasing or declining.

(d) Report. — The Department of Commerce shall report the results of these studies and its recommendations to the General Assembly biennially with the first report due by June 1, 2009. (2006-252, s. 1.1.)

Editor's Note. — Session Laws 2006-252, s. 1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

§ 105-129.83. (See notes) Eligibility; forfeiture.

(a) Eligible Business. — A taxpayer is eligible for a credit under this Article only with respect to activities occurring at an establishment whose primary activity is listed in this subsection. The primary activity of an establishment is determined based on the establishment's principal product or group of products produced or distributed, or services rendered.

(1) Air courier services hub.
(2) Aircraft maintenance and repair.
(3) Company headquarters, but only if the additional eligibility requirements of subsection (b) of this section are satisfied.
(4) Customer service call centers.
(5) Electronic shopping and mail order houses.
(6) Information technology and services.
(7) Manufacturing.
(8) Motorsports facility.
(9) Motorsports racing team.
(10) Research and development.
(11) Warehousing.
(12) Wholesale trade.

(b) Company Headquarters Eligibility. — A taxpayer is eligible for a credit under this Article with respect to a company headquarters only if the taxpayer creates at least 75 new jobs at the company headquarters within a 24-month period. A taxpayer that meets this job creation requirement is eligible for credits under this Article with respect to the company headquarters for three taxable years beginning with the year in which the job creation requirement is satisfied. A taxpayer that creates an additional 75 new jobs at the company headquarters in a 24-month period during a three-year eligibility period does not qualify for any extended eligibility period. However, a taxpayer that creates an additional 75 new jobs at the company headquarters in a 24-month period after the completion of a three-year eligibility period is eligible for credits with respect to the company headquarters for an additional three taxable years beginning in the year in which the additional job creation requirement is satisfied.

(c) Wage Standard. — A taxpayer is eligible for a credit under this Article in a development tier two or three area only if the taxpayer satisfies a wage standard. The taxpayer is not required to satisfy a wage standard if the activity occurs in a development tier one area. Jobs that are located within an urban progress zone or an agrarian growth zone but not in a development tier one area satisfy the wage standard if they pay an average weekly wage that is at least equal to ninety percent (90%) of the lesser of the average wage for all insured private employers in the State and the average wage for all insured private employers in the county. All other jobs satisfy the wage standard if they pay an average weekly wage that is at least equal to the lesser of one hundred ten percent (110%) of the average wage for all insured private employers in the State and ninety percent (90%) of the average wage for all insured private employers in the county. The Department of Commerce shall annually publish the wage standard for each county.

In making the wage calculation, the taxpayer shall include any jobs that were filled for at least 1,600 hours during the calendar year the taxpayer engages in the activity that qualifies for the credit even if those jobs are not filled at the time the taxpayer claims the credit. For a taxpayer with a taxable year other than a calendar year, the taxpayer shall use the wage standard for the calendar year in which the taxable year begins. Only full-time jobs are included when making the wage calculation.

(d) Health Insurance. — A taxpayer is eligible for a credit under this Article only if the taxpayer provides health insurance for all of the full-time jobs at the establishment with respect to which the credit is claimed when the taxpayer engages in the activity that qualifies for the credit. For the purposes of this subsection, a taxpayer provides health insurance if it pays at least fifty percent (50%) of the premiums for health care coverage that equals or exceeds the minimum provisions of the basic health care plan of coverage recommended by the Small Employer Carrier Committee pursuant to G.S. 58-50-125.

Each year that a taxpayer claims a credit or carryforward of a credit allowed under this Article, the taxpayer shall provide with the tax return the taxpayer's certification that the taxpayer continues to provide health insurance for all the jobs at the establishment with respect to which the credit was claimed. If the taxpayer ceases to provide health insurance for the jobs during a taxable year, the credit expires, and the taxpayer may not take any remaining installment or carryforward of the credit.

(e) Environmental Impact. — A taxpayer is eligible for a credit allowed under this Article only if the taxpayer certifies that, at the time the taxpayer claims the credit, the taxpayer has no pending administrative, civil, or criminal enforcement action based on alleged significant violations of any program implemented by an agency of the Department of Environment and Natural Resources and has had no final determination of responsibility for any significant administrative, civil, or criminal violation of any program implemented by an agency of the Department of Environment and Natural Resources within the last five years. A significant violation is a violation or alleged violation that does not satisfy any of the conditions of G.S. 143-215.6B(d). The Secretary of Environment and Natural Resources shall notify the Department of Revenue annually of every person that currently has any of these pending actions and every person that has had any of these final determinations within the last five years.

(f) Safety and Health Programs. — A taxpayer is eligible for a credit allowed under this Article only if the taxpayer certifies that, as of the time the taxpayer claims the credit, at the establishment with respect to which the credit is claimed, the taxpayer has no citations under the Occupational Safety and Health Act that have become a final order within the past three years for willful serious violations or for failing to abate serious violations. For the purposes of this subsection, 'serious violation' has the same meaning as in G.S. 95-127. The Commissioner of Labor shall notify the Department of Revenue annually of all employers who have had these citations become final orders within the past three years.

(g) Overdue Tax Debts. — A taxpayer is not eligible for a credit allowed under this Article if, at the time the taxpayer claims the credit or an installment or carryforward of the credit, the taxpayer has received a notice of an overdue tax debt and that overdue tax debt has not been satisfied or otherwise resolved.

(h) Expiration. — If, during the period that installments of a credit under this Article accrue, the taxpayer is no longer engaged in one of the types of business described in subsection (a) of this section at the establishment for which the credit was claimed, the credit expires. If, during the period that installments of a credit under this Article accrue, the number of jobs of an eligible company headquarters falls below the minimum number required under subsection (b) of this section, any credit associated with that company headquarters expires. When a credit expires, the taxpayer may not take any remaining installments of the credit. The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.84. A change in the development tier designation of the location of an establishment does not result in expiration of a credit under this Article.

(i) Forfeiture. — A taxpayer forfeits a credit allowed under this Article if the taxpayer was not eligible for the credit for the calendar year in which the taxpayer engaged in the activity for which the credit was claimed. In addition, a taxpayer forfeits a credit for investment in real property under G.S. 105-129.89 if the taxpayer fails to timely create the number of required new jobs or to timely make the required level of investment under G.S. 105-129.89(b). A taxpayer that forfeits a credit under this Article is liable for all past taxes avoided as a result of the credit plus interest at the rate established under G.S. 105-241.21, computed from the date the taxes would have been due if the credit had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited; a taxpayer that fails to pay the past taxes and interest by the due date is subject to the penalties provided in G.S. 105-236.

(j) Change in Ownership of Business. — As used in this subsection, the term "business" means a taxpayer or an establishment. The sale, merger, consolidation, conversion, acquisition, or bankruptcy of a business, or any transaction by which an existing business reformulates itself as another business, does not create new eligibility in a succeeding business with respect to credits for which the predecessor was not eligible under this Article. A successor business may, however, take any credit or carried-over portion of a credit that its predecessor could have taken if it had a tax liability. The acquisition of a business is a new investment that creates new eligibility in the acquiring taxpayer under this Article if any of the following conditions are met:

(1) The business closed before it was acquired.
(2) The business was required to file a notice of plant closing or mass layoff under the federal Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, before it was acquired.
(3) The business was acquired by its employees directly or indirectly through an acquisition company under an employee stock option transaction or another similar mechanism. For the purpose of this subdivision, "acquired" means that as part of the initial purchase of a business by the employees, the purchase included an agreement for the employees through the employee stock option transaction or another similar mechanism to obtain one of the following:
    a. Ownership of more than fifty percent (50%) of the business.
    b. Ownership of not less than forty percent (40%) of the business within seven years if the business has tangible assets with a net book value in excess of one hundred million dollars ($100,000,000) and has the majority of its operations located in a development tier one area.

(k) Advisory Ruling. — A taxpayer may request in writing from the Secretary of Revenue specific advice regarding eligibility for a credit under this Article. G.S. 105-264 governs the effect of this advice. A taxpayer may not

Article 3J has a delayed repeal date. See note.

legally rely upon advice offered by any other State or local government official or employee acting in an official capacity regarding eligibility for a credit under this Article.

(*l*) Planned Expansion. — A taxpayer that signs a letter of commitment with the Department of Commerce, after the Department has calculated the development tier designations for the next year but before the beginning of that year, to undertake specific activities at a specific site within the next two years may calculate the credit for which it qualifies based on the establishment's development tier designation and urban progress zone or agrarian growth zone designation in the year in which the letter of commitment was signed by the taxpayer. If the taxpayer does not engage in the activities within the two-year period, the taxpayer does not qualify for the credit; however, if the taxpayer later engages in the activities, the taxpayer qualifies for the credit based on the development tier and urban progress zone or agrarian growth zone designations in effect at that time. (2006-252, s. 1.1; 2007-491, s. 44(1)a.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3J, see G.S. 105-129.82(a).

Editor's Note. — Session Laws 2006-252, s. 1.1, enacted subdivisions (a)(1) and (a)(2) as subdivisions (a)(2) and (a)(1), respectively. They were redesignated at the direction of the Revisor of Statutes to preserve alphabetical order.

Session Laws 2006-252, s. 1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 44(1)a, effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in the next to last sentence in subsection (i). For applicability, see Editor's note.

§ 105-129.84. (See notes) Tax election; cap; carryforwards; limitations.

(a) Tax Election. — The credits provided in this Article are allowed against the franchise tax levied in Article 3 of this Chapter, the income taxes levied in Article 4 of this Chapter, and the gross premiums tax levied in Article 8B of this Chapter. The taxpayer may divide a credit between the taxes against which it is allowed. Carryforwards of a credit may be divided between the taxes against which it is allowed without regard to the original election regarding the division of the credit.

(b) Cap. — The credits allowed under this Article may not exceed fifty percent (50%) of the cumulative amount of taxes against which they may be claimed for the taxable year, reduced by the sum of all other credits allowed against those taxes, except tax payments made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of credit, including carryforwards, claimed by the taxpayer under this Article for the taxable year.

(c) Carryforward. — Unless a longer carryforward period applies, any unused portion of a credit allowed under G.S. 105-129.87 or G.S. 105-129.88

may be carried forward for the succeeding five years, and any unused portion of a credit allowed under G.S. 105-129.89 may be carried forward for the succeeding 15 years. If the Secretary of Commerce makes a written determination that the taxpayer is expected to purchase or lease, and place in service in connection with an eligible business within a two-year period, at least one hundred fifty million dollars ($150,000,000) worth of business and real property, any unused portion of a credit under this Article with respect to the establishment that satisfies that condition may be carried forward for the succeeding 20 years. If the taxpayer does not make the required level of investment, the taxpayer shall apply the five-year carryforward period rather than the 20-year carryforward period.

(d) Statute of Limitations. — Notwithstanding Article 9 of this Chapter, a taxpayer shall claim a credit under this Article within six months after the date set by statute for the filing of the return, including any extensions of that date. (2006-252, s. 1.1.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3J, see G.S. 105-129.82(a).

Editor's note. — Session Laws 2006-252, s. 1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

§ 105-129.85. (See notes) Fees and reports.

(a) Fee. — When filing a return for a taxable year in which the taxpayer engaged in activity for which the taxpayer is eligible for a credit under this Article, the taxpayer shall pay the Department of Revenue a fee of five hundred dollars ($500.00) for each type of credit the taxpayer claims or intends to claim with respect to an establishment. The fee is due at the time the return is due for the taxable year in which the taxpayer engaged in the activity for which the taxpayer is eligible for a credit. No credit is allowed under this Article for a taxable year until all outstanding fees have been paid. Fees collected under this section shall be credited to the General Fund.

(b) Reports. — The Department of Revenue shall publish by May 1 of each year the following information itemized by credit and by taxpayer for the 12-month period ending the preceding December 31:

(1) The number and amount of credits generated and taken for each credit allowed in this Article.

(2) The number and development tier area of new jobs with respect to which credits were generated and to which credits were taken.

(3) The cost and development tier area of business property with respect to which credits were generated and to which credits were taken.

(4) The cost and development tier area of real property investment with respect to which credits were generated and to which credits were taken. (2006-252, s. 1.1.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3J, see G.S. 105-129.82(a).

Editor's note. — Session Laws 2006-252, s. 1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

§ 105-129.86. (See notes) Substantiation.

(a) Records. — To claim a credit allowed by this Article, the taxpayer shall provide any information required by the Secretary of Revenue. Every taxpayer claiming a credit under this Article shall maintain and make available for inspection by the Secretary of Revenue any records the Secretary considers necessary to determine and verify the amount of the credit to which the taxpayer is entitled. The burden of proving eligibility for the credit and the amount of the credit shall rest upon the taxpayer, and no credit shall be allowed to a taxpayer that fails to maintain adequate records or to make them available for inspection.

(b) Documentation. — Each taxpayer shall provide with the tax return qualifying information for each credit claimed under this Article. The qualifying information shall be in the form prescribed by the Secretary and shall be signed and affirmed by the individual who signs the taxpayer's tax return. The information required by this subsection is information demonstrating that the taxpayer has met the conditions for qualifying for a credit and any carryforwards and includes the following:

(1) The physical location of the jobs and investment with respect to which the credit is claimed, including the street address and the development tier designation of the establishment.

(2) The type of business with respect to which the credit is claimed and the average weekly wage at the establishment with respect to which the credit is claimed.

(3) Any other qualifying information related to a specific credit allowed under this Article. (2006-252, s. 1.1.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3J, see G.S. 105-129.82(a).

Editor's note. — Session Laws 2006-252, s. 1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

§ 105-129.87. (See notes) Credit for creating jobs.

(a) Credit. — A taxpayer that meets the eligibility requirements set out in G.S. 105-129.83 and satisfies the threshold requirement for new job creation in this State under subsection (b) of this section during the taxable year is allowed a credit for creating jobs. The amount of the credit for each new job created is set out in the table below and is based on the development tier designation of the county in which the job is located. If the job is located in an urban progress zone or an agrarian growth zone, the amount of the credit is increased by one thousand dollars ($1,000) per job. In addition, if a job located in an urban progress zone or an agrarian growth zone is filled by a resident of that zone or by a long-term unemployed worker, the amount of the credit is increased by an additional two thousand dollars ($2,000) per job.

Area Development Tier	**Amount of Credit**
Tier One	$12,500
Tier Two	5,000
Tier Three	750

(b) Threshold. — The applicable threshold is the appropriate amount set out in the following table based on the development tier designation of the county where the new jobs are created during the taxable year. If the taxpayer creates new jobs at more than one eligible establishment in a county during the taxable year, the threshold applies to the aggregate number of new jobs created at all eligible establishments within the county during that year. If the taxpayer creates new jobs at eligible establishments in different counties during the taxable year, the threshold applies separately to the aggregate number of new jobs created at eligible establishments in each county. If the taxpayer creates new jobs in an urban progress zone or an agrarian growth zone, the applicable threshold is the one for a development tier one area. New jobs created in an urban progress zone or an agrarian growth zone are not

Article 3J has a delayed repeal date. See note.

aggregated with jobs created at any other eligible establishments regardless of county.

Area Development Tier	Threshold
Tier One	5
Tier Two	10
Tier Three	15

(c) Calculation. — A job is located in a county, an urban progress zone, or an agrarian growth zone if more than fifty percent (50%) of the employee's duties are performed in the county or the zone. The number of new jobs a taxpayer creates during the taxable year is determined by subtracting the average number of full-time employees the taxpayer had in this State during the 12-month period preceding the beginning of the taxable year from the average number of full-time employees the taxpayer has in this State during the taxable year.

(d) Installments. — The credit may not be taken in the taxable year in which the new jobs are created. Instead, the credit shall be taken in equal installments over the four years following the taxable year in which the new jobs were created and is conditional upon the continued maintenance of those jobs by the taxpayer. If, in one of the four years in which the installment of a credit accrues, a job is no longer filled, the credit with respect to that job expires, and the taxpayer may not take any remaining installment of the credit with respect to that job. If, in one of the years in which the installment of a credit accrues, the number of the taxpayer's full-time employees falls below the sum of the applicable threshold and the number of full-time employees the taxpayer had in the year before the year in which the taxpayer qualified for the credit, the credits with respect to all of the new jobs expire, and the taxpayer may not take any remaining installments of the credits. When a credit expires under this subsection, the taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.84.

(e) Transferred Jobs. — Jobs transferred from one area in the State to another area in the State are not considered new jobs for purposes of this section. Jobs that were located in this State and that are transferred to the taxpayer from a related member of the taxpayer are not considered new jobs for purposes of this section. If, in one of the four years in which the installment of a credit accrues, the job with respect to which the credit was claimed is moved to an area in a higher-numbered development tier or out of an urban progress zone or an agrarian growth zone, the remaining installments of the credit are allowed only to the extent they would have been allowed if the job was initially created in the area to which it was moved. If, in one of the years in which the installment of a credit accrues, the job with respect to which the credit was claimed is moved to an area in a lower-numbered development tier or an urban progress zone or an agrarian growth zone, the remaining installments of the credit shall be calculated as if the job had been created initially in the area to which it was moved.

(f) Wage Standard. — For the purposes of this section, a taxpayer satisfies the wage standard requirement of G.S. 105-129.83 only if the taxpayer satisfies the requirement with respect to both the new jobs, considered collectively, for which a credit is claimed and all of the jobs at the establishment, considered collectively, with respect to which a credit is claimed.

(g) No Double Credit. — A taxpayer may not claim a credit under this section with respect to jobs for which a taxpayer claims a credit under G.S. 105-129.8. (2006-252, s. 1.1; 2007-527, s. 6.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3J, see G.S. 105-129.82(a).

Editor's note. — Session Laws 2006-252, s. 1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

Effect of Amendments. — Session Laws 2007-527, s. 6, effective August 31, 2007, added the sentence preceding the table in subsection (b).

§ 105-129.88. (See notes) Credit for investing in business property.

(a) General Credit. — A taxpayer that meets the eligibility requirements set out in G.S. 105-129.83 and that has purchased or leased business property and placed it in service in this State during the taxable year and that has satisfied the threshold requirements of subsection (c) of this section is allowed a credit equal to the applicable percentage of the excess of the eligible investment amount over the applicable threshold. If the taxpayer places business property in service in an urban progress zone or an agrarian growth zone, the applicable percentage is the one for a development tier one area. Business property is eligible if it is not leased to another party. The credit may not be taken for the taxable year in which the business property is placed in service but shall be taken in equal installments over the four years following the taxable year in which it is placed in service. The applicable percentage is as follows:

Area Development Tier	Applicable Percentage
Tier One	7%
Tier Two	5%
Tier Three	3.5%

(b) Eligible Investment Amount. — The eligible investment amount is the lesser of (i) the cost of the eligible business property and (ii) the amount by which the cost of all of the taxpayer's eligible business property that is in service in this State on the last day of the taxable year exceeds the cost of all of the taxpayer's eligible business property that was in service in this State on the last day of the base year. The base year is that year, of the three immediately preceding taxable years, in which the taxpayer had the most eligible business property in service in this State.

(c) Threshold. — The applicable threshold is the appropriate amount set out in the following table based on the development tier where the eligible business property is placed in service during the taxable year. If the taxpayer places business property in service in an urban progress zone or an agrarian growth zone, the applicable threshold is the one for a development tier one area. Business property placed in service in an urban progress zone or an agrarian growth zone is not aggregated with business property placed in service at any other eligible establishments regardless of county. If the taxpayer places eligible business property in service at more than one establishment in a county during the taxable year, the threshold applies to the aggregate amount of eligible business property placed in service during the taxable year at all establishments in the county. If the taxpayer places eligible business property in service at establishments in different counties, the threshold applies separately to the aggregate amount of eligible business property placed in service in each county. If the taxpayer places eligible business property in service at an establishment over the course of a two-year period, the applicable threshold for the second taxable year is reduced by the eligible investment amount for the previous taxable year.

Article 3J has a delayed repeal date. See note.

Area Development Tier	Threshold
Tier One	$ -0-
Tier Two	1,000,000
Tier Three	2,000,000

(d) Expiration. — As used in this subsection, the term "disposed of" means disposed of, taken out of service, or moved out of State. If, in one of the four years in which the installment of a credit accrues, the business property with respect to which the credit was claimed is disposed of, the credit expires, and the taxpayer may not take any remaining installment of the credit for that business property unless the cost of that business property is offset in the same taxable year by the taxpayer's new investment in eligible business property placed in service in the same county, as provided in this subsection. If, during the taxable year, the taxpayer disposed of the business property for which installments remain, there has been a net reduction in the cost of all the taxpayer's eligible business property that are in service in the same county as the business property that was disposed of, and the amount of this reduction is greater than twenty percent (20%) of the cost of the business property that was disposed of, then the credit for the business property that was disposed of expires. If the amount of the net reduction is equal to twenty percent (20%) or less of the cost of the business property that was disposed of, or if there is no net reduction, then the credit does not expire. In determining the amount of any net reduction during the taxable year, the cost of business property the taxpayer placed in service during the taxable year and for which the taxpayer claims a credit under Article 3A or Article 3B of this Chapter may not be included in the cost of all the taxpayer's eligible business property that is in service. If in a single taxable year business property with respect to two or more credits in the same county are disposed of, the net reduction in the cost of all the taxpayer's eligible business property that is in service in the same county is compared to the total cost of all the business property for which credits expired in order to determine whether the remaining installments of the credits are forfeited.

The expiration of a credit does not prevent the taxpayer from taking the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.84.

(e) Transferred Property. — If, in one of the four years in which the installment of a credit accrues, the business property with respect to which the credit was claimed is moved to a county in a higher-numbered development tier or out of an urban progress zone or an agrarian growth zone, the remaining installments of the credit are allowed only to the extent they would have been allowed if the business property had been placed in service initially in the area to which it was moved. If, in one of the four years in which the installment of a credit accrues, the business property with respect to which a credit was claimed is moved to a county in a lower-numbered development tier or an urban progress zone or an agrarian growth zone, the remaining installments of the credit shall be calculated as if the business property had been placed in service initially in the area to which it was moved.

(f) Wage Standard. — For the purposes of this section, a taxpayer satisfies the wage standard requirement of G.S. 105-129.83 only if the taxpayer satisfies the requirement with respect to all of the jobs at the establishment, considered collectively, with respect to which a credit is claimed.

(g) No Double Credit. — A taxpayer may not claim a credit under this section with respect to business property for which the taxpayer claims a credit under G.S. 105-129.9 or G.S. 105-129.9A. (2006-252, s. 1.1; 2007-527, ss. 7, 8.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3J, see G.S. 105-129.82(a).

Editor's note. — Session Laws 2006-252, s. 1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

Effect of Amendments. — Session Laws 2007-527, ss. 7 and 8, effective August 31, 2007, in subsection (c), added the third sentence, and substituted "business property" for "machinery and equipment" in the sentence preceding the table; and in subsection (e) substituted "out of an urban progress zone" for "to an urban progress zone" near the middle of the first sentence.

§ 105-129.89. (See notes) Credit for investment in real property.

(a) Credit. — If a taxpayer that has purchased or leased real property in a development tier one area begins to use the property in an eligible business during the taxable year, the taxpayer is allowed a credit equal to thirty percent (30%) of the eligible investment amount if all of the eligibility requirements of G.S. 105-129.83 and of subsection (b) of this section are met. For the purposes of this section, property is located in a development tier one area if the area the property is located in was a development tier one area at the time the taxpayer made a written application for the determination required under subsection (b) of this section. The eligible investment amount is the lesser of (i) the cost of the property and (ii) the amount by which the cost of all of the real property the taxpayer is using in this State in an eligible business on the last day of the taxable year exceeds the cost of all of the real property the taxpayer was using in this State in an eligible business on the last day of the base year. The base year is that year, of the three immediately preceding taxable years, in which the taxpayer was using the most real property in this State in an eligible business. In the case of property that is leased, the cost of the property is not determined as provided in G.S. 105-129.81 but is considered to be the taxpayer's lease payments over a seven-year period, plus any expenditures made by the taxpayer to improve the property before it is used by the taxpayer if the expenditures are not reimbursed or credited by the lessor. The entire credit may not be taken for the taxable year in which the property is first used in an eligible business but shall be taken in equal installments over the seven years following the taxable year in which the property is first used in an eligible business. When part of the property is first used in an eligible business in one year and part is first used in an eligible business in a later year, separate credits may be claimed for the amount of property first used in an eligible business in each year. The basis in any real property for which a credit is allowed under this section shall be reduced by the amount of credit allowable.

(b) Determination by the Secretary of Commerce. — A taxpayer is eligible for the credit allowed under this section with respect to an establishment only if the Secretary of Commerce makes a written determination that the taxpayer is expected to purchase or lease and use in an eligible business at that establishment within a three-year period at least ten million dollars ($10,000,000) of real property and that the establishment that is the subject of the credit will create at least 200 new jobs within two years of the time that the property is first used in an eligible business. If the taxpayer fails to timely make the required level of investment or fails to timely create the required number of new jobs, the taxpayer forfeits the credit as provided in G.S. 105-129.83.

Article 3J has a delayed repeal date. See note.

(c) Mixed Use Property. — If the taxpayer uses only part of the property in an eligible business, the amount of the credit allowed under this section is reduced by multiplying it by a fraction, the numerator of which is the square footage of the property used in an eligible business and the denominator of which is the total square footage of the property.

(d) Expiration. — If, in one of the seven years in which the installment of a credit accrues, the property with respect to which the credit was claimed is no longer used in an eligible business, the credit expires, and the taxpayer may not take any remaining installment of the credit. If, in one of the seven years in which the installment of a credit accrues, part of the property with respect to which the credit was claimed is no longer used in an eligible business, the remaining installments of the credit shall be reduced by multiplying it by the fraction described in subsection (c) of this section. If, in one of the years in which the installment of a credit accrues and by which the taxpayer is required to have created 200 new jobs at the property, the total number of employees the taxpayer employs at the property with respect to which the credit is claimed is less than 200, the credit expires, and the taxpayer may not take any remaining installment of the credit.

In each of these cases, the taxpayer may nonetheless take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.84.

(e) No Double Credit. — A taxpayer may not claim a credit under this section with respect to real property for which a credit is claimed under G.S. 105-129.12 or G.S. 105-129.12A. (2006-252, s. 1.1.)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3J, see G.S. 105-129.82(a).

Editor's note. — Session Laws 2006-252, s. 1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

§§ 105-129.90 through 105-129.94: Reserved for future codification purposes.

Article 3K.

Tax Incentives for Railroad Intermodal Facilities.

(Repealed for taxable years beginning on or after January 1, 2038. See G.S. 105-129.99.)

§ 105-129.95. (Repealed for taxable years beginning on or after January 1, 2038 — see note) Definitions.

The following definitions apply in this Article:

(1) Costs of construction. — The costs of acquiring and improving land, constructing buildings and other structures, equipping the facility, and constructing and equipping rail tracks to the railroad intermodal facility that are necessary to access and support facility operations. In the case of property owned or leased by the taxpayer, cost is determined pursuant to regulations adopted under section 1012 of the Code.

(2) Eligible railroad intermodal facility. — A railroad intermodal facility whose costs of construction exceed thirty million dollars ($30,000,000).

(3) Intermodal facility. — A facility where freight is transferred from one mode of transportation to another.

(4) Railroad intermodal facility. — An intermodal facility whose primary purpose is to transfer freight between a railroad and another mode of transportation. (2007-323, s. 31.23(a); 2007-345, s. 14.7(a).)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3K, see G.S. 105-129.99.

Editor's Note. — Session Laws 2007-323, s. 31.23(e), made this Article effective for taxable years beginning on or after January 1, 2007, and applicable to eligible railroad intermodal facilities placed into service on or after January 1, 2007.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-345, s. 14.7(a), effective for taxable years beginning on or after January 1, 2007, in subdivision (1), deleted "and" following "other structures" and inserted "and constructing and equipping rail tracks to the railroad intermodal facility that are necessary to access and support facility operations."

§ 105-129.96. (Repealed for taxable years beginning on or after January 1, 2038 — see note) Credit for constructing a railroad intermodal facility.

(a) Credit. — A taxpayer that constructs or leases an eligible railroad intermodal facility in this State and places it in service during the taxable year is allowed a tax credit equal to fifty percent (50%) of all amounts payable by the taxpayer towards the costs of construction or under the lease.

(b) Taxes Credited. — The credit provided in this section is allowed against the franchise tax levied in Article 3 of this Chapter or the income taxes levied in Article 4 of this Chapter. The taxpayer must elect the tax against which a credit will be claimed when filing the return on which the first installment of the credit is claimed. This election is binding. The credit may not exceed fifty percent (50%) of the tax against which it is applied. Any unused portion of a credit may be carried forward for the succeeding 10 years. Any carryforwards of a credit must be claimed against the same tax. (2007-323, s. 31.23(a).)

Article 3K has a Delayed Repeal Date. — For delayed repeal of Article 3K, see G.S. 105-129.99.

§ 105-129.97. (Repealed for taxable years beginning on or after January 1, 2038 — see note) Substantiation.

To claim a credit allowed by this Article, the taxpayer must provide any information required by the Secretary. Each taxpayer claiming a credit under this Article must maintain and make available for inspection by the Secretary any records the Secretary considers necessary to determine and verify the amount of the credit to which the taxpayer is entitled. The burden of proving eligibility for a credit and the amount of the credit rests upon the taxpayer, and no credit may be allowed to a taxpayer that fails to maintain adequate records or to make them available for inspection. (2007-323, s. 31.23(a).)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3K, see G.S. 105-129.99.

§ 105-129.98. (Repealed for taxable years beginning on or after January 1, 2038 — see note) Reports.

The Department of Revenue must publish by May 1 of each year the following information, itemized by taxpayer, for the 12-month period ending the preceding December 31:

(1) The number of taxpayers that claimed a credit allowed in this Article.
(2) The amount of each credit claimed and the taxes against which it was applied.
(3) The total cost to the General Fund of the credits claimed. (2007-323, s. 31.23(a).)

Article has a Delayed Repeal Date. — For delayed repeal of Article 3K, see G.S. 105-129.99.

§ 105-129.99. Sunset.

This Article is repealed effective for taxable years beginning on or after January 1, 2038. (2007-323, s. 31.23(a).)

Article 4.

Income Tax.

Part 1. Corporation Income Tax.

§ 105-130. Short title.

This Part of the income tax Article shall be known and may be cited as the Corporation Income Tax Act. (1939, c. 158, s. 300; 1967, c. 1110, s. 3; 1998-98, ss. 42, 61, 68.)

Editor's Note. — Session Laws 2003-415, s. 3, provides: "The Department of Revenue shall modify the tax credit form for income tax filers to provide separate lines for each of the tax credits currently aggregated in a single line, so that the Department may capture data about the fiscal impact of the specific credits."

Legal Periodicals. — For discussion of changes made in this Article by the Session Laws of 1947 and 1949, respectively, see 25 N.C.L. Rev. 467 (1947); 27 N.C.L. Rev. 482 (1949).

For note, "A Matter of (Statutory) Interpretation: North Carolina Recognizes the Functional Test for Corporate Taxation in Polaroid Corp. v. Offerman," see 77 N.C. L. Rev. 2326 (1999).

§ 105-130.1. Purpose.

The general purpose of this Part is to impose a tax for the use of the State government upon the net income of every domestic corporation and of every foreign corporation doing business in this State.

The tax imposed upon the net income of corporations in this Part is in addition to all other taxes imposed under this Subchapter. (1939, c. 158, s. 301; 1967, c. 1110, s. 3; 1998-98, s. 69.)

§ 105-130.2. Definitions.

The following definitions apply in this Part:

(1) Code. — Defined in G.S. 105-228.90.

(1a) Corporation. — A joint-stock company or association, an insurance company, a domestic corporation, a foreign corporation, or a limited liability company.

(1b) C Corporation. — A corporation that is not an S Corporation.

(1c) Department. — The Department of Revenue.

(2) Domestic corporation. — A corporation organized under the laws of this State.

(3) Fiscal year. — An income year, ending on the last day of any month other than December. A corporation that pursuant to the provisions of the Code has elected to compute its federal income tax liability on the basis of an annual period varying from 52 to 53 weeks shall compute its taxable income under this Part on the basis of the same period used by the corporation in computing its federal income tax liability for the income year.

(4) Foreign corporation. — Any corporation other than a domestic corporation.

(4a) Gross income. — Defined in section 61 of the Code.

(4b) Income year. — The calendar year or the fiscal year upon the basis of which the net income is computed under this Part. If no fiscal year has been established, the income year is the calendar year. In the case of a return made for a fractional part of a year under the provisions of this Part or under rules adopted by the Secretary, the income year is the period for which the return is made.

(5) Limited liability company. — Either a domestic limited liability company organized under Chapter 57C of the General Statutes or a foreign limited liability company authorized by that Chapter to transact business in this State that is classified for federal income tax purposes as a corporation. As applied to a limited liability company that is a corporation under this Part, the term "shareholder" means a member of the limited liability company and the term "corporate officer" means a member or manager of the limited liability company.

(5a) S Corporation. — Defined in G.S. 105-131(b).

(5b) Secretary. — The Secretary of Revenue.

(5c) State net income. — The taxpayer's federal taxable income as determined under the Code, adjusted as provided in G.S. 105-130.5 and, in the case of a corporation that has income from business activity that is taxable both within and without this State, allocated and apportioned to this State as provided in G.S. 105-130.4.

(5d) Taxable year. — Income year.

(6) Taxpayer. — A corporation subject to the tax imposed by this Part. (1939, c. 158, s. 302; 1941, c. 50, s. 5; 1955, c. 1331, s. 2; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1983, c. 713, ss. 68, 82; 1985, c. 656, s. 7; 1985 (Reg. Sess., 1986), c. 853, s.

1; 1987, c. 778, s. 1; 1987 (Reg. Sess., 1988), c. 1015, s. 3; 1989, c. 36, s. 3; 1989 (Reg. Sess., 1990), c. 981, s. 3; 1991, c. 689, s. 257; 1991 (Reg. Sess., 1992), c. 922, s. 4; 1993, c. 12, s. 5; c. 354, s. 12; 1995, c. 17, s. 3; 1998-98, s. 69; 2006-162, s. 3(a).)

Editor's Note. — Session Laws 1993, c. 354, s. 12 originally enacted subdivision (5) as subdivision (5a), and redesignated subdivisions (5a), (5b), and (5c) as (5b), (5c), and (5d), respectively. Subdivision (5) has been redesignated as (4a), subdivision (5a) as (5), and (5a), (5b), and (5c) have not been changed, at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2006-162, s. 3(a), effective July 24, 2006, added subdivision (4a) and redesignated former subdivision (4a) as present subdivision (4b).

§ 105-130.3. Corporations.

A tax is imposed on the State net income of every C Corporation doing business in this State. An S Corporation is not subject to the tax levied in this section. The tax is a percentage of the taxpayer's State net income computed as follows:

Income Years Beginning	*Tax*
In 1997	7.5%
In 1998	7.25%
In 1999	7%
After 1999	6.9%.

(1939, c. 158, s. 311; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 752, s. 3; 1953, c. 1302, s. 4; 1955, c. 1350, s. 18; 1957, c. 1340, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; c. 1186; 1967, c. 1110, s. 3; 1973, c. 1287, s. 4; 1975, c. 275, s. 4; 1977, c. 657, s. 4; 1979, c. 179, s. 2; 1981, c. 15; 1983, c. 713, s. 69; 1987, c. 622, s. 8; 1987 (Reg. Sess., 1988), c. 1089, s. 5; 1989, c. 728, s. 1.33; 1991, c. 689, s. 258; 1996, 2nd Ex. Sess., c. 13, s. 2.1.)

Legal Periodicals. — For article, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

CASE NOTES

Every corporation doing business in North Carolina is required to pay an annual income tax equivalent to 6% of its net taxable income. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966), decided under §§ 105-134 and 105-140 prior to the 1967 amendments thereto. Section 105-140 was repealed by S.L. 1989, c. 728, s. 1.3.

"Taxable Income" Defined. — Under the Internal Revenue Code, "taxable income" means gross income minus specified allowable deductions. Mutual Sav. & Loan Ass'n v. Lanier, 279 N.C. 299, 182 S.E.2d 368 (1971).

Income Tax and Franchise Tax Distinguished. — A comparison of Article 3 of this Chapter, relating to franchise taxes, and Article 4, relating to income taxes, indicates a clear legislative intent to differentiate between these two types of taxes, for a clear distinction has been made by the General Assembly between an excise tax imposed on domestic and foreign corporations for the privilege of transacting business within the State, and an income tax on net corporate income, which is based on a past fact of earned net profits. The statutes under which these taxes were assessed in the instant case in precise words preclude a contention that it was the legislative intent that the taxes assessed and paid here were excise or privilege taxes. ET & WNC Transp. Co. v. Currie, 248 N.C. 560, 104 S.E.2d 403 (1958), aff'd, 359 U.S. 28, 79 S. Ct. 602, 3 L. Ed. 2d 625, rehearing denied, 359 U.S. 976, 79 S. Ct. 874, 3 L. Ed. 2d 843 (1959), construing § 105-134 prior to the 1967 amendment.

Foreign Corporation Taxed on Income Earned in State. — The incidence of the tax on a foreign corporation is that part of its net income earned within North Carolina by reason of its interstate business, and reasonably attributable to its interstate business done or performable within the borders of North Carolina, and not upon its franchise to engage in interstate business in North Carolina. ET & WNC Transp. Co. v. Currie, 248 N.C. 560, 104 S.E.2d 403 (1958), aff'd, 359 U.S. 28, 79 S. Ct.

602, 3 L. Ed. 2d 625, rehearing denied, 359 U.S. 976, 79 S. Ct. 874, 3 L. Ed. 2d 843 (1959), construing § 105-134 prior to the 1967 amendment.

North Carolina Secretary of Revenue did not exceed his authority in imposing franchise and income taxes on out-of-state trademark holding companies that entered into licensing agreements with related retail companies that operated in North Carolina, whereby the retail companies paid the holding companies royalties for the use of the trademarks in North Carolina; the holding companies were doing business in North Carolina, and the Secretary's attempt to assess the taxes did not offend the Commerce Clause of the United States Constitution. A&F Trademark, Inc. v. Tolson, 167 N.C. App. 150, 605 S.E.2d 187, 2004 N.C. App. LEXIS 2162 (2004), appeal dismissed, 359 N.C. 320, — S.E.2d — (2005), cert. denied, — U.S. —, 126 S. Ct. 353, 163 L. Ed. 2d 62 (2005).

Cited in Fieldcrest Mills, Inc. v. Coble, 290 N.C. 586, 227 S.E.2d 562 (1976); Dunn v. State, — N.C. App. —, 635 S.E.2d 604, 2006 N.C. App. LEXIS 2163 (2006).

§ 105-130.3A. Expired.

Editor's Note. — This section expired for taxable years beginning on or after January 1, 1995, pursuant to Session Laws 1991, c. 689, s. 357(2).

§ 105-130.4. Allocation and apportionment of income for corporations.

(a) As used in this section, unless the context otherwise requires:

(1) "Apportionable income" means all income that is apportionable under the United States Constitution.

(2) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(3) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(4) "Excluded corporation" means any corporation engaged in business as a building or construction contractor, a securities dealer, or a loan company or a corporation that receives more than fifty percent (50%) of its ordinary gross income from intangible property.

(5) "Nonapportionable income" means all income other than apportionable income.

(6) "Public utility" means any corporation that is subject to control of one or more of the following entities: the North Carolina Utilities Commission, the Federal Communications Commission, the Interstate Commerce Commission, the Federal Energy Regulatory Commission, or the Federal Aviation Agency; and that owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications, the transportation of goods or persons, or the production, storage, transmission, sale, delivery or furnishing of electricity, water, steam, oil, oil products, or gas. The term also includes a motor carrier of property whose principal business activity is transporting property by motor vehicle for hire over the public highways of this State.

(7) "Sales" means all gross receipts of the corporation except for the following receipts:

a. Receipts from a casual sale of property.

b. Receipts allocated under subsections (c) through (h) of this section.

c. Receipts exempt from taxation.

d. The portion of receipts realized from the sale or maturity of securities or other obligations that represents a return of principal.

(8) "Casual sale of property" means the sale of any property which was not purchased, produced or acquired primarily for sale in the corporation's regular trade or business.

(9) "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

(b) A corporation having income from business activity which is taxable both within and without this State shall allocate and apportion its net income or net loss as provided in this section. For purposes of allocation and apportionment, a corporation is taxable in another state if (i) the corporation's business activity in that state subjects it to a net income tax or a tax measured by net income, or (ii) that state has jurisdiction based on the corporation's business activity in that state to subject the corporation to a tax measured by net income regardless whether that state exercises its jurisdiction. For purposes of this section, "business activity" includes any activity by a corporation that would establish a taxable nexus pursuant to 15 United States Code section 381.

(c) Rents and royalties from real or tangible personal property, gains and losses, interest, dividends, patent and copyright royalties and other kinds of income, to the extent that they constitute nonapportionable income, less related expenses shall be allocated as provided in subsections (d) through (h) of this section.

(d)(1) Net rents and royalties from real property located in this State are allocable to this State.

(2) Net rents and royalties from tangible personal property are allocable to this State:

a. If and to the extent that the property is utilized in this State, or

b. In their entirety if the corporation's commercial domicile is in this State and the corporation is not organized under the laws of, or is not taxable in, the state in which the property is utilized.

(3) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the income year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the income year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the corporation, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

(e)(1) Gains and losses from sales or other disposition of real property located in this State are allocable to this State.

(2) Gains and losses from sales or other disposition of tangible personal property are allocable to this State if

a. The property had a situs in this State at the time of the sale, or

b. The corporation's commercial domicile is in this State and the corporation is not taxable in the state in which the property has a situs.

(3) Gains and losses from sales or other disposition of intangible personal property are allocable to this State if the corporation's commercial domicile is in this State.

(f) Interest and net dividends are allocable to this State if the corporation's commercial domicile is in this State. For purposes of this section, the term "net dividends" means gross dividend income received less related expenses.

(g)(1) Royalties or similar income received from the use of patents, copyrights, secret processes and other similar intangible property are allocable to this State:

a. If and to the extent that the patent, copyright, secret process or other similar intangible property is utilized in this State, or

b. If and to the extent that the patent, copyright, secret process or other similar intangible property is utilized in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this State.

(2) A patent, secret process or other similar intangible property is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, processing, or other use in the state or to the extent that a patented product is produced in the state. If the basis of receipts from such intangible property does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the intangible property is utilized in the state in which the taxpayer's commercial domicile is located.

(3) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

(h) The income less related expenses from any other nonbusiness activities or investments not otherwise specified in this section is allocable to this State if the business situs of the activities or investments are located in this State.

(i) All apportionable income of corporations other than public utilities and excluded corporations shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus twice the sales factor, and the denominator of which is four. Provided, that where the sales factor does not exist, the denominator of the fraction shall be the number of existing factors and where the sales factor exists but the payroll factor or the property factor does not exist, the denominator of the fraction shall be the number of existing factors plus one.

(j)(1) The property factor is a fraction, the numerator of which is the average value of the corporation's real and tangible personal property owned or rented and used in this State during the income year and the denominator of which is the average value of all the corporation's real and tangible personal property owned or rented and used during the income year.

(2) Property owned by the corporation is valued at its original cost. Property rented by the corporation is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the corporation less any annual rental rate received by the corporation from subrentals except that subrentals shall not be deducted when they constitute apportionable income. Any property under construction and any property the income from which constitutes nonapportionable income shall be excluded in the computation of the property factor.

(3) The average value of property shall be determined by averaging the values at the beginning and end of the income year, but in all cases the Secretary of Revenue may require the averaging of monthly or other periodic values during the income year if reasonably required to reflect properly the average value of the corporation's property. A corporation that ceases its operations in this State before the end of its income year because of its intention to dissolve or to relinquish its certificate of authority, or because of a merger, conversion, or consolidation, or for any other reason whatsoever shall use the real estate and tangible personal property values as of the first day of the income year and the last day of its operations in this State in determining the average value of property, but the Secretary may require averaging of

monthly or other periodic values during the income year if reasonably required to reflect properly the average value of the corporation's property.

(k)(1) The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the income year by the corporation as compensation, and the denominator of which is the total compensation paid everywhere during the income year. All compensation paid to general executive officers and all compensation paid in connection with nonapportionable income shall be excluded in computing the payroll factor. General executive officers shall include the chairman of the board, president, vice-presidents, secretary, treasurer, comptroller, and any other officers serving in similar capacities.

(2) Compensation is paid in this State if:

a. The individual's service is performed entirely within the State; or

b. The individual's service is performed both within and without the State, but the service performed without the State is incidental to the individual's service within the State; or

c. Some of the service is performed in this State and (i) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in this State, or (ii) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

(*l*)(1) The sales factor is a fraction, the numerator of which is the total sales of the corporation in this State during the income year, and the denominator of which is the total sales of the corporation everywhere during the income year. Notwithstanding any other provision under this Part, the receipts from any casual sale of property shall be excluded from both the numerator and the denominator of the sales factor. Where a corporation is not taxable in another state on its apportionable income but is taxable in another state only because of nonapportionable income, all sales shall be treated as having been made in this State.

(2) Sales of tangible personal property are in this State if the property is received in this State by the purchaser. In the case of delivery of goods by common carrier or by other means of transportation, including transportation by the purchaser, the place at which the goods are ultimately received after all transportation has been completed shall be considered as the place at which the goods are received by the purchaser. Direct delivery into this State by the taxpayer to a person or firm designated by a purchaser from within or without the State shall constitute delivery to the purchaser in this State.

(3) Other sales are in this State if:

a. The receipts are from real or tangible personal property located in this State; or

b. The receipts are from intangible property and are received from sources within this State; or

c. The receipts are from services and the income-producing activities are in this State.

(m) All apportionable income of a railroad company shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the "railway operating revenue" from business done within this State and the denominator of which is the "total railway operating revenue" from all business done by the company as shown by its records kept in accordance with the standard classification of accounts prescribed by the Interstate Commerce Commission.

"Railway operating revenue" from business done within this State shall mean "railway operating revenue" from business wholly within this State, plus the equal mileage proportion within this State of each item of "railway operating revenue" received from the interstate business of the company. "Equal mileage proportion" shall mean the proportion which the distance of movement of property and passengers over lines in this State bears to the total distance of movement of property and passengers over lines of the company receiving such revenue. "Interstate business" shall mean "railway operating revenue" from the interstate transportation of persons or property into, out of, or through this State. If the Secretary of Revenue finds, with respect to any particular company, that its accounting records are not kept so as to reflect with exact accuracy such division of revenue by State lines as to each transaction involving interstate revenue, the Secretary of Revenue may adopt such regulations, based upon averages, as will approximate with reasonable accuracy the proportion of interstate revenue actually earned upon lines in this State. Provided, that where a railroad is being operated by a partnership which is treated as a corporation for income tax purposes and pays a net income tax to this State, or if located in another state would be so treated and so pay as if located in this State, each partner's share of the net profits shall be considered as dividends paid by a corporation for purposes of this Part and shall be so treated for inclusion in gross income, deductibility, and separate allocation of dividend income.

(n) All apportionable income of a telephone company shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is gross operating revenue from local service in this State plus gross operating revenue from toll services performed wholly within this State plus the proportion of revenue from interstate toll services attributable to this State as shown by the records of the company plus the gross operating revenue in North Carolina from other service less the uncollectible revenue in this State, and the denominator of which is the total gross operating revenue from all business done by the company everywhere less total uncollectible revenue. Provided, that where a telephone company is required to keep its records in accordance with the standard classification of accounts prescribed by the Federal Communications Commission the amounts in such accounts shall be used in computing the apportionment fraction as provided in this subsection.

(o) All apportionable income of a motor carrier of property shall be apportioned by multiplying the income by a fraction, the numerator of which is the number of vehicle miles in this State and the denominator of which is the total number of vehicle miles of the company everywhere. The words "vehicle miles" shall mean miles traveled by vehicles owned or operated by the company hauling property for a charge or traveling on a scheduled route.

(p) All apportionable income of a motor carrier of passengers shall be apportioned by multiplying the income by a fraction, the numerator of which is the number of vehicle miles in this State and the denominator of which is the total number of vehicle miles of the company everywhere. The words "vehicle miles" shall mean miles traveled by vehicles owned or operated by the company carrying passengers for a fare or traveling on a scheduled route.

(q) All apportionable income of a telegraph company shall be apportioned by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor and the denominator of which is three.

The property factor shall be as defined in subsection (j) of this section, the payroll factor shall be as defined in subsection (k) of this section, and the sales factor shall be as defined in subsection (*l*) of this section.

(r) All apportionable income of an excluded corporation and of all other public utilities shall be apportioned by multiplying the income by the sales factor as determined under subsection (*l*) of this section.

(s) All apportionable income of an air or water transportation corporation shall be apportioned by a fraction, the numerator of which is the corporation's revenue ton miles in this State and the denominator of which is the corporation's revenue ton miles everywhere. The term "revenue ton mile" means one ton of passengers, freight, mail, or other cargo carried one mile. In making this computation, a passenger is considered to weigh two hundred pounds.

(t)(1) **(Repealed effective January 1, 2008)** If any corporation believes that the method of allocation or apportionment as administered by the Secretary has operated or will so operate as to subject it to taxation on a greater portion of its income than is reasonably attributable to business or earnings within the State, it may file with the Tax Review Board a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the Tax Review Board may prescribe. The Board shall grant a hearing on the petition. The time limitations set in G.S. 105-241.2 for the date of the hearing, notification to the taxpayer, and a decision following the hearing apply to a hearing held pursuant to this subsection. At least three members of the Tax Review Board shall attend any hearing pursuant to such petition. In such cases, the Tax Review Board's membership shall be augmented by the addition of the Secretary, who shall sit as a member of the Board with full power to participate in its deliberations and decisions with respect to petitions filed under the provisions of this subsection. An informal record containing in substance the evidence, contentions and arguments presented at the hearing shall be made. All members of the augmented Tax Review Board shall consider such evidence, contentions and arguments and the decisions thereon shall be made by a majority vote of the augmented Board.

(2) If the corporation employs in its books of account a detailed allocation of receipts and expenditures which reflects more clearly than the applicable allocation formula prescribed by this section the income attributable to the business within this State, application for permission to base the return upon the taxpayer's books of account shall be considered by the Tax Review Board. The Board may permit such separate accounting method in lieu of applying the applicable allocation formula if the Board finds that method best reflects the income and earnings attributable to this State.

(3) If the corporation shows that any other method of allocation than the applicable allocation formula prescribed by this section reflects more clearly the income attributable to the business within this State, application for permission to base the return upon such other method shall be considered by the Tax Review Board. The application shall be accompanied by a statement setting forth in detail, with full explanations, the method the corporation believes will more nearly reflect its income from business within this State. If the Board concludes that the allocation formula prescribed by this section allocates to this State a greater portion of the net income of the corporation than is reasonably attributable to business or earnings within this State, it shall determine the allocable net income by such other method as it finds best calculated to assign to this State for taxation the portion of the corporation's net income reasonably attributable to its business or earnings within this State.

(4) There shall be a presumption that the appropriate allocation formula reasonably attributes to this State the portion of the corporation's income earned in this State, and the burden shall rest upon the

corporation to show the contrary. The relief herein authorized shall be granted by the Board only in cases of clear, cogent and convincing proof that the petitioning corporation is entitled thereto. No corporation shall use any alternative formula or method other than the applicable allocation formula provided by statute in making a report or return of its income to this State except upon order in writing of the Board, and any return in which any alternative formula or other method, other than the applicable allocation formula prescribed by statute, is used without permission of the Board shall not be a lawful return.

When the Board determines, pursuant to the provisions of this subsection, that an alternative formula or other method more accurately reflects the income allocable to North Carolina and renders its decision with regard thereto, the corporation shall allocate its net income for future years in accordance with such determination and decision of the Board so long as the conditions constituting the basis upon which the decision was made remain unchanged or until such time as the business method of operation of the corporation changes. Provided, however, that the Secretary may, with respect to any subsequent year, require the corporation to furnish information relating to its property, operations, and activities.

(6) A corporation which proposes to do business in this State may file a petition with the Board setting forth the facts upon which it contends that the applicable allocation formula will allocate a greater portion of the corporation's future income to North Carolina than will be reasonably attributable to its proposed business or contemplated earnings within the State. Upon a proper showing in accordance with the procedure described above for determinations by the Board, the Board may authorize such corporation to allocate income from its future business to North Carolina on the basis prescribed by the Board under the provisions of this section for such future years if the conditions constituting the basis upon which the Board's decision is made remain unchanged and the business operations of the corporation continue to conform to the statement of proposed methods of business operation presented by the corporation to the Board.

(6) When the Secretary asserts liability under the formula adjustment decision of the Tax Review Board, an aggrieved corporation may pay the tax and bring a civil action for recovery under the provisions of Article 9.

(t1) **(Effective January 1, 2008)** Alternative Apportionment Method. — A corporation that believes the statutory apportionment method that otherwise applies to it under this section subjects a greater portion of its income to tax than is attributable to its business in this State may make a written request to the Secretary for permission to use an alternative method. The request must set out the reasons for the corporation's belief and propose an alternative method.

The statutory apportionment method that otherwise applies to a corporation under this section is presumed to be the best method of determining the portion of the corporation's income that is attributable to its business in this State. A corporation has the burden of establishing by clear, cogent, and convincing proof that the proposed alternative method is a better method of determining the amount of the corporation's income attributable to the corporation's business in this State.

The Secretary must issue a written decision on a corporation's request for an alternative apportionment method. If the decision grants the request, it must describe the alternative method the corporation is authorized to use and state the tax years to which the alternative method applies. A decision may apply to no more than three tax years. A corporation may renew a request to use an alternative apportionment method by following the procedure in this subsection. A decision of the Secretary on a request for an alternative apportionment method is final and is not subject to administrative or judicial review. A corporation authorized to use an alternative method may apportion its income in accordance with the alternative method or the statutory method. (1939, c. 158, s. 311; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 752, s. 3; 1953, c. 1302, s. 4; 1955, c. 1350, s. 18; 1957, c. 1340, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; c. 1186; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 1287, s. 4; 1981 (Reg. Sess., 1982), c. 1212; 1987, c. 804, s. 2; 1987 (Reg. Sess., 1988), c. 994, s. 1; 1993, c. 532, s. 12; 1995, c. 350, s. 3; 1996, 2nd Ex. Sess., c. 14, s. 5; 1998-98, s. 69; 1999-369, s. 5.4; 2000-126, s. 5; 2001-327, s. 1(c); 2002-126, s. 30G.1(a); 2003-349, ss. 1.2, 1.3; 2003-416, ss. 5(a)-5(h); 2004-170, s. 15; 2005-435, s. 53; 2007-491, ss. 2, 12.)

Editor's Note. — Session Laws 2001-327, s. 1(f), provides that: "This section is effective for taxable years beginning on or after January 1, 2001. Notwithstanding G.S. 105-163.41, no addition to tax may be made under that statute for a taxable year beginning on or after January 1, 2001, and before January 1, 2002, with respect to an underpayment of corporation income tax by a payer of royalties who adds the payments to State net income pursuant to G.S.105-130.7A(c), to the extent the underpayment was created or increased by this section."

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2005-435, s. 53, effective January 1, 2006, made a minor stylistic change in the introductory language of subdivision (a)(6).

Session Laws 2007-491, ss. 2 and 12, effective January 1, 2008, repealed subsection (t) and added subsection (t1). For applicability, see Editor's note.

Legal Periodicals. — For note on constitutionality of income allocation formulae under former G.S. 105-134 as applied to corporations, see 9 N.C.L. Rev. 470 (1931).

For note as to allocation of interstate corporate income, etc., under former G.S. 105-134, see 36 N.C.L. Rev. 156 (1958).

For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

CASE NOTES

Editor's Note. *— A number of the cases cited below were decided under provisions similar to this section appearing in G.S. 105-134 prior to the 1967 amendment thereto.*

Taxpayer Barred From Challenging Constitutionality of Augmented North Carolina Tax Review Board's Actions. — As a taxpayer sought, received, and benefitted from a variance from G.S. 105-130.4(t)'s tax allocation formula, it could not challenge, on separation-of-powers grounds, orders of the augmented North Carolina Tax Review Board that granted the variance. Philip Morris USA Inc. v. Tolson, 176 N.C. App. 509, 626 S.E.2d 853, 2006 N.C. App. LEXIS 536 (2006), cert. denied, appeal dismissed, 361 N.C. 356, 644 S.E.2d 231 (2007).

Purpose of Apportionment. — The imposition of the income tax upon a base which reasonably represents the proportion of the trade or business carried on within the State is designed to meet the due process requirement that a state show a sufficient nexus between such a tax and the transaction within a state for which the tax is an exaction, and the proscriptions of the Commerce Clause of the federal Constitution which permit a state to tax only that part of a corporation's net income from multistate operations which is attributable to earnings within the taxing state. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

Jurisdiction of Tax Review Board. — As an administrative tribunal, the North Carolina Tax Review Board lacks the authority or jurisdiction to make a determination regarding the constitutionality of the tax resulting from the application of G.S. 105-130.4. Cent. Tel. Co. v. Tolson, 174 N.C. App. 554, 621 S.E.2d 186, 2005 N.C. App. LEXIS 2488 (2005).

Reversion of Funds from Pension Fund. — Court must consider both transactional and functional tests in determining if the reversion of funds from a pension fund is business income the court must consider both the transactional test and the functional test. Union Carbide Corp. v. Offerman, 132 N.C. App. 665, 513 S.E.2d 341 (1999), aff'd, 351 N.C. 310, 526 S.E.2d 167 (2000).

Reversion of funds from a corporation's overfunded pension plan was not business income under the functional test, since the pension fund was not essential to the corporation's regular course of manufacturing and selling chemicals. Union Carbide Corp. v. Offerman, 132 N.C. App. 665, 513 S.E.2d 341 (1999), aff'd, 351 N.C. 310, 526 S.E.2d 167 (2000).

Plaintiff's reversion of pension plan contributions was not business income under the functional test of subsection (a)(1) of this section because plaintiff's contingent property right in the pension plan was not integral to its business nor used to generate income in its regular business operations. Union Carbide Corp. v. Offerman, 351 N.C. 310, 526 S.E.2d 167, 2000 N.C. LEXIS 2 (2000).

"Compensation". — Article 4 of the Revenue Act was extensively revised in 1967, and this new section dealing with the payroll factor clarified the provisions of former G.S. 105-134 so as to make it plain that "compensation" to be included means "wages, salaries, commissions and any other form of remuneration paid to employees for personal services." Myrtle Desk Co. v. Clayton, 8 N.C. App. 452, 174 S.E.2d 619 (1970).

"Excluded Corporation." — North Carolina Secretary of Revenue did not exceed his authority in imposing franchise and income taxes on out-of-state trademark holding companies that entered into licensing agreements with related retail companies that operated in North Carolina, whereby the retail companies paid the holding companies royalties for the use of the trademarks in North Carolina; the holding companies were were not excluded corporations under G.S. 105-130.4. A&F Trademark, Inc. v. Tolson, 167 N.C. App. 150, 605 S.E.2d 187, 2004 N.C. App. LEXIS 2162 (2004), appeal dismissed, 359 N.C. 320, — S.E.2d — (2005), cert. denied, — U.S. —, 126 S. Ct. 353, 163 L. Ed. 2d 62 (2005).

"Integral Part" of Business. — Even though corporate taxpayer was not in business of leasing equipment, lease arrangement which was means of gaining working capital and increasing cash flow for all corporation business operations was considered an "integral part" of the corporation's business. National Serv. Indus., Inc. v. Powers, 98 N.C. App. 504, 391 S.E.2d 509 (1990).

Once a corporation's assets are found to constitute integral parts of the corporation's regular trade or business, income resulting from the acquisition, management, and/or disposition of those assets constitutes business income regardless of how that income is received. Polaroid Corp. v. Offerman, 349 N.C. 290, 507 S.E.2d 284 (1998), cert. denied, 526 U.S. 1098, 119 S. Ct. 1576, 143 L. Ed. 2d 671 (1999) (decided prior to the 2002 amendment to the definition of "business income" in this section).

State has right to collect nondiscriminatory income taxes imposed on foreign corporation if the taxes are imposed solely on that part of the corporation's income earned within the State in its interstate business, and reasonably attributable to its interstate business done or performed within the borders of this State. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

Burden of Showing Statutory Assessment Unconstitutional. — Where the Commissioner (now Secretary) of Revenue assessed an income tax against a foreign corporation operating a manufacturing plant in this State in accordance with the provisions of G.S. 311 of the Revenue Act of 1929, without regard to its intangible property, the Commissioner's (now Secretary's) assessment was upheld upon appeal where the corporation failed to show that such method of allocation was unconstitutional in its application to the corporation. State ex rel. Maxwell v. Kent-Coffey Mfg. Co., 204 N.C. 365, 168 S.E. 397 (1933), aff'd, 291 U.S. 642, 54 S. Ct. 437, 78 L. Ed. 1040 (1934).

Method of Apportionment Not Unreasonable and Arbitrary Will Be Sustained. — In determining the amount of income of a foreign corporation subject to taxation by a state the difficulty of making an exact apportionment is apparent and hence, when the state has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

Evidence May Be Received to Show Arbitrariness of Method Fair on Its Face. — When there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a state has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

If Result Unjust, Additional Factors May Be Added to Formula. — If the apportionment formula produces an unjust result, differing and additional factors may be added. Clark Equip. Co. v. Johnson, 261 N.C. 269, 134 S.E.2d 327 (1964).

Authority of Augmented North Carolina Tax Review Board to Create Special income Tax Allocation Formula for Corporate Tax Payer. — As a special income tax allocation formula set forth in two North Carolina Tax Review Board orders was independent from and substituted G.S. 105-130.4(i)'s otherwise applicable allocation formula for multistate corporations, a taxpayer was not entitled to determine its tax liability by using the amended statutory formula. Philip Morris USA Inc. v. Tolson, 176 N.C. App. 509, 626 S.E.2d 853, 2006 N.C. App. LEXIS 536 (2006), cert. denied, appeal dismissed, 361 N.C. 356, 644 S.E.2d 231 (2007).

Augmented North Carolina Tax Review Board did not violate the separation of powers doctrine by creating a special tax allocation formula for a multi-state corporation, because in so doing, it only exercised the powers expressly reserved for it by the general assembly under G.S. 105-130.4(t). Philip Morris USA Inc. v. Tolson, 176 N.C. App. 509, 626 S.E.2d 853, 2006 N.C. App. LEXIS 536 (2006), cert. denied, appeal dismissed, 361 N.C. 356, 644 S.E.2d 231 (2007).

Use of Corporation's Own Accounting System. — When a complaining taxpayer establishes by evidence, clear, cogent and convincing, an inequitable result, the Tax Review Board may, in cases where the corporation keeps its books in such manner as to establish the income earned in this State, use the company's separate bookkeeping and accounting system to ascertain that portion of the income earned in North Carolina. Clark Equip. Co. v. Johnson, 261 N.C. 269, 134 S.E.2d 327 (1964).

Purpose of Subsection(s). — The purpose of provisions such as subsection (s) of this section was not to provide either a substitute for, or an alternative to, G.S. 105-267 [repealed], but to afford relief from the apportionment formula of this section when it operates to tax a greater portion of a corporation's income than is reasonably attributable to business in this State. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

Taxpayer May Pay Under Protest and Sue for Refund. — A taxpayer contending that an additional assessment of income tax is invalid is not required to proceed under provisions such as subsection (s) of this section, but may pay the tax under protest, make proper demand for refund and, upon refusal, bring suit under G.S. 105-267. Sayles Biltmore Bleacheries, Inc. v. Johnson, 266 N.C. 692, 147 S.E.2d 177 (1966).

Tax Review Board Ruling Not Required Before Seeking Relief in Superior Court. — It was not the intention of the legislature, when it amended the predecessor of this section in 1953, to require a corporation to secure a ruling from the augmented Tax Review Board before it might have the superior court determine the legality of a tax assessment against specific items of its income earned outside of North Carolina, no part of which, it contends, is allocable to North Carolina. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

No Appellate Review of Augmented Tax Review Board's Decision. — Appellate jurisdiction does not lie in a North Carolina superior court for an Augmented Tax Review Board's (ATRB's) decision; as a result, when a corporation is contesting the application of the apportionment formula before the ATRB, G.S. 105-130.4(t)(6) requires aggrieved corporations to pay the tax and bring an original civil action, thus directing them to G.S. 105-241.4 [repealed], which provides that an aggrieved corporation bypass administrative review and proceed to litigate the tax liability at issue in the superior court de novo pursuant to that court's original jurisdiction. In re Cent. Tel. Co., 167 N.C. App. 14, 604 S.E.2d 680, 2004 N.C. App. LEXIS 2058 (2004), appeal dismissed, cert. denied, — N.C. —, 610 S.E.2d 203 (2005).

Tax on Foreign Corporation Doing Exclusively Interstate Business. — An income tax imposed under former G.S. 105-134 on a foreign corporation doing an exclusively interstate business as a motor carrier of freight did not impose a burden on interstate commerce in contravention of the United States Constitution, since no tax would be imposed if such corporation should have no net income earned in North Carolina by reason of its interstate business, and the tax was imposed only upon that portion of its net income which was reasonably attributable to its interstate business done within the borders of the State, without any discrimination against the taxpayer either in the admeasurement of the tax or the means for enforcing it, and the tax not being upon the franchise to engage in business. ET & WNC Transp. Co. v. Currie, 248 N.C. 560, 104 S.E.2d 403 (1958), aff'd, 359 U.S. 28, 79 S. Ct. 602, 3 L. Ed. 2d 625, rehearing denied, 359 U.S. 976, 79 S. Ct. 874, 3 L. Ed. 2d 842 (1959), construing § 105-134 as it stood before the 1957 amendment.

In the collection of income taxes under former G.S. 105-134 from a foreign corporation doing an exclusively interstate business in North Carolina there was no violation of the "due process of law" provision of U.S. Const., Amend. XIV or of the "law of the land" provision of N.C. Const., Art. I, § 19. ET & WNC Transp. Co. v. Currie, 248 N.C. 560, 104 S.E.2d 403 (1958), aff'd, 359 U.S. 28, 79 S. Ct. 602, 3 L. Ed. 2d 625, rehearing denied, 359 U.S. 976, 79 S. Ct. 874, 3 L. Ed. 2d 843 (1959), construing § 105-134 as it stood before the 1957 amendment.

Transactional Test For Business Income. — Under the transactional test, to determine whether business income as defined in this section prior to the 2002 amendment was derived from a transaction or activity in the regular course of the corporation's trade or business, one had to consider the frequency and regularity of similar transactions, the former practices of the business, and the taxpayer's subsequent use of the income. Polaroid Corp. v. Offerman, 349 N.C. 290, 507 S.E.2d 284 (1998), cert. denied, 526 U.S. 1098, 119 S. Ct. 1576, 143 L. Ed. 2d 671 (1999) (decided prior to the 2002 amendment to the definition of "business income" in this section); Union Carbide Corp. v. Offerman, 132 N.C. App. 665, 513 S.E.2d 341 (1999), aff'd, 351 N.C. 310, 526 S.E.2d 167 (2000).

Functional Test for Business Income. — Under the functional test, income was classified as business income as defined in this section prior to the 2002 amendment if it arose from the acquisition, management, and/or disposition of an asset that was used by the taxpayer in the regular course of business, and when determining whether a source of income constitutes business income under the functional test, the extraordinary nature or infrequency of the event was irrelevant. Polaroid Corp. v. Offerman, 349 N.C. 290, 507 S.E.2d 284 (1998), cert. denied, 526 U.S. 1098, 119 S. Ct. 1576, 143 L. Ed. 2d 671 (1999) (decided prior to the 2002 amendment to the definition of "business income" in this section).

Prejudgment and postjudgment interest recovered by a taxpayer as part of a judgment for patent infringement was properly characterized as business income, where the patents arose out of and were created by the taxpayer's business activities, and the interest represented compensation received in lieu of income that the taxpayer would have earned in the marketplace absent the infringement. Polaroid Corp. v. Offerman, 349 N.C. 290, 507 S.E.2d 284 (1998), cert. denied, 526 U.S. 1098, 119 S. Ct. 1576, 143 L. Ed. 2d 671 (1999) (decided prior to the 2002 amendment to the definition of "business income" in this section).

In determining if income is business income under the functional test, the court considers whether there are indicia of corporate ownership of the property and whether the property is essential to completeness of the regular trade or business. Union Carbide Corp. v. Offerman, 132 N.C. App. 665, 513 S.E.2d 341 (1999), aff'd, 351 N.C. 310, 526 S.E.2d 167 (2000).

Functional Test for Business Income Applied to Liquidation. — The sale and liquidation of plaintiff's fine jewelry manufacturing division generated nonbusiness income for the purpose of its corporate return where the plaintiff continued to manufacture and sell other consumer products but not fine jewelry and where the proceeds were not reinvested in the company to pay off debts or meet other needs but were immediately distributed to the shareholder; because the sale was a partial liquidation, the court looked to the totality of the circumstances in applying the functional test. Lenox, Inc. v. Offerman, 140 N.C. App. 662, 538 S.E.2d 203, 2000 N.C. App. LEXIS 1263 (2000), aff'd sub nom. Lenox, Inc. v. Tolson, 353 N.C. 659, 548 S.E.2d 513 (2001) (decided prior to the 2002 amendment to the definition of "business income" in this section).

When a transaction involves a complete or partial liquidation and cessation of a company's particular line of business, and the proceeds are distributed to shareholders rather than reinvested in the company, any gain or loss generated from that transaction is nonbusiness income under the functional test. Lenox, Inc. v. Tolson, 353 N.C. 659, 548 S.E.2d 513, 2001 N.C. LEXIS 671 (2001), (decided prior to the 2002 amendment to the definition of "business income" in this section).

Apportionment of Income of Unitary Business. — The fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as component parts of a single unit so that the entire net income may be taxed in one state regardless of the extent to which it may be derived from the conduct of the enterprise in another state. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

Although a unitary business (a concern that is carrying on one kind of business, the component parts of which are too closely connected and necessary to each other to justify division or separate consideration, as independent units) may produce an income which must be allocated to two or more states in which its activities are carried on, such business may not be split up arbitrarily and conventionally in applying the tax laws; there must be some logical reference to the production of income. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

In apportioning the income of a unitary business to determine how much of it is subject to state taxation the formula used must give adequate weight to the essential elements responsible for the earning of the income. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

Lost Profit Damages Award for Patent Infringement. — The Secretary of Revenue's interpretation of business income to include a lost profit damages award for infringement of the taxpayer's patents was correct, in that the recovery was an extraordinary or unusual transaction that provided the taxpayer with income from assets that were integral parts of its regular trade or business operations. Polaroid Corp. v. Offerman, 349 N.C. 290, 507 S.E.2d 284 (1998), cert. denied, 526 U.S. 1098, 119 S. Ct. 1576, 143 L. Ed. 2d 671 (1999) (decided prior to the 2002 amendment to the definition of "business income" in this section).

Mutual Dependency of Interrelated Activities Sustains Apportionment Formula. — In allocating for taxation by this State a part of the net income of a unitary business operating in this State and several other states, it is not required that its equipment appropriately employed in this State be equally productive with that employed in the other states, but the mutual dependency of the interrelated activities in furtherance of the entire business sustains an apportionment formula which results in a reasonable approximation of its income earned here, it being required only that the formula not be intrinsically arbitrary or produce an unreasonable result. VEPCO v. Currie, 254 N.C. 17, 118 S.E.2d 155, appeal dismissed, 367 U.S. 910, 81 S. Ct. 1919, 6 L. Ed. 2d 1250 (1961).

Taxation of Dividends Received by Foreign Corporation from Foreign Subsidiary. — For purposes of taxation in a parent-subsidiary relationship, where the corporate separation is maintained and the subsidiary conducts its own business, the subsidiary, not the parent, is doing the business. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

The mere fact that a foreign corporation engaged in business in this and other states, owns a subsidiary corporation in another state, which subsidiary does no business in North Carolina and owns no property in this State but is engaged in a similar business to that of the parent corporation, does not of itself require the parent corporation to prorate the dividends received from such subsidiary to all the states in which the parent corporation does business. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

There was no legal basis for requiring a foreign corporation to pay income taxes to the State on the dividends received from its subsidiary, where the subsidiary was neither a customer nor a retail outlet of the parent corporation, and the dividends were paid out of earnings of the subsidiary no part of which was earned from business conducted or transacted in the State. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

Taxation of Dividends Received by Domesticated Corporation from Foreign Subsidiary. — Where the separate entities of the domesticated parent and its foreign, dividend-paying subsidiary (engaged in a similar business outside of North Carolina) are maintained — each transacting its own business as a distinct corporation and dealing with the other as if no parent-subsidiary relation existed — North Carolina cannot tax the subsidiary's dividends even though they are included in the parent's ultimate gains. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

The test for determining whether income of a foreign subsidiary may be taxed in this State is not solely whether the business of a foreign subsidiary is similar to that in which the domesticated parent is engaging in North Carolina or elsewhere, or whether it has had business transactions with the parent elsewhere in the world. Conceding both similarity of businesses and intercorporate transactions outside the State, yet the dividend income which the subsidiary pays the parent cannot be constitutionally allocated to North Carolina and prorated for income taxation unless (1) it is attributable to business activities within this jurisdiction or (2) the activities of the corporations are so interrelated as to make it impossible to identify the various sources of the taxpayer's total earnings with reasonable certainty. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

Cited in In re Dickinson, 281 N.C. 552, 189 S.E.2d 141 (1972); Fieldcrest Mills, Inc. v. Coble, 290 N.C. 586, 227 S.E.2d 562 (1976).

OPINIONS OF ATTORNEY GENERAL

Mortgage Guaranty Insurance Company Not "Excluded Corporation". — A mortgage guaranty insurance company is not an "excluded corporation" under subdivision (a)(4). See opinion of Attorney General to Mr. W.B. Matthews, Director, Corporate Income and Franchise Tax Division, North Carolina Department of Revenue, 46 N.C.A.G. 34 (1976).

§ 105-130.5. Adjustments to federal taxable income in determining State net income.

(a) The following additions to federal taxable income shall be made in determining State net income:

(1) Taxes based on or measured by net income by whatever name called and excess profits taxes;

(2) Interest paid in connection with income exempt from taxation under this Part;

(3) The contributions deduction allowed by the Code;

(4) Interest income earned on bonds and other obligations of other states or their political subdivisions, less allowable amortization on any bond acquired on or after January 1, 1963;

(5) The amount by which gains have been offset by the capital loss carryover allowed under the Code. All gains recognized on the sale or other disposition of assets must be included in determining State net income or loss in the year of disposition;

(6) The net operating loss deduction allowed by the Code; and

(7) Repealed by Session Laws 2001-327, s. 3(a), effective for taxable years beginning on or after January 1, 2001.

(8) Repealed by Session Laws 1987, c. 778, s. 2.

(9) Payments to or charges by a parent, subsidiary or affiliated corporation in excess of fair compensation in all intercompany transactions of any kind whatsoever pursuant to the Revenue Laws of this State.

(10) The total amounts allowed under this Chapter during the taxable year as a credit against the taxpayer's income tax. A corporation that apportions part of its income to this State shall make the addition required by this subdivision after it determines the amount of its income that is apportioned and allocated to this State and shall not apply to a credit taken under this Chapter the apportionment factor used by it in determining the amount of its apportioned income.

(11) The amount by which the percentage depletion allowance allowed by sections 613 and 613A of the Code for mines, oil and gas wells, and other natural deposits exceeds the cost depletion allowance for these items under the Code, except as otherwise provided herein. This subdivision does not apply to depletion deductions for clay, gravel, phosphate rock, lime, shells, stone, sand, feldspar, gemstones, mica, talc, lithium compounds, tungsten, coal, peat, olivine, pyrophyllite, and other solid minerals or rare earths extracted from the soil or waters of this State. Corporations required to apportion income to North Carolina shall first add to federal taxable income the amount of all percentage depletion in excess of cost depletion that was subtracted from the corporation's gross income in computing its federal income taxes and shall then subtract from the taxable income apportioned to North Carolina the amount by which the percentage depletion allowance allowed by sections 613 and 613A of the Code for solid minerals or rare earths extracted from the soil or waters of this State exceeds the cost depletion allowance for these items.

(12) The amount allowed under the Code for depreciation or as an expense in lieu of depreciation for a utility plant acquired by a natural gas local distribution company, to the extent the plant is included in the company's rate base at zero cost in accordance with G.S. 62-158.

(13) Repealed by Session Laws 2001-427, s. 4(b), effective for taxable years beginning on or after January 1, 2002.

(14) Royalty payments required to be added by G.S. 105-130.7A, to the extent deducted in calculating federal taxable income.

(15) The applicable percentage of the amount allowed as a special accelerated depreciation deduction under section 168(k) or section 1400L of the Code, as set out in the table below. In addition, a taxpayer who was allowed a special accelerated depreciation deduction under section 168(k) or section 1400L of the Code in a taxable year beginning before January 1, 2002, and whose North Carolina taxable income in that earlier year reflected that accelerated depreciation deduction must add to federal taxable income in the taxpayer's first taxable year beginning on or after January 1, 2002, an amount equal to the amount of the deduction allowed in the earlier taxable year. These adjustments do not result in a difference in basis of the affected assets for State and federal income tax purposes. The applicable percentage is as follows:

Taxable Year	Percentage
2002	100%
2003	70%
2004	70%
2005 and thereafter	0%

(16) The amount excluded from gross income under Subchapter R of Chapter 1 of the Code.

(17) The amount excluded from gross income under section 199 of the Code.

(18) **(Repealed effective for taxable years beginning on and after January 1, 2007)** To the extent not included in federal taxable income, the amount of qualifying expenses for which the taxpayer claims a credit under G.S. 105-130.47.

(19) **(Effective for taxable years beginning on or after January 1, 2007)** The dividend paid deduction allowed under the Code to a captive REIT, as defined in G.S. 105-130.12.

(20) **(Effective for taxable years beginning on or after January 1, 2008)** The amount of a donation made to a nonprofit organization for which a credit is claimed under G.S. 105-129.16H.

(b) The following deductions from federal taxable income shall be made in determining State net income:

(1) Interest upon the obligations of the United States or its possessions, to the extent included in federal taxable income: Provided, interest upon the obligations of the United States shall not be an allowable deduction unless interest upon obligations of the State of North Carolina or any of its political subdivisions is exempt from income taxes imposed by the United States.

(1a) Interest upon the obligations of any of the following, net of related expenses, to the extent included in federal taxable income:

a. This State, a political subdivision of this State, or a commission, an authority, or another agency of this State or of a political subdivision of this State.

b. A nonprofit educational institution organized or chartered under the laws of this State.

(2) Payments received from a parent, subsidiary or affiliated corporation in excess of fair compensation in intercompany transactions which in the determination of the net income or net loss of such corporation were not allowed as a deduction under the Revenue Laws of this State.

(3) Repealed by Session Laws 2003-349, s. 1.1, effective January 1, 2003.

(3a) Dividends treated as received from sources outside the United States as determined under section 862 of the Code, net of related expenses, to the extent included in federal taxable income. Notwithstanding the proviso in subdivision (c)(3) of this section, the netting of related expenses shall be calculated in accordance with subdivision (c)(3) of this section and G.S. 105-130.6A.

(3b) Any amount included in federal taxable income under section 78 or section 951 of the Code, net of related expenses.

(4) Losses in the nature of net economic losses sustained by the corporation in any or all of the 15 preceding years pursuant to the provisions of G.S. 105-130.8. A corporation required to allocate and apportion its net income under the provisions of G.S. 105-130.4 shall deduct its allocable net economic loss only from total income allocable to this State pursuant to the provisions of G.S. 105-130.8.

(5) Contributions or gifts made by any corporation within the income year to the extent provided under G.S. 105-130.9.

(6) Amortization in excess of depreciation allowed under the Code on the cost of any sewage or waste treatment plant, and facilities or equipment used for purposes of recycling or resource recovery of or from solid waste, or for purposes of reducing the volume of hazardous waste generated as provided in G.S. 105-130.10.

(7) Depreciation of emergency facilities acquired prior to January 1, 1955. Any corporation shall be permitted to depreciate any emergency facility, as such is defined in section 168 of the Code, over its useful life, provided such facility was acquired prior to January 1, 1955, and no amortization has been claimed on such facility for State income tax purposes.

(8) The amount of losses realized on the sale or other disposition of assets not allowed under section 1211(a) of the Code. All losses recognized on the sale or other disposition of assets must be included in determining State net income or loss in the year of disposition.

(9) With respect to a shareholder of a regulated investment company, the portion of undistributed capital gains of such regulated investment company included in such shareholder's federal taxable income and on which the federal tax paid by the regulated investment company is allowed as a credit or refund to the shareholder under section 852 of the Code.

(10) Repealed by Session Laws 1987, c. 778, s. 2.

(11) If a deduction for an ordinary and necessary business expense was required to be reduced or was not allowed under the Code because the corporation claimed a federal tax credit against its federal income tax liability for the income year in lieu of a deduction, the amount by which the deduction was reduced and the amount of the deduction that was disallowed.

(12) Reasonable expenses, in excess of deductions allowed under the Code, paid for reforestation and cultivation of commercially grown trees; provided, that this deduction shall be allowed only to those corporations in which the real owners of all the shares of such corporation are natural persons actively engaged in the commercial growing of trees, or the spouse, siblings, or parents of such persons. Provided, further, that in no case shall a corporation be allowed a deduction for the same reforestation or cultivation expenditure more than once.

(13) The eligible income of an international banking facility to the extent included in determining federal taxable income, determined as follows:

a. "International banking facility" shall have the same meaning as is set forth in the laws of the United States or regulations of the board of governors of the federal reserve system.

b. The eligible income of an international banking facility for the taxable year shall be an amount obtained by multiplying State taxable income as determined under G.S. 105-130.3 (determined without regard to eligible income of an international banking facility and allocation and apportionment, if applicable) for such year by a fraction, the denominator of which shall be the gross receipts for such year derived by the bank from all sources, and the numerator of which shall be the adjusted gross receipts for such year derived by the international banking facility from:
  1. Making, arranging for, placing or servicing loans to foreign persons substantially all the proceeds of which are for use outside the United States;
  2. Making or placing deposits with foreign persons which are banks or foreign branches of banks (including foreign subsidiaries or foreign branches of the taxpayer) or with other international banking facilities; or
  3. Entering into foreign exchange trading or hedging transactions related to any of the transactions described in this paragraph.

c. The adjusted gross receipts shall be determined by multiplying the gross receipts of the international banking facility by a fraction the numerator of which is the average amount for the taxable year of all assets of the international banking facility which are employed outside the United States and the denominator of which is the average amount for the taxable year of all assets of the international banking facility.

d. For the purposes of this subsection the term "foreign person" means:
  1. An individual who is not a resident of the United States;
  2. A foreign corporation, a foreign partnership or a foreign trust, as defined in section 7701 of the Code, other than a domestic branch thereof;
  3. A foreign branch of a domestic corporation (including the taxpayer);
  4. A foreign government or an international organization or an agency of either, or
  5. An international banking facility.

For purposes of this paragraph, the terms "foreign" and "domestic" shall have the same meaning as set forth in section 7701 of the Code.

(14) The amount by which the basis of a depreciable asset is required to be reduced under the Code for federal tax purposes because of a tax credit allowed against the corporation's federal income tax liability. This deduction may be claimed only in the year in which the Code requires that the asset's basis be reduced. In computing gain or loss on the asset's disposition, this deduction shall be considered as depreciation.

(15) The amount paid during the income year, pursuant to 7 U.S.C. § 1445-2, as marketing assessments on tobacco grown by the corporation in North Carolina.

(16) The amount of natural gas expansion surcharges collected by a natural gas local distribution company under G.S. 62-158.

(17) **(Effective until January 1, 2008)** To the extent included in federal taxable income, the following:

a. The amount of 911 charges collected under G.S. 62A-5 and remitted to a local government under G.S. 62A-6.

b. The amount of wireless Enhanced 911 service charges collected under G.S. 62A-23 and remitted to the Wireless Fund under G.S. 62A-24.

(17) **(Effective January 1, 2008)** To the extent included in federal taxable income, 911 charges imposed under G.S. 62A-43 and remitted to the 911 Fund under that section.

(18) Interest, investment earnings, and gains of a trust, the settlors of which are two or more manufacturers that signed a settlement agreement with this State to settle existing and potential claims of the State against the manufacturers for damages attributable to a product of the manufacturers, if the trust meets all of the following conditions:

a. The purpose of the trust is to address adverse economic consequences resulting from a decline in demand of the manufactured product potentially expected to occur because of market restrictions and other provisions in the settlement agreement.

b. A court of this State approves and retains jurisdiction over the trust.

c. Certain portions of the distributions from the trust are made in accordance with certifications that meet the criteria in the agreement creating the trust and are provided by a nonprofit entity, the governing board of which includes State officials.

(19) To the extent included in federal taxable income, the amount paid to the taxpayer during the taxable year from the Hurricane Floyd Reserve Fund in the Office of State Budget and Management for hurricane relief or assistance, but not including payments for goods or services provided by the taxpayer.

(20) Royalty payments received from a related member who added the payments to income under G.S. 105-130.7A for the same taxable year.

(21) In each of the taxpayer's first five taxable years beginning on or after January 1, 2005, an amount equal to twenty percent (20%) of the amount added to taxable income in a previous year as accelerated depreciation under subdivision (a)(15) of this section.

(22) To the extent included in federal taxable income, the amount paid to the taxpayer during the taxable year from the Disaster Relief Reserve Fund in the Office of State Budget and Management for hurricane relief or assistance, but not including payments for goods or services provided by the taxpayer.

(23) **(Effective for taxable years beginning on or after January 1, 2007)** A dividend received from a captive REIT, as defined in G.S. 105-130.12.

(c) The following other adjustments to federal taxable income shall be made in determining State net income:

(1) In determining State net income, no deduction shall be allowed for annual amortization of bond premiums applicable to any bond acquired prior to January 1, 1963. The amount of premium paid on any such bond shall be deductible only in the year of sale or other disposition.

(2) Federal taxable income must be increased or decreased to account for any difference in the amount of depreciation, amortization, or gains or losses applicable to property which has been depreciated or amortized by use of a different basis or rate for State income tax purposes than used for federal income tax purposes prior to the effective date of this Part.

(3) No deduction is allowed for any direct or indirect expenses related to income not taxed under this Part; provided, no adjustment shall be

made under this subsection for adjustments addressed in G.S. 105-130.5(a) and (b). G.S. 105-130.6A applies to the adjustment for expenses related to dividends received that are not taxed under this Part.

(4) The taxpayer shall add to federal taxable income the amount of any recovery during the taxable year not included in federal taxable income, to the extent the taxpayer's deduction of the recovered amount in a prior taxable year reduced the taxpayer's tax imposed by this Part but, due to differences between the Code and this Part, did not reduce the amount of the taxpayer's tax imposed by the Code. The taxpayer may deduct from federal taxable income the amount of any recovery during the taxable year included in federal taxable income under section 111 of the Code, to the extent the taxpayer's deduction of the recovered amount in a prior taxable year reduced the taxpayer's tax imposed by the Code but, due to differences between the Code and this Part, did not reduce the amount of the taxpayer's tax imposed by this Part.

(5) A savings and loan association may deduct interest earned on deposits at the Federal Home Loan Bank of Atlanta, or its successor, to the extent included in federal taxable income.

(d) Repealed by Session Laws 1987, c. 778, s. 3.

(e) Notwithstanding any other provision of this section, any recapture of depreciation required under the Code must be included in a corporation's State net income to the extent required for federal income tax purposes.

(f) Expired. (1967, c. 1110, s. 3; 1969, cc. 1113, 1124; 1971, c. 820, s. 1; c. 1206, s. 1; 1973, c. 1287, s. 4; 1975, c. 764, s. 4; 1977, 2nd Sess., c. 1200, s. 1; 1979, c. 179, s. 2; c. 801, s. 32; 1981, c. 704, s. 20; c. 855, s. 1; 1983, c. 61; c. 713, ss. 70-73, 82, 83; 1985, c. 720, s. 1; c. 791, s. 43; 1985 (Reg. Sess., 1986), c. 825; 1987, c. 89; c. 637, s. 1; c. 778, ss. 2, 3; c. 804, s. 3; 1991, c. 598, ss. 3, 10; 1991 (Reg. Sess., 1992), c. 857, s. 1; 1993 (Reg. Sess., 1994), c. 745, ss. 4, 5; 1995, c. 509, s. 50; 1996, 2nd Ex. Sess., c. 14, ss. 4, 10; 1997-439, s. 1; 1998-98, ss. 1(c), 4, 69; 1998-158, s. 5; 1998-171, s. 7; 1999-333, s. 2; 1999-337, s. 1; 1999-463, Ex. Sess., s. 4.6(b); 2000-140, s. 93.1(a); 2000-173, s. 19(c); 2001-327, ss. 1(d), (e), 3(a), (b); 2001-424, s. 12.2(b); 2001-427, ss. 4(b), 10(a); 2002-72, s. 14; 2002-126, ss. 30C.2(a), 30C.2(c); 2002-136, ss. 1, 4; 2003-284, s. 37A.3; 2003-349, s. 1.1; 2005-1, s. 5.7(b); 2005-276, ss. 35.1(b), 39.1(e); 2006-220, s. 1; 2007-323, ss. 31.18(a), (b); 2007-383, s. 5; 2007-397, s. 13(b).)

Subdivision (b)(17) Set Out Twice. — The first version of subdivision (b)(17) set out above is effective until January 1, 2008. The second version of subdivision (b)(17) set out above is effective January 1, 2008.

Editor's Note. — For the Hurricane Floyd Recovery Fund, see the Hurricane Floyd Recovery Act, Session Laws 1999-463.

Session Laws 1999-463, s. 4.5 and Session Laws 2005-1, s. 5.6, provide that a written statement of State and federal income tax treatment be included with the disbursement of funds or property for hurricane relief or assistance by each agency disbursing same.

Session Laws 2001-327, s. 1(a), provides: "The General Assembly finds that most corporations engaged in manufacturing and retailing activities in this State comply with the State tax on income generated from using trademarks in those activities. Taxpayers who do not comply, however, create an unfair burden on these corporate citizens. It is the intent of this section to reward taxpayers who comply, by giving them an option on how to file tax returns involving royalty income."

Session Laws 2001-327, ss. 1(d), 1(e), 3(a) and 3(b), effective for taxable years beginning on or after January 1, 2001, added subsections (a)(14), (b)(3a), (b)(3b), and (b)(20), and repealed subdivision (a)(7), which read: "Special deductions allowable under sections 241 to 247, inclusive, of the Code."

Session Laws 2001-427, s. 10(b), provides that notwithstanding G.S. 105-163.41, no addition to tax may be made under that statute for a taxable year beginning on or after January 1, 2001, and before January 1, 2002, with respect to an underpayment of corporation income tax to the extent the underpayment was created or increased by s. 10 of the act, which amended subdivisions (b)(3a) and (b)(3b) of G.S. 105-130.5.

Session Laws 2005-1, s. 1, provides that 2005-1 shall be known as "The Hurricane Recovery Act of 2005."

For Session Laws 2005-1, ss. 2.1 and 4, containing provisions for legislative findings regarding critical hurricane recovery needs not met by existing state and federal programs and funds, and establishment of the Disaster Relief Reserve Fund, see note at G.S. 143-1.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-323, s. 31.18(d), provides: "The Department of Revenue must report to the Revenue Laws Study Committee by May 1, 2009, on the amount of corporate income tax revenue generated in the 2007 taxable year by the addition to corporate income required by G.S. 105-130.5(a)(19), as enacted by this section. Based upon this report, the Revenue Laws Study Committee must determine the revenue-neutral corporate income tax rate and include this information in its report to the 2010 Session of the 2009 General Assembly."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2007-323, s. 31.18(a) and Session Laws 2007-397, s. 13(b) both enacted subdivisions designated as subdivision (a)(19). The subdivision enacted by Session Laws 2007-397 has been renumbered as subdivision (a)(20) at the direction of the Revisor of Statutes.

Session Laws 2007-397, s. 15, is a severability clause.

Effect of Amendments. — Session Laws 2005-1, s. 5.7(b), effective for taxable years beginning on or after January 1, 2004, added subdivision (b)(22).

Session Laws 2005-276, s. 35.1(b), effective for taxable years beginning on or after January 1, 2005, added subdivisions (a)(16), (a)(17).

Session Laws 2005-276, s. 39.1(e), effective for taxable years beginning on or after January 1, 2005, and applicable to qualifying expenses incurred on or after July 1, 2005, added subdivision (a)(18).

Session Laws 2006-220, s. 1, effective for taxable years beginning on and after January 1, 2007, repealed subdivision (a)(18), which read: "To the extent not included in federal taxable income, the amount of qualifying expenses for which the taxpayer claims a credit under G.S. 105-130.47."

Session Laws 2007-323, s. 31.18(a), (b), effective January 1, 2007, and effective for taxable years beginning on or after January 1, 2007, added subdivisions (a)(19) and subdivision (b)(23).

Session Laws 2007-383, s. 5, effective January 1, 2008, rewrote subdivision (b)(17).

Session Laws 2007-397, s. 13(b), effective for taxable years beginning on or after January 1, 2008, added the subdivision designated herein as subdivision (a)(20).

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 481.

CASE NOTES

Cited in Fieldcrest Mills, Inc. v. Coble, 290 N.C. 586, 227 S.E.2d 562 (1976); Dunn v. State, — N.C. App. —, 635 S.E.2d 604, 2006 N.C. App. LEXIS 2163 (2006).

§ 105-130.6. Subsidiary and affiliated corporations.

The net income of a corporation doing business in this State that is a parent, subsidiary, or affiliate of another corporation shall be determined by eliminating all payments to or charges by the parent, subsidiary, or affiliated corporation in excess of fair compensation in all intercompany transactions of any kind whatsoever. If the Secretary finds as a fact that a report by a corporation does not disclose the true earnings of the corporation on its business carried on in this State, the Secretary may require the corporation to file a consolidated return of the entire operations of the parent corporation and of its subsidiaries and affiliates, including its own operations and income. The Secretary shall determine the true amount of net income earned by such corporation in this State. The combined net income of the corporation and of its parent, subsidiaries, and affiliates shall be apportioned to this State by use of the applicable apportionment formula required to be used by the corporation under G.S. 105-130.4. The return shall include in the apportionment formula the property, payrolls, and sales of all corporations for which the return is made. For the purposes of this section, a corporation is considered a subsidiary of another corporation when, directly or indirectly, it is subject to control by the other corporation by stock ownership, interlocking directors, or by any other means whatsoever exercised by the same or associated financial interests, whether the control is direct or through one or more subsidiary, affiliated, or controlled corporations. A corporation is considered an affiliate of another corporation when both are directly or indirectly controlled by the same parent corporation or by the same or associated financial interests by stock ownership, interlocking directors, or by any other means whatsoever, whether the control is direct or through one or more subsidiary, affiliated, or controlled corporations. The secretary may require a consolidated return under this section regardless of whether the parent or controlling corporation or interests or its subsidiaries or affiliates, other than the taxpayer, are or are not doing business in this State.

If a consolidated return required by this section is not filed within 60 days after it is demanded, then the corporation is subject to the penalties provided in G.S. 105-230 and G.S. 105-236.

The parent, subsidiary, or affiliated corporation must incorporate in its return required under this section information needed to determine the net income taxable under this Part, and must furnish any additional information the Secretary requires. If the return does not contain the information required or the additional information requested is not furnished within 30 days after it is demanded, the corporation is subject to the penalties provided in G.S. 105-230 and G.S. 105-236.

If the Secretary finds that the determination of the income of a parent, subsidiary,or affiliated corporation under a consolidated return will produce a greater or lesser figure than the amount of income earned in this State, the Secretary may readjust the determination by reasonable methods of computation to make it conform to the amount of income earned in this State. If the corporation contends the figure produced is greater than the earnings in this State, it must file with the Secretary within 30 days after notice of the determination a statement of its objections and of an alternative method of determination. The Secretary must consider the statement in determining the income earned in this State. The findings and conclusions of the Secretary shall be presumed to be correct and shall not be set aside unless shown to be plainly wrong. (1939, c. 158, s. 3181/2; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1959, c. 1259, ss. 4, 8; 1967, c. 1110, s. 3; 1971, c. 1223, s. 1; 1973, c. 476, s. 193; 1998-98, s. 69; 1998-212, s. 29A.14(f).)

Editor's Note. — Session Laws 2007-323, s. 31.18(d), provides: "The Department of Revenue must report to the Revenue Laws Study Committee by May 1, 2009, on the amount of corporate income tax revenue generated in the 2007 taxable year by the addition to corporate income required by G.S. 105-130.5(a)(19), as enacted by this section. Based upon this report, the Revenue Laws Study Committee must determine the revenue-neutral corporate income tax rate and include this information in its report to the 2010 Session of the 2009 General Assembly."

Session Laws 2007-323, s. 31.18(e), provides: "This section does not affect the authority of the Department of Revenue under G.S. 105-130.6, G.S. 105-130.16, or any other statute to require a corporation to file a consolidated return or to determine the net income of a corporation properly attributable to this State. The General Assembly finds that an alternative method of addressing a corporation's attempt to use a real estate investment trust to shift income between entities and avoid State taxes is to require a captive REIT, as defined in G.S. 105-130.12 as amended by this section, to add to its federal taxable income the dividend paid deduction otherwise allowed under the Internal Revenue Code."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides:

"Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

CASE NOTES

Taxation of Dividends Received by Domesticated Corporation from Foreign Subsidiary. — Where the separate entities of the domesticated parent and its foreign, dividend-paying subsidiary (engaged in a similar business outside of North Carolina) are maintained, each transacting its own business as a distinct corporation and dealing with the other as if no parent-subsidiary relation existed, North Carolina cannot tax the subsidiary's dividends, even though they are included in the parent's ultimate gains. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

The test for determining whether income of a foreign subsidiary may be taxed in this State is not solely whether the business of a foreign subsidiary is similar to that in which the domesticated parent is engaging in North Carolina or elsewhere, or whether it has had business transactions with the parent elsewhere in the world. Conceding both similarity of businesses and intercorporate transactions outside the State, yet the dividend income which the subsidiary pays the parent cannot be constitutionally allocated to North Carolina and prorated for income taxation unless (1) it is attributable to business activities within this jurisdiction, or (2) the activities of the corporations are so interrelated as to make it impossible to identify the various sources of the taxpayer's total earnings with reasonable certainty. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

Applied in NCNB Mtg. Corp. v. Coble, 31 N.C. App. 243, 228 S.E.2d 776 (1976).

§ 105-130.6A. Adjustment for expenses related to dividends.

(a) Definitions. — The provisions of G.S. 105-130.6 govern the determination of whether a corporation is a subsidiary or an affiliate of another corporation. In addition, the following definitions apply in this section:

(1) Affiliated group. — A group that includes a corporation, all other corporations that are affiliates or subsidiaries of that corporation, and all other corporations that are affiliates or subsidiaries of another corporation in the group.

(2) Bank holding company. — A holding company with an affiliate that is subject to the privilege tax on banks levied in G.S. 105-102.3.

(3) Dividends. — Dividends received that are not taxed under this Part.

(4) Electric power holding company. — A holding company with an affiliate or a subsidiary that is subject to the franchise tax on electric power companies levied in G.S. 105-116.

(5) Expense adjustment. — The adjustment required by G.S. 105-130.5(c)(3) for expenses related to dividends not taxed under this Part.

(6) Holding company. — Defined in G.S. 105-120.2.

(b) General Rule. — For corporations other than bank holding companies and electric power holding companies, the adjustment under G.S. 105-130.5(c)(3) for expenses related to dividends not taxed under this Part may not exceed an amount equal to fifteen percent (15%) of the dividends.

(c) Bank Holding Companies. — For bank holding companies the adjustment under G.S. 105-130.5(c)(3) for expenses related to dividends not taxed under this Part may not exceed an amount equal to twenty percent (20%) of the dividends.

(d) Electric Power Holding Companies. — For electric power holding companies, the adjustment under G.S. 105-130.5(c)(3) for expenses related to dividends not taxed under this Part may not exceed an amount equal to fifteen percent (15%) of its total interest expenses.

(e) Cap for Bank Holding Companies. — After calculating the expense adjustment as provided in subsection (c) of this section, each bank holding company must calculate the amount of additional tax that results from the expense adjustments for the holding company and for every corporation in the holding company's affiliated group for the taxable year. If the expense adjustments result in additional tax exceeding eleven million dollars ($11,000,000) for a taxable year for the affiliated group, the affiliated group may reduce the amount of the expense adjustment so that the resulting additional tax does not exceed this maximum. This maximum applies once to each affiliated group each taxable year, whether or not the group includes more than one bank holding company.

The members of the affiliated group may allocate this reduction among themselves in their discretion. In order to take this reduction, each member of the affiliated group that is required to file a return under this Part and that has dividends for the taxable year must provide a schedule with its return that lists every member of the group that has dividends, the amount of the dividends, and whether the member is a bank holding company. In addition, the schedule must show the expense adjustments for those members whose additional tax as a result of the expense adjustment constitutes the maximum amount. In addition, each member must provide any other documentation required by the Secretary.

If the expense adjustment for an affiliated group is reduced under this subsection, and the return of a member of the group is later changed in a manner that reduces below the maximum the amount of additional tax for the group resulting from the expense adjustment, the Secretary may increase the expense adjustment for any member of the group in order to increase to the maximum the amount of additional tax for the group resulting from the expense adjustment. In this situation, the amount of the increase is considered a forfeited tax benefit with respect to the affiliated group for the purposes of G.S. 105-241.8. The date of the forfeiture is the date of the change that triggers the Secretary's authority to increase the expense adjustment. Any member whose expense adjustment the Secretary increases is liable for interest on the amount of the increase at the rate established under G.S. G.S. 105-241.21 computed from the date the taxes would have been due if the expense adjustment had been calculated correctly on the original return. The amount of the increase and the interest are due 60 days after the date of the forfeiture. A taxpayer that fails to pay the amount of the increase and interest by the due date is subject to the penalties provided in G.S. 105-236.

(f) Credits for Bank Holding Companies. — If the affiliated group of which a bank holding company is a member is eligible for the reduction provided in subsection (e) of this section for a taxable year, the affiliated group is also eligible for a credit equal to two million dollars ($2,000,000). If the affiliated group of which a bank holding company is a member is not eligible for the reduction provided in subsection (e) of this section for a taxable year, the affiliated group is eligible for a credit equal to the amount of additional tax that results from its expense adjustments in excess of the amount of additional tax that would result from the expense adjustments if the expense adjustment of any bank holding company in the group were equal to fifteen percent (15%) of the holding company's dividends for that taxable year.

A credit allowed by this subsection may be taken in four equal, annual installments beginning with the later of the following taxable year or the taxpayer's taxable year beginning in 2003. The members of the affiliated group may allocate a credit allowed by this subsection among themselves in their discretion.

(g) Credit for Electric Power Holding Companies. — After calculating the adjustment for expenses related to dividends under G.S. 105-130.5(c)(3), each electric power holding company must calculate the amount of additional tax under this Part that results from the expense adjustment for the taxable year.

The electric power holding company is allowed a credit for the following taxable year equal to one-half of this amount of additional tax.

As an alternative to taking this credit against its own tax liability, an electric power holding company may elect to allocate the credit among the members of its affiliated group. In this case, the credit must be taken in four equal installments beginning in the later of the following taxable year or the taxable year for which the taxpayer's final return is due in 2004.

(h) Limitation on Credits. — The credits provided in this section are allowed against the tax levied in this Part and the franchise tax levied in Article 3 of this Chapter. A taxpayer may claim a credit against only one of the taxes against which it is allowed. Each taxpayer must elect the tax against which the credit will be taken when filing the return on which the first installment of the credit is claimed. This election is binding. All installments and carryforwards of the credit must be taken against the same tax.

In order for a member of an affiliated group to take a credit, each member of the affiliated group that is required to file a return under this Part or under Article 3 of this Chapter must attach a schedule to its return that shows for every member of the group the amount of the credit taken by it, the tax against which it is taken, and the amount of the resulting tax. In addition, each member must provide any other documentation required by the Secretary.

A credit allowed in this section may not exceed the amount of tax against which it is taken for the taxable year reduced by the sum of all credits allowable, except tax payments made by or on behalf of the taxpayer. Any unused portion of the credit may be carried forward to succeeding taxable years. (2002-136, s. 2; 2007-491, s. 13.)

Editor's Note. — Session Laws 2007-491, s. 13, amended this section in the coded bill drafting format provided by G.S. 120-20.1. In the fourth sentence in the last paragraph of subsection (e), the act struck through "105-241.1(i)" but failed to strike through the "G.S." that immediately preceded it. The fourth sentence has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 13, effective January 1, 2008, in the third paragraph of subsection (e), substituted "G.S. 105-241.8" for "G.S. 105-241.1(e)" and "G.S. 105-241.21" for "105-241.1(i)" in the second and fourth sentences, respectively. For applicability, see Editor's note.

§ 105-130.7: Repealed by Session Laws 2003-349, s. 1.1, effective January 1, 2003.

§ 105-130.7A. Royalty income reporting option.

(a) Purpose. — Royalty payments received for the use of intangible property in this State are income derived from doing business in this State. This section provides taxpayers with an option concerning the method by which these royalties can be reported for taxation when the recipient and the payer are related members. As provided in this section, these royalty payments can be either (i) deducted by the payer and included in the income of the recipient, or (ii) added back to the income of the payer and excluded from the income of the recipient.

(b) Definitions. — The following definitions apply in this section:

(1) Component member. — Defined in section 1563(b) of the Code.

(1a) Intangible property. — Copyrights, patents, and trademarks.

(2) North Carolina royalty. — An amount charged that is for, related to, or in connection with the use in this State of intangible property. The term includes royalty and technical fees, licensing fees, and other similar charges.

(3) Own. — To own directly, indirectly, beneficially, or constructively. The attribution rules of section 318 of the Code apply in determining ownership under this section.

(4) Related entity. — Any of the following:

a. A stockholder who is an individual, or a member of the stockholder's family enumerated in section 318 of the Code, if the stockholder and the members of the stockholder's family own in the aggregate at least eighty percent (80%) of the value of the taxpayer's outstanding stock.

b. A stockholder, or a stockholder's partnership, limited liability company, estate, trust, or corporation, if the stockholder and the stockholder's partnerships, limited liability companies, estates, trusts, and corporations own in the aggregate at least fifty percent (50%) of the value of the taxpayer's outstanding stock.

c. A corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of section 318 of the Code, if the taxpayer owns at least eighty percent (80%) of the value of the corporation's outstanding stock.

(5) Related member. — A person that, with respect to the taxpayer during any part of the taxable year, is one or more of the following:

a. A related entity.

b. A component member.

c. A person to or from whom there would be attribution of stock ownership in accordance with section 1563(e) of the Code if the phrase "5 percent or more" were replaced by "twenty percent (20%) or more" each place it appears in that section.

(6) Royalty payment. — Either of the following:

a. Expenses, losses, and costs paid, accrued, or incurred for North Carolina royalties, to the extent the amounts are allowed as deductions or costs in determining taxable income before operating loss deduction and special deductions for the taxable year under the Code.

b. Amounts directly or indirectly allowed as deductions under section 163 of the Code, to the extent the amounts are paid, accrued, or incurred for a time price differential charged for the late payment of any expenses, losses, or costs described in this subdivision.

(7) Trademark. — A trademark, trade name, service mark, or other similar type of intangible asset.

(8) Use. — Use of intangible property includes direct or indirect maintenance, management, ownership, sale, exchange, or disposition of the intangible property.

(c) Election. — For the purpose of computing its State net income, a taxpayer must add royalty payments made to, or in connection with transactions with, a related member during the taxable year. This addition is not required for an amount of royalty payments that meets any of the following conditions:

(1) The related member includes the amount as income on a return filed under this Part for the same taxable year that the amount is deducted by the taxpayer, and the related member does not elect to deduct the amount pursuant to G.S. 105-130.5(b)(20).

(2) The taxpayer can establish that the related member during the same taxable year directly or indirectly paid, accrued, or incurred the amount to a person who is not a related member.

(3) The taxpayer can establish that the related member to whom the amount was paid is organized under the laws of a country other than the United States, the country has a comprehensive income tax treaty with the United States, and the country imposes a tax on the royalty income of the related member at a rate that equals or exceeds the rate set in G.S. 105-130.3.

(d) Indirect Transactions. — For the purpose of this section, an indirect transaction or relationship has the same effect as if it were direct. (2001-327, s. 1(b); 2003-416, s. 15; 2006-66, s. 24A.3(a); 2006-196, s. 10.)

Editor's Note. — Session Laws 2001-327, s. 1(a), provides: "The General Assembly finds that most corporations engaged in manufacturing and retailing activities in this State comply with the State tax on income generated from using trademarks in those activities. Taxpayers who do not comply, however, create an unfair burden on these corporate citizens. It is the intent of this section to reward taxpayers who comply, by giving them an option on how to file tax returns involving royalty income."

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-196, s. 13, provides: "The Revenue Laws Study Committee shall study the following issues:

"(1) The simplification of the additional tax imposed on insurance contracts on property coverage, as enacted in Section 3 of this act, and the distribution of the revenue generated by the tax. The study of this issue may include a recommendation on the percentage of revenue to be distributed to the firemen's local relief funds and the formula for making this distribution. The study may also consider the increasing difference between the amount of revenue available in the Volunteer Fire Department Fund for matching grants to purchase equipment and make capital improvements and the amount of grant requests received.

"(2) The authority of the Secretary of Revenue to require taxpayers to file consolidated returns. The study of this issue may include consideration of whether the State should require some corporations or all corporations to file a consolidated return.

"(3) The feasibility of replacing the State's current corporate income and franchise tax laws with a commercial activity tax based upon business gross receipts.

"(4) The administrative process for the review of disputed tax matters."

Effect of Amendments. — Session Laws 2006-66, s. 24A.3(a), effective for taxable years beginning on or after January 1, 2006, substituted "intangible property" for "trademarks" throughout the section; and added new subdivision (b)(1a).

Session Laws 2006-196, s. 10, effective for taxable years beginning on or after January 1, 2006, in subsection (c), substituted "any" for "either" at the end of the introductory paragraph and added paragraph (c)(3).

§ 105-130.8. Net economic loss.

(a) Net economic losses sustained by a corporation in any or all of the 15 preceding income years shall be allowed as a deduction to the corporation subject to the following limitations:

(1) The purpose in allowing the deduction of a net economic loss of a prior year is to grant some measure of relief to the corporation that has incurred economic misfortune or is otherwise materially affected by strict adherence to the annual accounting rule in the determination of net income. The deduction allowed in this section does not authorize

the carrying forward of any particular items or category of loss except to the extent that the loss results in the impairment of the net economic situation of the corporation so as to result in a net economic loss as defined in this section.

(2) The net economic loss for any year means the amount by which allowable deductions for the year other than prior year losses exceed income from all sources in the year including any income not taxable under this Part.

(3) Any net economic loss of prior years brought forward and claimed as a deduction in any income year may be deducted from net income of the year only to the extent that the loss carried forward from the prior years exceeds any income not taxable under this Part received in the same year in which the deduction is claimed, except that in the case of a corporation required to allocate and apportion to North Carolina its net income, only that proportionate part of the net economic loss of a prior year shall be deductible from total income allocable to this State as would be determined by the use of the allocation and apportionment provisions of G.S. 105-130.4 for the year of the loss.

(4) A net economic loss carried forward from any year shall first be applied to, or offset by, any income taxable or nontaxable of the next succeeding year before any portion of the loss may be carried forward to a succeeding year.

(5) For purposes of this section, any income item deductible in determining State net income under the provisions of G.S. 105-130.5 and any nonapportionable income not allocable to this State under the provisions of G.S. 105-130.4 shall be considered as income not taxable under this Part. The amount of the income item considered income not taxable under this Part is determined after subtracting related expenses for which a deduction was allowed under this Part.

(6) No loss shall either directly or indirectly be carried forward more than 15 years.

(b) A corporation claiming a deduction for a loss for the current year or carried forward from a prior year must maintain and make available for inspection by the Secretary all records necessary to determine and verify the amount of the deduction. The Secretary or the taxpayer may redetermine an item originating in a taxable year that is closed under the statute of limitations for the purpose of determining the amount of net economic loss that can be carried forward to a taxable year that remains open under the statute of limitations. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; c. 1302, s. 4; 1955, c. 1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343, s. 1; 1957, c. 1340, ss. 4, 8; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, c. 1110, s. 3; 1998-98, s. 69; 1998-171, ss. 6, 8; 2002-136, s. 3; 2003-416, s. 5(i).)

Legal Periodicals. — For survey of 1976 case law on taxation, see 55 N.C.L. Rev. 1083 (1977).

CASE NOTES

Editor's Note. — *Many of the cases in the following notes were decided under G.S. 105-147 prior to the amendment thereof by Session Laws 1967, c. 1110. Section 105-147 was repealed by Session Laws 1989, c. 728, s. 1.3.*

Section Patterned After Internal Revenue Code. — This section is patterned after the net operating loss carryover deduction found in the 1939 federal Internal Revenue Code (see now Internal Revenue Code of 1954). Fieldcrest Mills, Inc. v. Coble, 290 N.C. 586, 227 S.E.2d 562 (1976).

Federal Case Law Applicable. — The Supreme Court of North Carolina in construing this section has looked to and relied upon federal cases applying the analogous federal deduction. Fieldcrest Mills, Inc. v. Coble, 290 N.C. 586, 227 S.E.2d 562 (1976).

Carry-Over Provisions Enacted as a Matter of Grace. — The General Assembly was under no constitutional or other legal compulsion to permit a net economic loss or losses deduction for a corporation from taxable income in a subsequent year or years. It enacted the carry-over provisions purely as a matter of grace, gratuitously conferring a benefit but limiting such benefit to the net economic loss of the taxpayer after deducting therefrom the allocable portion of such taxpayer's nontaxable income. Aberfoyle Mfg. Co. v. Clayton, 265 N.C. 165, 143 S.E.2d 113 (1965).

The General Assembly was under no constitutional compulsion to allow any deduction whatever from income otherwise taxable in this State, because of a "net economic loss" in a prior year. Dayco Corp. v. Clayton, 269 N.C. 490, 153 S.E.2d 28 (1967).

Determination of Deduction of Loss for Prior Years. — This section requires the inclusion of nontaxable income in arriving at an allowable deduction for carry-over purposes to be deducted from taxable income in a succeeding year. Dayton Rubber Co. v. Shaw, 244 N.C. 170, 92 S.E.2d 799 (1956), decided prior to the 1963 amendment to former § 105-147.

As to process provided for determining amount of deduction allowable to corporation on account of a "net economic loss" in a prior year, see Dayco Corp. v. Clayton, 269 N.C. 490, 153 S.E.2d 28 (1967).

Out-of-State Dividends and Capital Gains Received by Foreign Corporation Must Be Deducted. — Dividends received by a foreign corporation from shares of stock owned by it in nonsubsidiary corporations and capital gains received by it from the sale of shares of stock in such nonsubsidiary corporations, even though such income is derived from out-of-state transactions and is not taxable here, must be deducted from the amount of loss carry-over claimed by the corporation against its income taxable by this State in succeeding years, since the income derived from dividends and capital gains is "income not taxable under this Division." Dayco Corp. v. Clayton, 269 N.C. 490, 153 S.E.2d 28 (1967).

As Must Nonrecognized Gain on Liquidation of Subsidiaries. — Plaintiff's gain realized from the sale of its two wholly-owned subsidiaries constituted "income from all sources in the year including any income not taxable under this division"; consequently, plaintiff was not entitled to any net economic losses deduction as sought in its complaint. Aberfoyle Mfg. Co. v. Clayton, 265 N.C. 165, 143 S.E.2d 113 (1965).

Deduction by Successor Corporation of Loss Sustained by Submerged Corporation. — Whether a successor corporation is entitled to deduct from its gross income an economic loss sustained by another corporation depends upon whether the successor corporation is for practical purposes the same and is engaged in continuing the business of the kind and character conducted by the corporation whose loss is claimed as a deduction. Good Will Distribs. (N.), Inc. v. Shaw, 247 N.C. 157, 100 S.E.2d 334 (1957); Good Will Distribs., Inc. v. Currie, 251 N.C. 120, 110 S.E.2d 880 (1959).

Where a corporation surviving a merger seeks to establish its right to deduct from its gross income an economic loss of one of its submerged corporations for a prior year as a carry-over under this section, and it appears from the facts alleged that the submerged corporation had a profit in the months of the fiscal year prior to the merger and that it had deducted its prior economic loss from such net income, leaving a balance on the loss side, and further, that as far as the facts alleged disclosed, to allow the surviving corporation to make such deduction would result in reducing the surviving corporation's income tax liability which had accrued on the date of the merger, such deduction by the surviving corporation was disallowed. Good Will Distribs. (N.), Inc. v. Shaw, 247 N.C. 157, 100 S.E.2d 334 (1957).

The enactment of loss carry-over legislation by the General Assembly was purely a matter of grace. The provision should not be construed to give a "windfall" to a taxpayer who happens to have merged with other corporations. Its purpose is not to give a merged taxpayer a tax advantage over others who have not merged. Good Will Distribs., Inc. v. Currie, 251 N.C. 120, 110 S.E.2d 880 (1959).

In determining whether a successor corporation may claim a net economic loss suffered by a predecessor corporation, the court must find that the two corporations are the "same," applying the continuity of business enterprise test. Fieldcrest Mills, Inc. v. Coble, 290 N.C. 586, 227 S.E.2d 562 (1976).

Continuity of business enterprise theory, the test used in determining whether a successor corporation may claim a net economic loss suffered by its predecessor, means that where a loss corporation and a gain corporation are merged, premerger losses may be offset against post-merger gains only to the extent that the business (or group of assets) which was previously operating at a loss is now operating at a profit. Fieldcrest Mills, Inc. v. Coble, 290 N.C. 586, 227 S.E.2d 562 (1976).

The forgiveness of an indebtedness by an officer-stockholder constitutes a contribution to capital and does not constitute income of the corporation. Hence, the forgiveness of such indebtedness does not offset a net operating loss of a corporation for a taxable year, and the corporation is entitled to carry forward such loss. Foreman Mfg. Co. v. Johnson, 261 N.C. 504, 135 S.E.2d 205 (1964).

Applied in Royle & Pilkington Co. v. Currie, 250 N.C. 726, 110 S.E.2d 339 (1959), decided prior to the 1963 amendment to former § 105-147.

Cited in Bellsouth Telecommunications, Inc. v. North Carolina Dep't of Revenue, 126 N.C. App. 409, 485 S.E.2d 333 (1997).

OPINIONS OF ATTORNEY GENERAL

Life insurance proceeds constitute "income not taxable" for Purposes of Computing the Net Economic Loss Deduction under this Section. See opinion of Attorney General to Mr. Wiley A. Warren, Jr., Assistant Director, Corporate Income and Franchise Tax Division, 47 N.C.A.G. 29 (1977).

§ 105-130.9. Contributions.

Contributions shall be allowed as a deduction to the extent and in the manner provided as follows:

(1) Charitable contributions as defined in section 170(c) of the Code, exclusive of contributions allowed in subdivision (2) of this section, shall be allowed as a deduction to the extent provided herein. The amount allowed as a deduction hereunder shall be limited to an amount not in excess of five percent (5%) of the corporation's net income as computed without the benefit of this subdivision or subdivision (2) of this section. Provided, that a carryover of contributions shall not be allowed and that contributions made to North Carolina donees by corporations allocating a part of their total net income outside this State shall not be allowed under this subdivision, but shall be allowed under subdivision (3) of this section.

(2) Contributions by any corporation to the State of North Carolina, any of its institutions, instrumentalities, or agencies, any county of this State, its institutions, instrumentalities, or agencies, any municipality of this State, its institutions, instrumentalities, or agencies, and contributions or gifts by any corporation to educational institutions located within North Carolina, no part of the net earnings of which inures to the benefit of any private stockholders or dividend. For the purpose of this subdivision, the words "educational institution" shall mean only an educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where the educational activities are carried on. The words "educational institution" shall be deemed to include all of such institution's departments, schools and colleges, a group of "educational institutions" and an organization (corporation, trust, foundation, association or other entity) organized and operated exclusively to receive, hold, invest and administer property and to make expenditures to or for the sole benefit of an "educational institution" or group of "educational institutions."

(3) Corporations allocating a part of their total net income outside North Carolina under the provisions of G.S. 105-130.4 shall deduct from total income allocable to North Carolina contributions made to North Carolina donees qualified under subdivisions (1) and (2) of this section or made through North Carolina offices or branches of other donees qualified under the above-mentioned subdivisions of this section; provided, such deduction for contributions made to North Carolina donees qualified under subdivision (1) of this section shall be limited

G.S. 105-130.9(4) is set out twice. See note.

in amount to five percent (5%) of the total income allocated to North Carolina as computed without the benefit of this deduction for contributions.

(4) **(Effective for taxable years beginning before January 1, 2011)** The amount of a contribution for which the taxpayer claimed a tax credit pursuant to G.S. 105-130.34 or G.S. 105-130.48 shall not be eligible for a deduction under this section. The amount of the credit claimed with respect to the contribution is not, however, required to be added to income under G.S. 105-130.5(a)(10).

(4) **(Effective for taxable years beginning on or after January 1, 2011)** The amount of a contribution for which the taxpayer claimed a tax credit pursuant to G.S. 105-130.34 shall not be eligible for a deduction under this section. The amount of the credit claimed with respect to the contribution is not, however, required to be added to income under G.S. 105-130.5(a)(10). (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; c. 1302, s. 4; 1955, c. 1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343, s. 1; 1957, c. 1340, ss. 4, 8; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, c. 1110, s. 3; 1969, c. 1175, s. 1; 1973, c. 1287, s. 4; 1983, c. 713, s. 82; c. 793, s. 2; 1995, c. 370, s. 4; 2006-66, s. 24.18(b).)

Subdivision (4) is set out twice. — The first version of subdivision (4) set out above is effective for taxable years beginning before January 1, 2011. The second version of subdivision (4) set out above is effective for taxable years beginning on or after January 1, 2011.

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 24.18(b), effective for taxable years beginning on or after January 1, 2006, and expires for taxable years beginning on or after January 1, 2011, added "or G.S. 105-130.48" following "G.S. 105-130.34" in subdivision (4).

§ 105-130.10. Amortization of air-cleaning devices, waste treatment facilities and recycling facilities.

In lieu of any depreciation allowance, at the option of the corporation, a deduction shall be allowed for the amortization, based on a period of 60 months, of the cost of:

(1) Any air-cleaning device, sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage, industrial waste, or other polluting materials or substances into the outdoor atmosphere or streams, lakes, rivers, or coastal waters. The deduction provided herein shall apply also to the facilities or equipment of private or public utilities built and installed primarily for the purpose of providing sewer service to residential and outlying areas. The deduction provided for in this subdivision shall be allowed by the Secretary of Revenue only upon the condition that the corporation claiming such allowance shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources or from a local air pollution control program for air-cleaning devices located in an area where the Environmental Management Commission has certified a local air pollution control program pursu-

ant to G.S. 143-215.112 certifying that the Environmental Management Commission or local air pollution control program has found as a fact that the air-cleaning device, waste treatment plant or other pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such construction, plant or equipment complies with the requirements of the Environmental Management Commission or local air pollution control program with respect to such devices, construction, plants or equipment, that such device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission or local air pollution control program, and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions.

(2) Purchasing and installing equipment or constructing facilities for the purpose of recycling or resource recovering of or from solid waste, or for the purpose of reducing the volume of hazardous waste generated. The deduction provided for in this subdivision shall be allowed by the Secretary of Revenue only upon the condition that the corporation claiming such allowance shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources certifying that the Department of Environment and Natural Resources has found as a fact that the equipment or facility has actually been purchased, installed or constructed, that it is in conformance with all rules and regulations of the Department of Environment and Natural Resources, and that recycling or resource recovering is the primary purpose of the facility or equipment. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; c. 1302, s. 4; 1955, c. 1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343, s. 1; 1957, c. 1340, ss. 4, 8; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, c. 1110, s. 3; 1969, c. 817; 1973, c. 476, s. 193; c. 1262, s. 23; 1975, c. 764, s. 3; 1977, c. 771, s. 4; 1981, c. 704, s. 19; 1987, c. 804, s. 4; 1989, c. 148, s. 2; c. 727, ss. 218(40), 219(28); 1997-443, s. 11A.119(a).)

§ 105-130.10A. Amortization of equipment mandated by OSHA.

(a) In lieu of any depreciation allowance, at the option of the corporation, a deduction shall be allowed for the amortization, based on a period of 60 months, of the cost of any equipment mandated by the Occupational Safety and Health Act (OSHA), including the cost of planning, acquiring, constructing, modifying, and installing said equipment.

(b) For the purposes of this section and G.S. 105-147(13)d, the term "equipment mandated by the Occupational Safety and Health Act" is any tangible personal property and other buildings and structural components of buildings, which is acquired, constructed, reconstructed, modified, or erected after January 1, 1979; and which the taxpayer must acquire, construct, install, or make available in order to comply with the occupational safety and health standards adopted and promulgated by the United States Secretary of Labor or the Commissioner of Labor of North Carolina, and the term "occupational safety and health standards" includes but is not limited to interim federal standards, consensus standards, any proprietary standards or permanent standards, as well as temporary emergency standards which may be adopted by the United States Secretary of Labor, promulgated as provided by the Occupational Safety and Health Act of 1970, (Public Law 91-596, 91st Congress, Act of December 29, 1970, 84 Stat. 1950) and which standards or regulations are published in the Code of Federal Regulations or otherwise properly promulgated under the Occupational Safety and Health Act of 1970 or any alternative rule, regulation or standard promulgated by the Commissioner of Labor of North Carolina as provided in G.S. 95-131. (1979, c. 776, s. 1.)

Editor's Note. — Section 105-147(13)d, referred to in this section, was repealed by Session Laws 1989, c. 728, s. 13, effective for taxable years beginning on or after January 1, 1989.

§ 105-130.11. Conditional and other exemptions.

(a) Exempt Organizations. — Except as provided in subsections (b) and (c), the following organizations and any organization that is exempt from federal income tax under the Code are exempt from the tax imposed under this Part.

(1) Fraternal beneficiary societies, orders or associations
  a. Operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and
  b. Providing for the payment of life, sick, accident, or other benefits to the members of such society, order or association, or their dependents.

(2) Cooperative banks without capital stock organized and operated for mutual purposes and without profit; and electric and telephone membership corporations organized under Chapter 117 of the General Statutes.

(3) Cemetery corporations and corporations organized for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual.

(4) Business leagues, chambers of commerce, merchants' associations, or boards of trade not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder or individual.

(5) Civic leagues or organizations not organized for profit, but operated exclusively for the promotion of social welfare.

(6) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member.

(7) Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations of a purely local character the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting expenses.

(8) Farmers', fruit growers', or like organizations organized and operated as sales agents for the purpose of marketing the products of members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of product furnished by them.

(9) Mutual associations formed under G.S. 54-111 through 54-128 to conduct agricultural business on the mutual plan and marketing associations organized under G.S. 54-129 through 54-158.

Nothing in this subdivision shall be construed to exempt any cooperative, mutual association, or other organization from an income tax on net income that has not been refunded to patrons on a patronage basis and distributed either in cash, stock, or certificates, or in some other manner that discloses the amount of each patron's refund. Provided, in arriving at net income for purposes of this subdivision, no deduction shall be allowed for dividends paid on capital stock. Patronage refunds made after the close of the taxable year and on or before the fifteenth day of the ninth month following the close of the taxable year are considered as to be made on the last day of the taxable year to the extent the allocations are attributable to income derived before the close of the year; provided, that no stabilization or marketing organization that handles agricultural products for sale for producers on a pool basis is considered to have realized any net income or profit in the disposition of a pool or any part of a pool until all of the products in that pool have been sold and the pool has been closed; provided, further, that a pool is not considered closed until the expiration of at least 90 days after the sale of the last remaining product in that pool. These cooperatives and other organizations shall file an annual information return with the Secretary on forms to be furnished by the Secretary and shall include the names and addresses of all persons, patrons, or shareholders whose patronage refunds amount to ten dollars ($10.00) or more.

(10) Insurance companies paying the tax on gross premiums as specified in G.S. 105-228.5.

(11) Corporations or organizations, such as condominium associations, homeowner associations, or cooperative housing corporations not organized for profit, the membership of which is limited to the owners or occupants of residential units in the condominium, housing development, or cooperative housing corporation, and operated exclusively for the management, operation, preservation, maintenance, or landscaping of the common areas and facilities owned by the corporation or organization or its members situated contiguous to the houses, apartments, or other dwellings or for the management, operation, preservation, maintenance, and repair of the houses, apartments, or other dwellings owned by the corporation or organization or its members, but only if no part of the net earnings of the corporation or organization inures (other than through the performance of related services for the members of such corporation or organization) to the benefit of any member of such corporation or organization or other person.

(b) Unrelated Business Income. — Except as provided in this subsection, an organization described in subdivision (a)(1), (3), (4), (5), (6), (7), (8), or (9) of this section and any organization exempt from federal income tax under the Code is subject to the tax provided in G.S. 105-130.3 on its unrelated business taxable income, as defined in section 512 of the Code, adjusted as provided in G.S. 105-130.5. The tax does not apply, however, to net income derived from any of the following:

(1) Research performed by a college, university, or hospital.

(2) Research performed for the United States or its instrumentality or for a state or its political subdivision.

(3) Research performed by an organization operated primarily to carry on fundamental research, the results of which are freely available to the general public.

(c) Homeowner Association Income. — An organization described in subdivision (a)(11) of this section is subject to the tax provided in G.S. 105-130.3 on its gross income other than membership income less the deductions allowed by this Article that are directly connected with the production of the gross income other than membership income. The term "membership income" means the gross income from assessments, fees, charges, or similar amounts received from members of the organization for expenditure in the preservation, maintenance, and management of the common areas and facilities of or the residential units in the condominium or housing development.

(d) Real Estate Mortgage Investment Conduits. — An entity that qualifies as a real estate mortgage investment conduit, as defined in section 860D of the Code, is exempt from the tax imposed under this Part, except that any net income derived from a prohibited transaction, as defined in section 860F of the Code, is taxable to the real estate mortgage investment conduit under G.S. 105-130.3 and G.S. 105-130.3A, subject to the adjustments provided in G.S. 105-130.5. This subsection does not exempt the holders of a regular or residual interest in a real estate mortgage investment conduit as defined in section 860G of the Code from any tax on the income from that interest. (1939, c. 158, s. 314; 1945, c. 708, s. 4; c. 752, s. 3; 1949, c. 392, s. 3; 1951, c. 937, s. 1; 1955, c. 1313, s. 1; 1957, c. 1340, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 1053, s. 4; 1975, c. 19, s. 28; c. 591, s. 2; 1981, c. 450, s. 2; 1983, c. 28, s. 1; c. 31; 1985 (Reg. Sess., 1986), c. 826, s. 5; 1991 (Reg. Sess., 1992), c. 921, s. 1; 1993, c. 494, s. 2; 1998-98, ss. 1(b), 69.)

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Income realized by an educational institution of another state from the rental of real estate owned by it in this State is exempt from income taxes under this section, when such income is placed in the general fund of such educational institution and is used exclusively for educational purposes. In re Vanderbilt Univ., 252 N.C. 743, 114 S.E.2d 655 (1960), decided under former § 105-138.

Cited in North Carolina Div. of Sons of Confederate Veterans v. Faulkner, 131 N.C. App. 775, 509 S.E.2d 207 (1998).

§ 105-130.12. Real estate investment trusts.

(a) Definitions. — The following definitions apply in this section:

(1) Captive REIT. — A REIT whose shares or certificates of beneficial interest are not regularly traded on an established securities market and are owned or controlled, at any time during the last half of the tax year, by a person that is subject to tax under this Part and is not a REIT or a listed Australian property trust.

(2) Own or control. — To own or control directly, indirectly, beneficially, or constructively more than fifty percent (50%) of the voting power or value of an entity. The attribution rules of section 318 of the Code, as modified by section 856(d)(5) of the Code, apply in determining ownership and control.

(3) REIT. — A trust or another entity that qualifies as a real estate investment trust under section 856 of the Code.

(b) Tax. — The income of a REIT is taxable under this Part in accordance with the Code, unless the REIT is a captive REIT. A captive REIT is required to add to its federal taxable income the amount of a dividend paid deduction allowed under the Code, as provided in G.S. 105-130.5. (1963, c. 1169, s. 2; 1967, c. 110, s. 3; 1971, c. 820, s. 2; 1973, c. 476, s. 193; 1983, c. 713, s. 74; 1998-98, s. 69; 2007-323, s. 31.18(c).)

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 31.18(c), substituted "Real" for

"Regulated investment companies and real" in the section heading; and rewrote the section.

§ 105-130.13: Repealed by Session Laws 1987 (Regular Session, 1988), c. 1089, s. 2, as amended by Session Laws 1989, c. 728, s. 1.33.

§ 105-130.14. Corporations filing consolidated returns for federal income tax purposes.

Any corporation electing or required to file a consolidated income tax return with the Internal Revenue Service shall not file a consolidated return with the Secretary of Revenue, unless specifically directed to do so in writing by the Secretary, and shall determine its State net income as if a separate return had been filed for federal purposes. (1967, c. 1110, s. 3; 1973, c. 476, s. 193.)

§ 105-130.15. Basis of return of net income.

(a) The net income of a corporation shall be computed in accordance with the method of accounting it regularly employs in keeping its books. The method must be consistent with respect to both income and deductions. If this method does not clearly reflect the income, the computation shall be made in accordance with a method that, in the Secretary's opinion, does clearly reflect the income, but shall follow as nearly as practicable the federal practice, unless contrary to the context and intent of this Part.

The Secretary may adopt the rules and regulations and any guidelines administered or established by the Internal Revenue Service unless contrary to any provisions of this Part.

(b) Change of Income Year. —

(1) A corporation may change the income year upon which it reports for income tax purposes without prior approval by the Secretary of Revenue if such change in income year has been approved by or is acceptable to the Federal Commissioner of Internal Revenue and is used for filing income tax returns under the provisions of the Code.

If a corporation desires to make a change in its income year other than as provided above, it may make such change in its income year with the approval of the Secretary of Revenue, provided such approval is requested at least 30 days prior to the end of its new income year.

A corporation which has changed its income year without requesting the approval of the Secretary of Revenue as provided in the first paragraph of this subdivision shall submit to the Secretary of Revenue notification of any change in the income year after the change has been approved by the Federal Commissioner of Internal Revenue or his agent where application for permission to change is required by the Federal Commissioner of Internal Revenue with such notification stating that such approval has been received. Where application for change of the income year is not required by the Federal Commissioner of Internal Revenue, notification of the change of income year shall be submitted to the Secretary of Revenue with the short period return.

(2) A return for a period of less than 12 months (referred to in this subsection as "short period") shall be made when the corporation changes its income year. In such a case, the return shall be made for the short period beginning on the day after the close of the former taxable year and ending at the close of the day before the day designated as the first day of the new taxable year, except that a corporation changing to, or from, a taxable year varying from 52 to 53

weeks shall not be required to file a short period return if such change results in a short period of 359 days or more, or less than seven days. Short period income tax returns shall be filed within the same period following the end of such short period as is required for full year returns under the provisions of G.S. 105-130.17.

(c) Any foreign corporation not domesticated in this State shall not use the installment method of reporting income to this State unless such corporation files a bond with the Secretary of Revenue in such amount and with such sureties as the Secretary shall deem necessary to secure the payment of any taxes which were deferred with respect to any installment transaction.

(d) Notwithstanding any other provision of this Part, any corporation which uses the installment method of reporting income to this State and which is planning to withdraw from this State, merge, or consolidate its business, or terminate its business in this State by any other means whatsoever, shall be required to make a report for income tax purposes, to the Secretary of Revenue, of any unrealized or unreported income from installment sales made while doing business in this State and to pay any tax which may be due on such income. The manner and form for making such report and paying the tax shall be as prescribed by the Secretary. (1939, c. 158, s. 318; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1949, c. 392, s. 3; 1955, c. 1313, s. 1; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1983, c. 713, s. 82; 1998-98, s. 69; 2000-140, s. 64(a).)

§ 105-130.16. Returns.

(a) Return. — Every corporation doing business in this State must file with the Secretary an income tax return showing specifically the items of gross income and the deductions allowed by this Part and any other facts the Secretary requires to make any computation required by this Part. The return of a corporation must be signed by its president, vice-president, treasurer, assistant treasurer, secretary, or assistant secretary. The officer signing the return must furnish an affirmation verifying the return. The affirmation must be in the form required by the Secretary.

(b) Correction of Distortions. — When the Secretary has reason to believe that any corporation so conducts its trade or business in such manner as to either directly or indirectly distort its true net income and the net income properly attributable to the State, whether by the arbitrary shifting of income, through price fixing, charges for service, or otherwise, whereby the net income is arbitrarily assigned to one or another unit in a group of taxpayers carrying on business under a substantially common control, the Secretary may require any facts the Secretary considers necessary for the proper computation of the entire net income and the net income properly attributable to the State, and in determining these computations, the Secretary must have regard to the fair profit that would normally arise from the conduct of the trade or business.

(c) Other Corrections. — When any corporation liable to taxation under this Part conducts its business in such a manner as to either directly or indirectly benefit the members or stockholders thereof or any person interested in the business by selling its products or goods or commodities in which it deals at less than the fair price which might be obtained therefor, or when a corporation, a substantial portion of whose capital stock is owned either directly or indirectly by another corporation, acquires and disposes of the products of the corporation so owning a substantial portion of its stock in such a manner as to create a loss or improper net income for either of the corporations, or when a corporation, owning directly or indirectly a substantial portion of the stock of another corporation, acquires and disposes of the products of the corporation of which it so owns a substantial portion of the stock in such manner as to create a loss or improper net income for either of the corporations, the Secretary may determine the amount of taxable income of the such corporations for the calendar or fiscal year, having due regard to the reasonable profits which, but for such arrangement or understanding, might or could have been obtained by the corporations liable to taxation under this Part from dealing in such products, goods or commodities. (1939, c. 158, s. 326; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1951, c. 643, s. 4; 1957, c. 1340, s. 4; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1998-98, s. 69; 1999-337, s. 22.)

Editor's Note. — Session Laws 2007-323, s. 31.18(e), provides: "This section does not affect the authority of the Department of Revenue under G.S. 105-130.6, G.S. 105-130.16, or any other statute to require a corporation to file a consolidated return or to determine the net income of a corporation properly attributable to this State. The General Assembly finds that an alternative method of addressing a corporation's attempt to use a real estate investment trust to shift income between entities and avoid State taxes is to require a captive REIT, as defined in G.S. 105-130.12 as amended by this section, to add to its federal taxable income the dividend paid deduction otherwise allowed under the Internal Revenue Code."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 105-130.17. (Effective for taxable years beginning before January 1, 2008) Time and place of filing returns.

(a) Returns must be filed as prescribed by the Secretary at the place prescribed by the Secretary. Returns must be in the form prescribed by the Secretary. The Secretary shall furnish forms in accordance with G.S. 105-254.

(b) Except as otherwise provided in this section, the return of a corporation shall be filed on or before the fifteenth day of the third month following the close of its income year. An income year ending on any day other than the last day of the month shall be deemed to end on the last day of the calendar month ending nearest to the last day of a taxpayer's actual income year.

(c) In the case of mutual associations formed under G.S. 54-111 through 54-128 to conduct agricultural business on the mutual plan and marketing associations organized under G.S. 54-129 through 54-158, which are required to file under subsection (a)(9) of G.S. 105-130.11, a return made on the basis of a calendar year shall be filed on or before the fifteenth day of the September following the close of the calendar year, and a return made on the basis of a fiscal year shall be filed on or before the fifteenth day of the ninth month following the close of the fiscal year.

(d) A taxpayer may ask the Secretary for an extension of time to file a return under G.S. 105-263.

(d1) Organizations described in G.S. 105-130.11(a)(1), (3), (4), (5), (6), (7) and (8) that are required to file a return under G.S. 105-130.11(b) shall file a return made on the basis of a calendar year on or before the fifteenth day of May following the close of the calendar year and a return made on the basis of a fiscal year on or before the fifteenth day of the fifth month following the close of the fiscal year.

(e) Any corporation that ceases its operations in this State before the end of its income year because of its intention to dissolve or to withdraw from this State, or because of a merger, conversion, or consolidation or for any other reason whatsoever shall file its return for the then current income year within 75 days after the date it terminates its business in this State.

G.S. 105-130.17 is set out twice. See note.

(f) Repealed by Session Laws 1998-217, s. 42, effective October 31, 1998.

(g) A corporation that files a federal return pursuant to section 6072(c) of the Code shall file its return on or before the fifteenth day of the sixth month following the close of its income year. (1939, c. 158, s. 329; 1943, c. 400, s. 4; 1951, c. 643, s. 4; 1953, c. 1302, s. 4; 1955, c. 17, s. 1; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 1287, s. 4; 1981, c. 56; 1989 (Reg. Sess., 1990), c. 984, s. 8; 1997-300, s. 3; 1998-217, s. 42; 1999-369, s. 5.5; 2000-140, s. 64(b); 2006-18, s. 7.)

Section Set Out Twice. — The section above is effective for taxable years beginning before January 1, 2008. For this section as effective for taxable years beginning on or after January 1, 2008, see the following section, also numbered G.S. 105-130.17.

Effect of Amendments. — Session Laws 2006-18, s. 7, effective for taxable years beginning on or after January 1, 2006, added subsection (g).

§ 105-130.17. (Effective for taxable years beginning on or after January 1, 2008) Time and place of filing returns.

(a) Returns must be filed as prescribed by the Secretary at the place prescribed by the Secretary. Returns must be in the form prescribed by the Secretary. The Secretary must furnish forms in accordance with G.S. 105-254.

(b) Except as otherwise provided in this section, the return of a corporation shall be filed on or before the fifteenth day of the fourth month following the close of its income year. An income year ending on any day other than the last day of the month shall be deemed to end on the last day of the calendar month ending nearest to the last day of a taxpayer's actual income year.

(c) In the case of mutual associations formed under G.S. 54-111 through 54-128 to conduct agricultural business on the mutual plan and marketing associations organized under G.S. 54-129 through 54-158, which are required to file under subsection (a)(9) of G.S. 105-130.11, a return made on the basis of a calendar year shall be filed on or before the fifteenth day of the September following the close of the calendar year, and a return made on the basis of a fiscal year shall be filed on or before the fifteenth day of the ninth month following the close of the fiscal year.

(d) A taxpayer may ask the Secretary for an extension of time to file a return under G.S. 105-263.

(d1) Organizations described in G.S. 105-130.11(a)(1), (3), (4), (5), (6), (7) and (8) that are required to file a return under G.S. 105-130.11(b) shall file a return made on the basis of a calendar year on or before the fifteenth day of May following the close of the calendar year and a return made on the basis of a fiscal year on or before the fifteenth day of the fifth month following the close of the fiscal year.

(e) Any corporation that ceases its operations in this State before the end of its income year because of its intention to dissolve or to withdraw from this State, or because of a merger, conversion, or consolidation or for any other reason whatsoever shall file its return for the then current income year within 105 days after the date it terminates its business in this State.

(f) Repealed by Session Laws 1998-217, s. 42, effective October 31, 1998.

(g) A corporation that files a federal return pursuant to section 6072(c) of the Code shall file its return on or before the fifteenth day of the seventh month following the close of its income year. (1939, c. 158, s. 329; 1943, c. 400, s. 4; 1951, c. 643, s. 4; 1953, c. 1302, s. 4; 1955, c. 17, s. 1; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 1287, s. 4; 1981, c. 56;

G.S. 105-130.17 is set out twice. See note.

1989 (Reg. Sess., 1990), c. 984, s. 8; 1997-300, s. 3; 1998-217, s. 42; 1999-369, s. 5.5; 2000-140, s. 64(b); 2006-18, s. 7; 2007-491, s. 14.)

Section Set Out Twice. — The section above is effective for taxable years beginning on or after January 1, 2008. For this section as effective for taxable years beginning before January 1, 2008, see the preceding section, also numbered G.S. 105-130.17.

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2006-18, s. 7, effective for taxable years beginning on or after January 1, 2006, added subsection (g).

Session Laws 2007-491, s. 14, effective for taxable years beginning on or after January 1, 2008, substituted "must furnish" for "shall furnish" in the third sentence of subsection (a); substituted "fourth month" for "third month" in the first sentence of subsection (b); substituted "105 days" for "75 days" at the end of subsection (e); and substituted "seventh month" for "sixth month" in subsection (g). For applicability, see Editor's note.

§ 105-130.18. Failure to file returns; supplementary returns.

If the Secretary determines that a corporation has failed to file a return or to include in a return filed, either intentionally or through error, items of taxable income, the Secretary may require from the corporation a return or supplementary return, under affirmation, of all the items of income that the corporation received during the year for which the return is made, whether or not taxable under this Part. If from a supplementary return or otherwise the Secretary finds that any items of income, taxable under this Part, have been omitted from the original return, that any items returned as taxable are not taxable, or that any item of taxable income is overstated or understated, the Secretary may require that the item be disclosed under affirmation of the corporation, and be added to or deducted from the original return. The filing of a supplementary return and the correction of the original return does not relieve the corporation from any of the penalties under G.S. 105-236. The Secretary may proceed under the provisions of G.S. 105-241.1, whether or not the Secretary requires a return or a supplementary return under this section. (1939, c. 158, s. 331; 1959, c. 1259, s. 8; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1998-98, s. 69; 2000-140, s. 64(c).)

Editor's Note. — G.S. 105-241.1, referred to in this section, was repealed by Session Laws 2007-491, s. 2.

§ 105-130.19. When tax must be paid.

(a) Except as provided in Article 4C of this Chapter, the full amount of the tax payable as shown on the return must be paid to the Secretary within the time allowed for filing the return.

(b), (c) Repealed by Session Laws 1989, c. 37, s. 1.

(d) Repealed by Session Laws 1993, c. 450, s. 3. (1939, c. 158, s. 332; 1943, c. 400, s. 4; 1947, c. 501, s. 4; 1951, c. 643, s. 4; 1955, c. 17, s. 2; 1959, c. 1259, s. 2; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1977, c. 1114, s. 7; 1989, c. 37, s. 1; 1989 (Reg. Sess., 1990), c. 984, s. 9; 1991 (Reg. Sess., 1992), c. 930, s. 14; 1993, c. 450, s. 3.)

§ 105-130.20. Federal corrections.

If a taxpayer's federal taxable income is corrected or otherwise determined by the federal government, the taxpayer must, within six months after being notified of the correction or final determination by the federal government, file an income tax return with the Secretary reflecting the corrected or determined taxable income. The Secretary must propose an assessment for any additional tax due from the taxpayer as provided in Article 9 of this Chapter. The Secretary must refund any overpayment of tax as provided in Article 9 of this Chapter. A taxpayer that fails to comply with this section is subject to the penalties in G.S. 105-236 and forfeits its rights to any refund due by reason of the determination. (1939, c. 158, s. 334; 1947, c. 501, s. 4; 1949, c. 392, s. 3; 1957, c. 1340, s. 14; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1993 (Reg. Sess., 1994), c. 582, s. 2; 2006-18, s. 4; 2007-491, s. 15.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2006-18, s. 4, effective July 1, 2006, and applicable to federal determinations made on or after that date, substituted "six months" for "two years" in the first sentence of the first undesignated paragraph.

Session Laws 2007-491, s. 15, effective for taxable years beginning on or after January 1, 2007, rewrote the second and third sentences of the former first paragraph and the first sentence of the former second paragraph as the present second sentence; and substituted "must refund" for "shall refund" in the present third sentence. For applicability, see Editor's note.

§ 105-130.21. Information at the source.

(a) Every corporation having a place of business or having one or more employees, agents or other representatives in this State, in whatever capacity acting, including lessors or mortgagors of real or personal property, or having the control, receipt, custody, disposal, or payment of interest (other than interest coupons payable to the bearer), rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains or profits paid or payable during any year to any taxpayer, shall make complete return thereof to the Secretary of

Revenue under such regulations and in such form and manner and to such extent as may be prescribed by him. The filing of any report in compliance with the provisions of this section by a foreign corporation shall not constitute an act in evidence of and shall not be deemed to be evidence that such corporation is doing business in this State.

(b) Every corporation doing business or having a place of business in this State shall file with the Secretary of Revenue, on such form and in such manner as he may prescribe, the names and addresses of all taxpayers, residents of North Carolina, to whom dividends have been paid and the amount of such dividends during the income year. (1939, c. 158, s. 328; 1945, c. 708, s. 4; 1957, c. 1340, s. 4; 1967, c. 1110, s. 3; 1973, c. 476, s. 193.)

§ 105-130.22. Tax credit for construction of dwelling units for handicapped persons.

There is allowed to corporate owners of multifamily rental units located in this State as a credit against the tax imposed by this Part, an amount equal to five hundred fifty dollars ($550.00) for each dwelling unit constructed by the corporate owner that conforms to Volume I-C of the North Carolina Building Code for the taxable year within which the construction of the dwelling unit is completed. The credit is allowed only for dwelling units completed during the taxable year that were required to be built in compliance with Volume I-C of the North Carolina Building Code. If the credit allowed by this section exceeds the tax imposed by this Part reduced by all other credits allowed, the excess may be carried forward for the next succeeding year. In order to secure the credit allowed by this section the corporation shall file with its income tax return a copy of the occupancy permit on the face of which is recorded by the building inspector the number of units completed during the taxable year that conform to Volume I-C of the North Carolina Building Code. After recording the number of these units on the face of the occupancy permit, the building inspector shall promptly forward a copy of the permit to the Building Accessibility Section of the Department of Insurance. (1973, c. 910, s. 1; 1979, c. 803, ss. 1, 2; 1981, c. 682, s. 16; 1997-6, s. 3; 1998-98, s. 69.)

§ 105-130.23: Repealed by Session Laws 1999-342, s. 1, effective for taxable years beginning on or after January 1, 2000.

§ 105-130.24: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1004, s. 2.

§ 105-130.25. Credit against corporate income tax for construction of cogenerating power plants.

(a) Credit. — A corporation or a partnership, other than a public utility as defined in G.S. 62-3(23), that constructs a cogenerating power plant in North Carolina is allowed as a credit against the tax imposed by this Part an amount equal to ten percent (10%) of the costs paid during the taxable year to purchase and install the electrical or mechanical power generation equipment of that plant. The credit may not be taken for the year in which the costs are paid but shall be taken for the taxable year beginning during the calendar year following the calendar year in which the costs were paid. To be eligible for the credit allowed by this section, the corporation or partnership must own or control the power plant at the time of construction. The credit allowed by this section may not exceed the amount of tax imposed by this Part for the year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer.

(b) Cogenerating Power Plant Defined. — For purposes of this section, a cogenerating power plant is a power plant that sequentially produces electrical or mechanical power and useful thermal energy using natural gas as its primary energy source.

(c) Alternative Method. — A taxpayer eligible for the credit allowed by this section may elect to treat the costs paid during an earlier year as if they were paid during the year the plant becomes operational. This election must be made on or before April 15 following the calendar year in which the plant becomes operational. The election must be in the form prescribed by the Secretary and must contain any supporting documentation the Secretary may require. An election with respect to costs paid by a partnership must be made by the partnership and is binding on any partners to whom the credit is passed through.

The costs with respect to which this election is made will be treated, for the purposes of this section, as if they had actually been paid in the year the plant becomes operational. If a taxpayer makes this election, however, the credit may not exceed one-fourth the amount of tax imposed by this Part for the year reduced by the sum of all credits allowed, except payments of tax by or on behalf of the taxpayer, but any unused portion of the credit may be carried forward for the next 10 taxable years. An election made under this subsection is irrevocable.

(d) Application. — To be eligible for the credit allowed in this section, a taxpayer must file an application for the credit with the Secretary on or before April 15 following the calendar year in which the costs were paid. The application shall be in the form prescribed by the Secretary and shall include any supporting documentation the Secretary may require. An application with respect to costs paid by a partnership must be made by the partnership on behalf of its partners.

(e) Ceiling. — The total amount of all tax credits allowed to taxpayers under this section for payments for construction and installation made in a calendar year may not exceed five million dollars ($5,000,000). The Secretary shall calculate the total amount of tax credits claimed from the applications filed pursuant to subsection (d). If the total amount of tax credits claimed for payments made in a calendar year exceeds five million dollars ($5,000,000), the Secretary shall allow a portion of the credits claimed by allocating the total allowable amount among all taxpayers claiming the credits in proportion to the size of the credit claimed by each taxpayer. In no case may the total amount of all tax credits allowed under this section for costs paid in a calendar year exceed five million dollars ($5,000,000).

If a credit claimed under this section is reduced as provided in this subsection, the Secretary shall notify the taxpayer of the amount of the reduction of the credit on or before December 31 of the year the taxpayer applied for the credit. The amount of the reduction of the credit may be carried forward and claimed for the next 10 taxable years if the taxpayer reapplies for a credit for the amount of the reduction, as provided in subsection (d). In such a reapplication, the costs for which a credit is claimed shall be considered as if they had been paid in the year preceding the reapplication. The Secretary's allocations based on applications filed pursuant to subsection (d) are final and shall not be adjusted to account for credits applied for but not claimed. (1979, c. 801, s. 34; 1993 (Reg. Sess., 1994), c. 674, ss. 1, 2, 4; 1995, c. 17, s. 2; 1998-98, s. 69.)

Editor's Note. — Subsections (a1) and (b) through (d) were redesignated as subsections (b) through (e), respectively, at the direction of the Revisor of Statutes.

§ 105-130.26: Repealed by Session Laws 1999-342, s. 1, effective for taxable years beginning on or after January 1, 2000.

§ 105-130.27: Expired.

Editor's Note. — Pursuant to former subsection (g) of this section, this section applied only to costs incurred during taxable years beginning prior to January 1, 1998.

§ 105-130.27A: Repealed by Session Laws 1999-342, s. 1, effective for taxable years beginning on or after January 1, 2000.

§ 105-130.28: Repealed by Session Laws 2000-128, s. 3, effective for costs incurred during taxable years beginning on or after January 1, 2006.

Editor's Note. — Session Laws 2000-128, s. 4, effective July 14, 2000, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under the statute repealed by this act before the effective date of its repeal, nor does it affect the right to any refund or credit of a tax that accrued under the repealed statute before the effective date of its repeal."

§§ 105-130.29 through 105-130.33: Repealed by Session Laws 1999-342, s. 1, effective for taxable years beginning on or after January 1, 2000.

Editor's Note. — Repealed G.S. 105-130.33 was amended by Session Laws 1999-337, s. 23, effective July 22, 1999, which, in subsection (a), inserted a second instance of "generator" and deleted "under this Part" following "allowable."

§ 105-130.34. Credit for certain real property donations.

(a) **(Effective for taxable years beginning before January 1, 2007)** Any corporation that makes a qualified donation of an interest in real property located in North Carolina during the taxable year that is useful for public beach access or use, public access to public waters or trails, fish and wildlife conservation, or other similar land conservation purposes is allowed a credit against the tax imposed by this Part equal to twenty-five percent (25%) of the fair market value of the donated property interest. To be eligible for this credit, the interest in real property must be donated in perpetuity to and accepted by the State, a local government, or a body that is both organized to receive and administer lands for conservation purposes and qualified to receive charitable contributions pursuant to G.S. 105-130.9. Lands required to be dedicated pursuant to local governmental regulation or ordinance and dedications made to increase building density levels permitted under a regulation or ordinance are not eligible for this credit. The credit allowed under this section may not exceed five hundred thousand dollars ($500,000). To support the credit allowed by this section, the taxpayer must file with its income tax return, for the taxable year in which the credit is claimed, a certification by the Department of Environment and Natural Resources that the property donated is suitable for one or more of the valid public benefits set forth in this subsection.

(a) **(Effective for taxable years beginning on or after January 1, 2007)** Any C Corporation that makes a qualified donation of an interest in real property located in North Carolina during the taxable year that is useful for (i) public beach access or use, (ii) public access to public waters or trails, (iii) fish and wildlife conservation, (iv) forestland or farmland conservation, (v) watershed protection, (vi) conservation of natural areas as that term is defined in G.S. 113A-164.3(3), (vii) conservation of natural or scenic river areas as those terms are used in G.S. 113A-34, (viii) conservation of predominantly natural parkland, or (ix) historic landscape conservation is allowed a credit against the tax imposed by this Part equal to twenty-five percent (25%) of the fair market value of the donated property interest. To be eligible for this credit, the interest in real property must be donated in perpetuity to and accepted by the State, a local government, or a body that is both organized to receive and administer lands for conservation purposes and qualified to receive charitable contributions pursuant to G.S. 105-130.9. Lands required to be dedicated pursuant to local governmental regulation or ordinance and dedications made to increase building density levels permitted under a regulation or ordinance are not eligible for this credit. The credit allowed under this section may not exceed five hundred thousand dollars ($500,000). To support the credit allowed by this section, the taxpayer must file with the income tax return for the taxable year in which the credit is claimed the following:

(1) A certification by the Department of Environment and Natural Resources that the property donated is suitable for one or more of the valid public benefits set forth in this subsection.

(2) A self-contained appraisal report or summary appraisal report as defined in Standards Rule 2-2 in the latest edition of the Uniform Standards of Professional Appraisal Practice as promulgated by the Appraisal Foundation for the property. For fee simple absolute donations of real property, a taxpayer may submit documentation of the county's appraised value of the donated property, as adjusted by the sales assessment ratio, in lieu of an appraisal report.

(b) The credit allowed by this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer.

(c) Any unused portion of this credit may be carried forward for the next succeeding five years.

(d) That portion of a qualifying donation that is the basis for a credit allowed under this section is not eligible for deduction as a charitable contribution under G.S. 105-130.9. (1983, c. 793, s. 1; 1989, c. 716, s. 1; c. 727, s. 218 (41); 1997-226, s. 1; 1997-443, s. 11A.119(a); 1998-98, s. 69; 1998-212, s. 29A.13(c); 2002-72, s. 15(a); 2007-309, s. 1.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective for taxable years until January 1, 2007. The second version of subsection (a) set out above is effective for taxable years beginning on or after January 1, 2007.

Effect of Amendments. — Session Laws 2007-309, s. 1, effective for taxable years beginning on or after January 1, 2007, rewrote subsection (a).

§ 105-130.35: Recodified as § 105-269.5 by Session Laws 1991, c. 45, s. 20.

§ 105-130.36. Credit for conservation tillage equipment.

(a) Any corporation that purchases conservation tillage equipment for use in a farming business, including tree farming, shall be allowed a credit against the tax imposed by this Part equal to twenty-five percent (25%) of the cost of the equipment paid during the taxable year. This credit may not exceed two thousand five hundred dollars ($2,500) for any taxable year for any taxpayer. The credit may be claimed only by the first purchaser of the equipment and may not be claimed by a corporation that purchases the equipment for resale or for use outside this State. This credit may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except tax payments made by or on behalf of the taxpayer. If the credit allowed by this section exceeds the tax imposed under this Part, the excess may be carried forward for the succeeding five years. The basis in any equipment for which a credit is allowed under this section shall be reduced by the amount of credit allowable.

(b) As used in this section, "conservation tillage equipment" means:

(1) A planter such as a planter commonly known as a "no-till" planter designed to minimize disturbance of the soil in planting crops or trees, including equipment that may be attached to equipment already owned by the taxpayer; or,

(2) Equipment designed to minimize disturbance of the soil in reforestation site preparation, including equipment that may be attached to equipment already owned by the taxpayer; provided, however, this shall include only those items of equipment generally known as a "KG-Blade", a "drum-chopper", or a "V-Blade". (1983 (Reg. Sess., 1984), c. 969, s. 1; 1998-98, s. 88.)

§ 105-130.37. Credit for gleaned crop.

(a) Any corporation that grows a crop and permits the gleaning of the crop during the taxable year is allowed a credit against the tax imposed by this Part equal to ten percent (10%) of the market price of the quantity of the gleaned crop. This credit may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except tax payments made by or on behalf of the taxpayer. No deduction is allowed under G.S. 105-130.5(b)(5) for the items for which a credit is claimed under this section. Any unused portion of the credit may be carried forward for the succeeding five years.

(b) The following definitions apply to this section:

(1) "Gleaning" means the harvesting of a crop that has been donated by the grower to the nonprofit organization which will distribute the crop to individuals or other nonprofit organizations it considers appropriate recipients of the food;

(2) "Market price" means the season average price of the crop as determined by the North Carolina Crop and Livestock Reporting Service in the Department of Agriculture and Consumer Services, or the average price of the crop in the nearest local market for the month in which the crop is gleaned if the Crop and Livestock Reporting Service does not determine the season average price for that crop; and

(3) "Nonprofit organization" means an organization to which charitable contributions are deductible from gross income under the Code. (1983 (Reg. Sess., 1984), c. 1018, s. 1; 1993 (Reg. Sess., 1994), c. 745, s. 6; 1997-261, s. 12; 1998-98, s. 89.)

§ 105-130.38: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 1, effective for taxable years beginning on or after January 1, 1996.

§ 105-130.39. Credit for certain telephone subscriber line charges.

(a) A corporation that provides local telephone service to low-income residential consumers at reduced rates pursuant to an order of the North Carolina

Utilities Commission is allowed a credit against the tax imposed by this Part equal to the difference between the following:

(1) The amount of receipts the corporation would have received during the taxable year from those low-income customers had the customers been charged the regular rates for local telephone service and fees.

(2) The amount billed those low-income customers for local telephone service during the taxable year.

(b) This credit is allowed only for a reduction in local telephone service rates and fees and is not allowed for any reduction in interstate subscriber line charges. This credit may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except tax payments made by or on behalf of the corporation. (1985, c. 694, s. 2; 1998-98, s. 90.)

§ 105-130.40: Recodified as § 105-129.8 by Session Laws 1996, Second Extra Session, c. 13, s. 3.2, effective for taxable years beginning on or after January 1, 1996.

§ 105-130.41. (Repealed effective for taxable years beginning on or after January 1, 2009) Credit for North Carolina State Ports Authority wharfage, handling, and throughput charges.

(a) Credit. — A taxpayer whose waterborne cargo is loaded onto or unloaded from an ocean carrier calling at the State-owned port terminal at Wilmington or Morehead City, without consideration of the terms under which the cargo is moved, is allowed a credit against the tax imposed by this Part. The amount of credit allowed is equal to the excess of the wharfage, handling (in or out), and throughput charges assessed on the cargo for the current taxable year over an amount equal to the average of the charges for the current taxable year and the two preceding taxable years. The credit applies to forest products, break-bulk cargo and container cargo, including less-than-container-load cargo, that is loaded onto or unloaded from an ocean carrier calling at either the Wilmington or Morehead City port terminal and to bulk cargo that is loaded onto or unloaded from an ocean carrier calling at the Morehead City port terminal. To obtain the credit, taxpayers must provide to the Secretary a statement from the State Ports Authority certifying the amount of charges for which a credit is claimed and any other information required by the Secretary.

(b) Limitations. — This credit may not exceed fifty percent (50%) of the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except tax payments made by or on behalf of the corporation. Any unused portion of the credit may be carried forward for the succeeding five years. The maximum cumulative credit that may be claimed by a corporation under this section is two million dollars ($2,000,000).

(c) Definitions. — For purposes of this section, the terms "handling" (in or out) and "wharfage" have the meanings provided in the State Ports Tariff Publications, "Wilmington Tariff, Terminal Tariff #6," and "Morehead City Tariff, Terminal Tariff #1." For purposes of this section, the term "throughput" has the same meaning as "wharfage" but applies only to bulk products, both dry and liquid.

(c1) Report. — The Department of Revenue must publish by May 1 of each year the following information itemized by taxpayer for the 12-month period ending the preceding December 31:

(1) The number of taxpayers taking a credit allowed in this section.

(2) The total amount of charges assessed for the taxable year.

G.S. 105-130.41 has a postponed repeal date. See notes.

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(3) The total cost to the General Fund of the credits taken.

(d) Sunset. — This section is repealed effective for taxable years beginning on or after January 1, 2009. (1991 (Reg. Sess., 1992), c. 977, s. 1; 1993 (Reg. Sess., 1994), c. 681, s. 1; 1995, c. 17, s. 17; c. 495, ss. 1, 3, 4; 1996, 2nd Ex. Sess., c. 18, s. 15.3(a); 1997-443, s. 29.1(a)-(c); 1998-98, s. 69; 2001-517, ss. 1, 2; 2002-99, s. 6(c); 2003-414, s. 7; 2005-429, s. 2.9; 2007-527, s. 26(a).)

Editor's Note. — Session Laws 2002-99, s. 6(a), effective August 29, 2002, amended Session Laws 1991 (Reg. Sess., 1992), c. 977, s. 4, which, as amended by Session Laws 1995, c. 17, s. 17, by Session Laws 1995, c. 495, s. 3, by Session Laws 1997-443, s. 29.1(a), and by Session Laws 2001-517, s. 1, made this section effective for taxable years beginning on or after March 1, 1992, and provided for its expiration for taxable years beginning on or after January 1, 2003, by deleting the sunset provision. For sunset, see now subsection (d) of this section.

Session Laws 2002-99, s. 6(b), effective August 29, 2002, amended Session Laws 1993, c. 681, s. 4, which, as amended by Session Laws 1995, c. 17, s. 17, by Session Laws 1995, c. 495, s. 4, by Session Laws 1997-443, s. 29.1(b), and by Session Laws 2001-517, s. 2, made the amendments to this section by the 1993 act effective for taxable years beginning on or after January 1, 1994, by deleting the sunset provision. For sunset, see now subsection (d) of this section.

Session Laws 2005-429, s. 3, provides: "The Economic Development Oversight Committee shall study the issue of public disclosure as it relates to economic development efforts. Specifically, the Committee shall study ways of providing the public information about the employment levels, and any changes in employment levels, of businesses that receive economic development incentives from the State or local governments. The Committee may make an interim report on this study, including any recommendations for legislative proposals, to the 2006 Regular Session of the 2005 General Assembly and shall make a final report on this study to the 2007 General Assembly."

Effect of Amendments. — Session Laws 2005-429, s. 2.9, effective January 1, 2007, added subsection (c1).

Session Laws 2007-527, s. 26(a), effective August 31, 2007, substituted "assessed for the taxable year" for "with respect to which credits were taken" in subdivision (c1)(2).

§ 105-130.42: Recodified as §§ 105-129.35 through 105-129.37 by Session Laws 1999-389, ss. 2-4, effective for taxable years beginning on or after January 1, 1999.

Editor's Note. — Session Laws 1999-389, s. 6 provides that Article 3D of Chapter 105, as amended by Session Laws 1999-389, incorporates both G.S. 105-130.42 and G.S. 105-151.23.

§ 105-130.43. Credit for savings and loan supervisory fees.

Every savings and loan association is allowed a credit against the tax imposed by this Part for a taxable year equal to the amount of supervisory fees, paid by the association during the taxable year, that were assessed by the Commissioner of Banks of the Department of Commerce for the State fiscal year beginning during that taxable year. This credit may not exceed the amount of tax imposed by this Part for the taxable year, reduced by the sum of all credits allowed against the tax, except tax payments made by or on behalf of the taxpayer. A taxpayer that claims the credit allowed under this section may not deduct the supervisory fees in determining taxable income. (1985, c. 750, s. 1; 1989, c. 76, s. 24; c. 751, s. 7(8); 1991 (Reg. Sess., 1992), c. 959, s. 22; 1998-98, s. 1(d), (e); 2001-193, s. 16.)

Editor's Note. — Session Laws 1998-98, s. 1(d), recodified 105-228.24A as this section, effective for taxable years beginning on or after January 1, 1999.

§ 105-130.44. Credit for construction of poultry composting facility.

A taxpayer who constructs in this State a poultry composting facility, as defined in G.S. 106-549.51 for the composting of whole, unprocessed poultry carcasses from commercial operations in which poultry is raised or produced, is allowed as a credit against the tax imposed by this Part an amount equal to twenty-five percent (25%) of the installation, materials, and equipment costs of construction paid during the taxable year. This credit may not exceed one thousand dollars ($1,000) for any single installation. The credit allowed by this section may not exceed the amount of tax imposed by this Part the taxable year reduced by the sum of all credits allowable, except payments of tax by or on behalf of the taxpayer. The credit allowed by this section does not apply to costs paid with funds provided the taxpayer by a State or federal agency. (1998-134, s. 1; 1998-98, s. 69.)

§ 105-130.45. (Effective for cigarettes exported before January 1, 2005 and repealed effective January 1, 2018) Credit for manufacturing cigarettes for exportation.

(a) Definitions. — The following definitions apply in this section:

(1) Base year exportation volume. — The number of cigarettes manufactured and exported by a corporation during the calendar year 1998.

(2) Exportation. — The shipment of cigarettes manufactured in the United States to any of the following sufficient to relieve the cigarettes in the shipment of the federal excise tax on cigarettes:
  a. A foreign country.
  b. A possession of the United States.
  c. A commonwealth of the United States that is not a state.

(b) Credit. — A corporation engaged in the business of manufacturing cigarettes for exportation to a foreign country is allowed a credit against the taxes levied by this Part. The amount of credit allowed under this section is determined by comparing the exportation volume of the corporation in the year for which the credit is claimed with the corporation's base year exportation volume, rounded to the nearest whole percentage. The amount of credit allowed is as follows:

Current Year's Exportation Volume Compared to its Base Year's Exportation Volume	Amount of Credit per Thousand Cigarettes Exported
120% or more	40¢
119% — 100%	35¢
99% — 80%	30¢
79% — 60%	25¢
59% — 50%	20¢
Less than 50%	None

(c) Cap. — The credit allowed under this section may not exceed the lesser of six million dollars ($6,000,000) or fifty percent (50%) of the amount of tax imposed by this Part for the taxable year reduced by the sum of all other credits allowable, except tax payments made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of the credit allowed in any tax year, including carryforwards claimed by the taxpayer under this section for previous tax years. Any unused portion of a credit allowed in this section may be carried forward for the next succeeding five years.

§ 105-130.45 has a delayed repeal date. See notes.

(d) Documentation of Credit. — A corporation that claims the credit under this section must include the following with its tax return:

(1) A statement of the base year exportation volume.
(2) A statement of the exportation volume on which the credit is based.
(3) A list of the corporation's export volumes shown on its monthly reports to the Bureau of Alcohol, Tobacco, and Firearms of the United States Treasury for the months in the tax year for which the credit is claimed. (1999-333, s. 4; 2003-435, 2nd Ex. Sess., ss. 5.1, 5.3.)

Section Set Out Twice. — The section above is effective for cigarettes exported before January 1, 2005. For the section as in effect for cigarettes exported on or after January 1, 2005, see the following section, also numbered G.S. 105-130.45.

Editor's Note. — Session Laws 1999-333, s. 10, made this section effective for taxable years beginning on or after January 1, 1999. Section 10 provides that this section is repealed effective for cigarettes exported on or after January 1, 2005.

Effect of Amendments. — Session Laws 2003-435, 2nd Ex. Sess., s. 5.3 effective for taxable years beginning on or after January 1, 2004, rewrote subdivision (a)(2).

§ 105-130.45. (Effective for cigarettes exported on or after January 1, 2005 and repealed effective January 1, 2018) Credit for manufacturing cigarettes for exportation.

(a) Definitions. — The following definitions apply in this section:

(1) Base year exportation volume. — The number of cigarettes manufactured and exported by a corporation during the calendar year 1998.
(2) Exportation. — The shipment of cigarettes manufactured in the United States to any of the following sufficient to relieve the cigarettes in the shipment of the federal excise tax on cigarettes:
    a. A foreign country.
    b. A possession of the United States.
    c. A commonwealth of the United States that is not a state.

(b) Credit. — A corporation engaged in the business of manufacturing cigarettes for exportation to a foreign country is allowed a credit against the taxes levied by this Part. The amount of credit allowed under this section is determined by comparing the exportation volume of the corporation in the year for which the credit is claimed with the corporation's base year exportation volume, rounded to the nearest whole percentage. The amount of credit allowed is as follows:

Current Year's Exportation Volume Compared to its Base Year's Exportation Volume	Amount of Credit per Thousand Cigarettes Exported
120% or more	40¢
119% — 100%	35¢
99% — 80%	30¢
79% — 60%	25¢
59% — 50%	20¢
Less than 50%	None

(c) Cap. — The credit allowed under this section may not exceed the lesser of six million dollars ($6,000,000) or fifty percent (50%) of the amount of tax imposed by this Part for the taxable year reduced by the sum of all other credits allowable, except tax payments made by or on behalf of the taxpayer.

§ 105-130.45 has a delayed repeal date. See notes.

This limitation applies to the cumulative amount of the credit allowed in any tax year, including carryforwards claimed by the taxpayer under this section for previous tax years. Any unused portion of a credit allowed in this section may be carried forward for the next succeeding five years.

(d) Documentation of Credit. — A corporation that claims the credit under this section must include the following with its tax return:

(1) A statement of the base year exportation volume.
(2) A statement of the exportation volume on which the credit is based.
(3) A list of the corporation's export volumes shown on its monthly reports to the Bureau of Alcohol, Tobacco, and Firearms of the United States Treasury for the months in the tax year for which the credit is claimed.

(e) Reserved for future codification purposes.

(f) Report. — The Department of Revenue must publish by May 1 of each year the following information itemized by taxpayer for the 12-month period ending the preceding December 31:

(1) The number of taxpayers taking a credit allowed in this section.
(2) The total amount of exports with respect to which credits were taken.
(3) The total cost to the General Fund of the credits taken. (1999-333, s. 4; 2003-435, 2nd Ex. Sess., ss. 5.1, 5.2, 5.3; 2005-429, s. 2.10.)

Section Set Out Twice. — The section above is effective for cigarettes exported on or after January 1, 2005. For the section as in effect for cigarettes exported before January 1, 2005, see the preceding section, also numbered G.S. 105-130.45.

Editor's Note. — Session Laws 2005-429, s. 3, provides: "The Economic Development Oversight Committee shall study the issue of public disclosure as it relates to economic development efforts. Specifically, the Committee shall study ways of providing the public information about the employment levels, and any changes in employment levels, of businesses that receive economic development incentives from the State or local governments. The Committee may make an interim report on this study, including any recommendations for legislative proposals, to the 2006 Regular Session of the 2005 General Assembly and shall make a final report on this study to the 2007 General Assembly."

Effect of Amendments. — Session Laws 2003-435, 2nd Ex. Sess., s. 5.2, effective for cigarettes exported on or after January 1, 2005, rewrote the section.

Session Laws 2003-435, 2nd Ex. Sess., s. 5.3, effective for taxable years beginning on or after January 1, 2004, rewrote subdivision (a)(2).

Session Laws 2005-429, s. 2.10, effective January 1, 2007, added subsection (f).

§ 105-130.46. (See notes for expiration date) Credit for manufacturing cigarettes for exportation while increasing employment and utilizing State Ports.

(a) Purpose. — The credit authorized by this section is intended to enhance the economy of this State by encouraging qualifying cigarette manufacturers to increase employment in this State with the purpose of expanding this State's economy, the use of the North Carolina State Ports, and the use of other State goods and services, including tobacco.

(b) Definitions. — The following definitions apply in this section:

(1) Employment level. — The total number of full-time jobs and part-time jobs converted into full-time equivalences. A job is included in the employment level for a year only if that job is located within the State for more than six months of the year. A job is located in this State if more than fifty percent (50%) of the employee's duties are performed in this State.

(2) Exportation. — The shipment of cigarettes manufactured in the United States to a foreign country sufficient to relieve the cigarettes in the shipment of the federal excise tax on cigarettes.

(3) Full-time job. — A position that requires at least 1,600 hours of work per year and is intended to be held by one employee during the entire year.

(4) Successor in business. — A corporation that through amalgamation, merger, acquisition, consolidation, or other legal succession becomes invested with the rights and assumes the burdens of the predecessor corporation and continues the cigarette exportation business.

(c) Employment Level. — In order to be eligible for a full credit allowed under this section, the corporation must maintain an employment level in this State for the taxable year that exceeds the corporation's employment level in this State at the end of the 2004 calendar year by at least 800 full-time jobs. In the case of a successor in business, the corporation must maintain an employment level in this State for the taxable year that exceeds all its predecessor corporations' combined employment levels in this State at the end of the 2004 calendar year by at least 800 full-time jobs.

(d) Credit. — A corporation that satisfies the employment level requirement under subsection (c) of this section, is engaged in the business of manufacturing cigarettes for exportation, and exports cigarettes and other tobacco products through the North Carolina State Ports during the taxable year is allowed a credit as provided in this section. The amount of credit allowed under this section is equal to forty cents (40¢) per one thousand cigarettes exported. The amount of credit earned during the taxable year may not exceed ten million dollars ($10,000,000).

(e) Reduction of Credit. — A corporation that has previously satisfied the qualification requirements of this section but that fails to satisfy the employment level requirement in a succeeding year may still claim a partial credit for the year in which the employment level requirement is not satisfied. The partial credit allowed is equal to the credit that would otherwise be allowed under subsection (d) of this section multiplied by a fraction. The numerator of the fraction is the number of full-time jobs by which the corporation's employment level in this State for the taxable year exceeds the corporation's employment level in this State at the end of the 2004 calendar year. The denominator of the fraction is 800. In the case of a successor in business, the numerator of the fraction is the number of full-time jobs by which the corporation's employment level in this State for the taxable year exceeds all its predecessor corporations' combined employment levels in this State at the end of the 2004 calendar year.

(f) Allocation. — The credit allowed by this section may be taken against the income taxes levied under this Part or the franchise taxes levied under Article 3 of this Chapter. When the taxpayer claims a credit under this section, the taxpayer must elect the percentage of the credit to be applied against the taxes levied under this Part with any remaining percentage to be applied against the taxes levied under Article 3 of this Chapter. This election is binding for the year in which it is made and for any carryforwards. A taxpayer may elect a different allocation for each year in which the taxpayer qualifies for a credit.

(g) Ceiling. — The total amount of credit that may be taken in a taxable year under this section may not exceed the lesser of the amount of credit which may be earned for that year under subsection (d) of this section or fifty percent (50%) of the amount of tax against which the credit is taken for the taxable year reduced by the sum of all other credits allowable, except tax payments made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of the credit allowed in any tax year, including carryforwards claimed by the taxpayer under this section or G.S. 105-130.45 for previous tax years.

(h) Carryforward. — Any unused portion of a credit allowed in this section may be carried forward for the next succeeding 10 years. All carryforwards of a credit must be taken against the tax against which the credit was originally claimed. A successor in business may take the carryforwards of a predecessor corporation as if they were carryforwards of a credit allowed to the successor in business.

(i) Documentation of Credit. — A corporation that claims the credit under this section must include the following with its tax return:

(1) A statement of the exportation volume on which the credit is based.

(2) A list of the corporation's export volumes shown on its monthly reports to the Alcohol and Tobacco Tax and Trade Bureau of the United States Treasury for the months in the tax year for which the credit is claimed.

(3) Any other information required by the Department of Revenue.

(j) No Double Credit. — A taxpayer may not claim this credit and the credit allowed under G.S. 105-130.45 for the same activity.

(k) Reports. — Any corporation that takes a credit under this section must submit an annual report by May 1 of each year to the Senate Finance Committee, the House of Representatives Finance Committee, the Senate Appropriations Committee, the House of Representatives Appropriations Committee, and the Fiscal Research Division of the General Assembly. The report must state the amount of credit earned by the corporation during the previous year, the amount of credit including carryforwards claimed by the corporation during the previous year, and the percentage of domestic leaf content in cigarettes produced by the corporation during the previous year. The first reports required under this section are due by May 1, 2006. (2003-435, 2nd Ex. Sess., s. 6.1; 2004-170, s. 16(a).)

Editor's Note. — Session Laws 2003-435, 2nd Ex. Sess., s. 6.2, provides that this section is effective for taxable years beginning on or after January 1, 2006, and expires for exports occurring on or after January 1, 2018.

Effect of Amendments. — Session Laws 2004-170, s. 16.(a), effective for taxable years beginning on or after January 1, 2006, and expires for exports occurring on or after January 1, 2018, added the second and last sentences in subdivision (b)(1); in subsection (c), inserted "for the taxable year" preceding "that exceeds" two times, and deleted the former last sentence which read: "A job is located in this State if more than fifty percent (50%) of the employee's duties are performed in this State."; substituted "(c)" for "(b)" in subsection (d); in subsection (e), substituted "(d)" for "(c)," and inserted "for the taxable year" preceding "exceeds" two times; and substituted "(d)" for "(c)" in subsection (g).

§ 105-130.47. (Repealed for qualifying expenses occurring on or after January 1, 2010) Credit for qualifying expenses of a production company.

(a) Definitions. — The following definitions apply in this section:

(1) Highly compensated individual. — An individual who directly or indirectly receives compensation in excess of one million dollars ($1,000,000) for personal services with respect to a single production. An individual receives compensation indirectly when a production company pays a personal service company or an employee leasing company that pays the individual.

(2) Live sporting event. — A scheduled sporting competition, game, or race that is not originated by a production company, but originated solely by an amateur, collegiate, or professional organization, institution, or association for live or tape-delayed television or satellite broadcast. A live sporting event does not include commercial advertising, an episodic television series, a television pilot, a music video, a

motion picture, or a documentary production in which sporting events are presented through archived historical footage or similar footage taken at least 30 days before it is used.

(3) Production company. — Defined in G.S. 105-164.3.

(4) Qualifying expenses. — The sum of the following amounts spent in this State by a production company in connection with a production, less the amount paid to a highly compensated individual:

a. Goods and services leased or purchased. For goods with a purchase price of twenty-five thousand dollars ($25,000) or more, the amount included in qualifying expenses is the purchase price less the fair market value of the good at the time the production is completed.

b. Compensation and wages on which withholding payments are remitted to the Department of Revenue under Article 4A of this Chapter.

(b) Credit. — A taxpayer that is a production company and has qualifying expenses of at least two hundred fifty thousand dollars ($250,000) with respect to a production is allowed a credit against the taxes imposed by this Part equal to fifteen percent (15%) of the production company's qualifying expenses. For the purposes of this section, in the case of an episodic television series, an entire season of episodes is one production. The credit is computed based on all of the taxpayer's qualifying expenses incurred with respect to the production, not just the qualifying expenses incurred during the taxable year.

(c) Pass-Through Entity. — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this section does not distribute the credit among any of its owners. The pass-through entity is considered the taxpayer for purposes of claiming the credit allowed by this section. If a return filed by a pass-through entity indicates that the entity is paying tax on behalf of the owners of the entity, the credit allowed under this section does not affect the entity's payment of tax on behalf of its owners.

(d) Return. — A taxpayer may claim the credit allowed by this section on a return filed for the taxable year in which the production activities are completed. The return must state the name of the production, a description of the production, and a detailed accounting of the qualifying expenses with respect to which a credit is claimed.

(e) Credit Refundable. — If the credit allowed by this section exceeds the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, the Secretary must refund the excess to the taxpayer. The refundable excess is governed by the provisions governing a refund of an overpayment by the taxpayer of the tax imposed in this Part. In computing the amount of tax against which multiple credits are allowed, nonrefundable credits are subtracted before refundable credits.

(f) Limitations. — The amount of credit allowed under this section with respect to a production that is a feature film may not exceed seven million five hundred thousand dollars ($7,500,000). No credit is allowed under this section for any production that satisfies one of the following conditions:

(1) It is political advertising.

(2) It is a television production of a news program or live sporting event.

(3) It contains material that is obscene, as defined in G.S. 14-190.1.

(4) It is a radio production.

(g) Substantiation. — A taxpayer allowed a credit under this section must maintain and make available for inspection any information or records required by the Secretary of Revenue. The taxpayer has the burden of proving eligibility for a credit and the amount of the credit. The Secretary may consult with the North Carolina Film Office of the Department of Commerce and the regional film commissions in order to determine the amount of qualifying expenses.

(h) Report. — The Department of Revenue must publish by May 1 of each year the following information, itemized by taxpayer for the 12-month period ending the preceding December 31:

(1) The location of sites used in a production for which a credit was claimed.
(2) The qualifying expenses for which a credit was claimed, classified by whether the expenses were for goods, services, or compensation paid by the production company.
(3) The number of people employed in the State with respect to credits claimed.
(4) The total cost to the General Fund of the credits claimed.

(i) Repealed by Session Laws 2006-220, s. 2, effective for taxable years beginning on or after January 1, 2007.

(j) Sunset. — This section is repealed for qualifying expenses occurring on or after January 1, 2010. (2005-276, s. 39.1(a); 2005-345, ss. 47(a), 47(b); 2006-162, s. 4(a); 2006-220, s. 2; 2007-527, s. 24.)

Editor's Note. — Session Laws 2005-345, s. 47(a), amended this section by adding subdivision (a)(2a); to maintain alphabetical order, the subdivisions in subsection (a) were subsequently renumbered at the direction of the Revisor of Statutes.

Session Laws 2005-276, s. 39.1(g), made this section effective for taxable years beginning on or after January 1, 2005, and applicable to qualifying expenses incurred on or after July 1, 2005.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-162, s. 33, as amended by Session Laws 2007-527, s. 24, provides, in part, that s. 4(a) and (b) of the act are effective for taxable years beginning on or after January 1, 2006, and that s. 4(c) of the act is effective July 13, 2006.

Effect of Amendments. — Session Laws 2005-345, ss. 47(a) and 47(b), effective July 1, 2005, added subdivision (a)(2); and inserted "live" preceding "sporting event" in subdivision (f)(2).

Session Law 2006-162, s. 4, as amended by Session Laws 2007-527, s. 24, in subdivision (a)(1), in the first sentence, inserted "directly or indirectly" near the beginning and inserted "for personal services" near the middle, and added the second sentence; in the second sentence of subdivision (a)(2), substituted "does not" for "shall not", inserted "a" in three places, substituted "in which" for "where any", and substituted "taken at least 30 days before it is used" for "depicting earlier live sporting events that originated more than thirty days before the time of such usage" at the end; in subdivision (a)(4), substituted "following amounts spent in this State" for "total mount spent in this State for the following", added ", less the amount paid to a highly compensated individual" at the end of the introductory paragraph, deleted "by the production company" following "purchased" at the end of the first sentence in subdivision (a)(4)(a), and substituted "wages on which withholding payments are remitted" for "wages paid by the production company, other than amounts paid to a highly compensated individual, wages on which the production company remitted withholding payments" in the middle of subdivision (a)(4)(b). For effective dates, see Editor's note.

Session Laws 2006-220, s. 2, effective for taxable years beginning on and after January 1, 2007, repealed subsection (i), which read: "No Double Benefit. — A taxpayer may not claim a credit under this section for qualifying expenses for which it claimed a deduction under the Code. A taxpayer that claims a credit provided under this section must adjust taxable income as provided in G.S. 105-130.5(a)(18)."

§ 105-130.48. (Repealed for taxable years beginning on or after January 1, 2011) Credit for recycling oyster shells.

(a) Credit. — A taxpayer who donates oyster shells to the Division of Marine Fisheries of the Department of Environment and Natural Resources is eligible for a credit against the tax imposed by this Part. The amount of the credit is equal to one dollar ($1.00) per bushel of oyster shells donated.

(b) Limitation. — The credit allowed under this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except tax payment made by or on behalf of the taxpayer.

(c) Carryforward. — Any unused portion of a credit allowed in this section may be carried forward for the succeeding five years. A successor in business may take the carryforwards of a predecessor corporation as if they were carryforwards of a credit allowed to the successor in business.

(d) No Double Benefit. — No deduction is allowed under G.S. 105-130.5(b)(5) or G.S. 105-130.9 for the donation of oyster shells for which a credit is claimed under this section.

(e) Documentation of Credit. — Upon request, to support the credit allowed by this section, the taxpayer must file with its income tax return, for the taxable year in which the credit is claimed, a certification by the Department of Environment and Natural Resources stating the number of bushels of oyster shells donated by the taxpayer.

(f) Sunset. — This section is repealed effective for taxable years beginning on or after January 1, 2011. (2006-66, s. 24.18(a); 2007-527, s. 9(a).)

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 24.18(g), makes this section effective for taxable years beginning on or after January 1, 2006, and expires for taxable years beginning on or after January 1, 2011.

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2007-527, s. 9(a), effective August 31, 2007, inserted "Upon request" at the beginning of subsection (e).

Part 1A. S Corporation Income Tax.

§ 105-131. Title; definitions; interpretation.

(a) This Part of the income tax Article shall be known and may be cited as the S Corporation Income Tax Act.

(b) For the purpose of this Part, unless otherwise required by the context:

(1) "Code" has the same meaning as in G.S. 105-228.90.

(2) "C Corporation" means a corporation that is not an S Corporation and is subject to the tax levied under Part 1 of this Article.

(3) "Department" means the Department of Revenue.

(4) "Income attributable to the State" means items of income, loss, deduction, or credit of the S Corporation apportioned and allocated to this State pursuant to G.S. 105-130.4.

(5) "Income not attributable to the State" means all items of income, loss, deduction, or credit of the S Corporation other than income attributable to the State.

(6) "Post-termination transition period" means that period defined in section 1377(b)(1) of the Code.

(7) "Pro rata share" means the share determined with respect to an S Corporation shareholder for a taxable period in the manner provided in section 1377(a) of the Code.

(8) "S Corporation" means a corporation for which a valid election under section 1362(a) of the Code is in effect.

(9) "Secretary" means the Secretary of Revenue.

(10) "Taxable period" means any taxable year or portion of a taxable year during which a corporation is an S Corporation.

(c) Except as otherwise expressly provided or clearly appearing from the context, any term used in this Part shall have the same meaning as when used in a comparable context in the Code, or in any statute relating to federal income taxes, in effect during the taxable period. Due consideration shall be given in the interpretation of this Part to applicable sections of the Code in effect and to federal rulings and regulations interpreting those sections, except where the Code, ruling, or regulation conflicts with the provisions of this Part. (1987 (Reg. Sess., 1988), c. 1089, s. 1; 1989, c. 728, ss. 1.33, 1.35; 1989 (Reg. Sess., 1990), c. 981, s. 4; 1991, c. 689, s. 251; 1991 (Reg. Sess., 1992), c. 922, s. 5; 1993, c. 12, s. 6; 1998-98, ss. 43, 68-70.)

Editor's Note. — Another section, also numbered G.S. 105-131, which was in Division I [now Part I] of Article 4 of this Chapter, was repealed by Session Laws 1967, c. 1110, s. 3. For present provisions similar to the repealed section, see G.S. 105-130.1, 105-134.

§ 105-131.1. Taxation of an S Corporation and its shareholders.

(a) An S Corporation shall not be subject to the tax levied under G.S. 105-130.3.

(b) Each shareholder's pro rata share of an S Corporation's income attributable to the State and each resident shareholder's pro rata share of income not attributable to the State, shall be taken into account by the shareholder in the manner and subject to the adjustments provided in Parts 2 and 3 of this Article and section 1366 of the Code and shall be subject to the tax levied under Parts 2 and 3 of this Article. (1987 (Reg. Sess., 1988), c. 1089, s. 1; 1989, c. 728, ss. 1.33, 1.35; 1998-98, ss. 5, 68.)

§ 105-131.2. Adjustment and characterization of income.

(a) Adjustment. — Each shareholder's pro rata share of an S Corporation's income is subject to the adjustments provided in G.S. 105-134.6.

(b) Repealed by Session Laws 1989, c. 728, s. 1.35.

(c) Characterization of Income. — S Corporation items of income, loss, deduction, and credit taken into account by a shareholder pursuant to G.S. 105-131.1(b) are characterized as though received or incurred by the S Corporation and not its shareholder. (1987 (Reg. Sess., 1988), c. 1089, s. 1; 1989, c. 728, ss. 1.33, 1.35; 1993, c. 485, s. 8; 2006-17, s. 1.)

Effect of Amendments. — Session Laws 2006-17, s. 1, effective for taxable years beginning on or after January 1, 2006, rewrote subsection (a); in subsection (c) substituted "are" for "shall be."

§ 105-131.3. Basis and adjustments.

(a) The initial basis of a resident shareholder in the stock of an S Corporation and in any indebtedness of the corporation owed to that shareholder shall be determined, as of the later of the date the stock is acquired, the effective date of the S Corporation election, or the date the shareholder became a resident of this State, as provided under the Code.

(b) The basis of a resident shareholder in the stock and indebtedness of an S Corporation shall be adjusted in the manner and to the extent required by section 1011 of the Code except that:

(1) Any adjustments made (other than for income exempt from federal or State income taxes) pursuant to G.S. 105-131.2 shall be taken into account; and

(2) Any adjustments made pursuant to section 1367 of the Code for a taxable period during which this State did not measure S Corporation shareholder income by reference to the corporation's income shall be disregarded.

(c) The initial basis of a nonresident shareholder in the stock of an S Corporation and in any indebtedness of the corporation to that shareholder shall be zero.

(d) The basis of a nonresident shareholder in the stock and indebtedness of an S Corporation shall be adjusted as provided in section 1367 of the Code, except that adjustments to basis shall be limited to the income taken into account by the shareholder pursuant to G.S. 105-131.1(b).

(e) The basis of a shareholder in the stock of an S Corporation shall be reduced by the amount allowed as a loss or deduction pursuant to G.S. 105-131.4(c).

(f) The basis of a resident shareholder in the stock of an S Corporation shall be reduced by the amount of any cash distribution that is not taxable to the shareholder as a result of the application of G.S. 105-131.6(b).

(g) For purposes of this section, a shareholder shall be considered to have acquired stock or indebtedness received by gift at the time the donor acquired the stock or indebtedness, if the donor was a resident of this State at the time of the gift. (1987 (Reg. Sess., 1988), c. 1089, s. 1; 1989, c. 728, ss. 1.33, 1.35.)

§ 105-131.4. Carryforwards; carrybacks; loss limitation.

(a) Carryforwards and carrybacks to and from an S Corporation shall be restricted in the manner provided in section 1371(b) of the Code.

(b) The aggregate amount of losses or deductions of an S Corporation taken nto account by a shareholder pursuant to G.S. 105-131.1(b) may not exceed the combined adjusted bases, determined in accordance with G.S. 105-131.3, of the shareholder in the stock and indebtedness of the S Corporation.

(c) Any loss or deduction that is disallowed for a taxable period pursuant to subsection (b) of this section shall be treated as incurred by the corporation in the succeeding taxable period with respect to that shareholder.

(d)(1) Any loss or deduction that is disallowed pursuant to subsection (b) of this section for the corporation's last taxable period as an S Corporation shall be treated as incurred by the shareholder on the last day of any post-termination transition period.

(2) The aggregate amount of losses and deductions taken into account by a shareholder pursuant to subdivision (1) of this subsection may not exceed the adjusted basis of the shareholder in the stock of the corporation (determined in accordance with G.S. 105-131.3 at the close of the last day of any post-termination transition period and without regard to this subsection).

(e) Expired. (1987 (Reg. Sess., 1988), c. 1089, s. 1; 1989, c. 728, ss. 1.33, 1.35; 1989 (Reg. Sess., 1990), c. 984, s. 1; 1991, c. 752, s. 1.)

§ 105-131.5. Part-year resident shareholder.

If a shareholder of an S Corporation is both a resident and nonresident of this State during any taxable period, the shareholder's pro rata share of the S Corporation's income attributable to the State and income not attributable to the State for the taxable period shall be further prorated between the shareholder's periods of residence and nonresidence, in accordance with the number of days in each period, as provided in G.S. 105-134.5. (1987 (Reg. Sess., 1988), c. 1089, s. 1; 1989, c. 728, ss. 1.33, 1.35.)

§ 105-131.6. Distributions.

(a) Subject to the provisions of subsection (c) of this section, a distribution made by an S Corporation with respect to its stock to a resident shareholder is taxable to the shareholder as provided in Parts 2 and 3 of this Article to the extent that the distribution is characterized as a dividend or as gain from the sale or exchange of property pursuant to section 1368 of the Code.

(b) Subject to the provisions of subsection (c) of this section, any distribution of money made by a corporation with respect to its stock to a resident shareholder during a post-termination transition period is not taxable to the shareholder as provided in Parts 2 and 3 of this Article to the extent the distribution is applied against and reduces the adjusted basis of the stock of the shareholder in accordance with section 1371(e) of the Code.

(c) In applying sections 1368 and 1371(e) of the Code to any distribution referred to in this section:

- (1) The term "adjusted basis of the stock" means the adjusted basis of the shareholder's stock as determined under G.S. 105-131.3.
- (2) The accumulated adjustments account maintained for each resident shareholder must be equal to, and adjusted in the same manner as, the corporation's accumulated adjustments account defined in section 1368(e)(1)(A) of the Code, except that:
  - a. The accumulated adjustments account shall be modified in the manner provided in G.S. 105-131.3(b)(1).
  - b. The amount of the corporation's federal accumulated adjustments account that existed on the day this State began to measure the S Corporation shareholders' income by reference to the income of the S Corporation is ignored and is treated for purposes of this Article as additional accumulated earnings and profits of the corporation. (1987 (Reg. Sess., 1988), c. 1089, s. 1; 1989, c. 728, ss. 1.33, 1.35; 1998-98, s. 6.)

§ 105-131.7. Returns; shareholder agreements; mandatory withholding.

(a) An S Corporation incorporated or doing business in the State shall file with the Department an annual return, on a form prescribed by the Secretary, on or before the due date prescribed for the filing of C Corporation returns in G.S. 105-130.17. The return shall show the name, address, and social security or federal identification number of each shareholder, income attributable to the State and the income not attributable to the State with respect to each shareholder as defined in G.S. 105-131(4) and (5), and such other information as the Secretary may require.

(b) The Department shall permit S Corporations to file composite returns and to make composite payments of tax on behalf of some or all nonresident shareholders. The Department may permit S Corporations to file composite returns and make composite payments of tax on behalf of some or all resident shareholders.

(c) An S Corporation shall file with the Department, on a form prescribed by the Secretary, the agreement of each nonresident shareholder of the corporation (i) to file a return and make timely payment of all taxes imposed by this State on the shareholder with respect to the income of the S Corporation, and (ii) to be subject to personal jurisdiction in this State for purposes of the collection of any unpaid income tax, together with related interest and penalties, owed by the nonresident shareholder. If the corporation fails to timely file an agreement required by this subsection on behalf of any of its nonresident shareholders, then the corporation shall at the time specified in subsection (d) of this section pay to the Department on behalf of each nonresident shareholder with respect to whom an agreement has not been timely filed an estimated amount of the tax due the State. The estimated amount of tax due the State shall be computed at the rates levied in G.S. 105-134.2(a)(3) on the shareholder's pro rata share of the S Corporation's income attributable to the State reflected on the corporation's return for the taxable period. An S Corporation may recover a payment made pursuant to the preceding sentence from the shareholder on whose behalf the payment was made.

(d) The agreements required to be filed pursuant to subsection (c) of this section shall be filed at the following times:

(1) At the time the annual return is required to be filed for the first taxable period for which the S Corporation becomes subject to the provisions of this Part.

(2) At the time the annual return is required to be filed for any taxable period in which the corporation has a nonresident shareholder on whose behalf such an agreement has not been previously filed.

(e) Amounts paid to the Department on account of the corporation's shareholders under subsections (b) and (c) constitute payments on their behalf of the income tax imposed on them under Parts 2 and 3 of this Article for the taxable period. (1987 (Reg. Sess., 1988), c. 1089, s. 1; 1989, c. 728, ss. 1.33, 1.35; 1991, c. 689, s. 301; 1998-98, s. 7; 1999-337, s. 24.)

Editor's Note. — The reference in subsection (a) to "G.S. 105-131(4) and (5)" should probably be to "G.S. 105-131(b)(4) and (5)."

§ 105-131.8. Tax credits.

(a) For purposes of G.S. 105-151 and G.S. 105-160.4, each resident shareholder is considered to have paid a tax imposed on the shareholder in an amount equal to the shareholder's pro rata share of any net income tax paid by the S Corporation to a state that does not measure the income of S Corporation shareholders by the income of the S Corporation. For purposes of the preceding sentence, the term "net income tax" means any tax imposed on or measured by a corporation's net income.

(b) Except as otherwise provided in G.S. 105-160.3, each shareholder of an S Corporation is allowed as a credit against the tax imposed by Parts 2 and 3 of this Article an amount equal to the shareholder's pro rata share of the tax credits for which the S Corporation is eligible. (1987 (Reg. Sess., 1988), c. 1089, s. 1; 1989, c. 728, ss. 1.33, 1.35; 1991, c. 45, s. 7; 1998-98, s. 8.)

Cross References. — As to credits for rehabilitated mill property, see G.S. 105-129.71 and 105-129.72.

§ 105-132: Recodified as G.S. 105-135 by Session Laws 1967, c. 1110, s. 3.

Editor's Note. — Section 105-132, at the end of this Part, is reserved for future codification purposes. Another section, also numbered G.S. 105-132, was transferred to G.S. 105-135 by Session Laws 1967, c. 1110, s. 3, but was repealed by Session Laws 1989, c. 728, s. 1.3.

Part 2. Individual Income Tax.

§ 105-133. Short title.

This Part of the income tax Article shall be known as the Individual Income Tax Act. (1967, c. 1110, s. 3; 1989, c. 728, s. 1.1; 1998-98, ss. 44, 68.)

Legal Periodicals. — For comment on definition of rents from foreign real estate, see 17 N.C.L. Rev. 382 (1939).

For discussion of the provisions of this and other sections of the North Carolina income tax law designed to guard against excessive duplicate taxation, see 27 N.C.L. Rev. 582 (1949).

For note on income tax consequences of alimony payments, see 29 N.C.L. Rev. 319 (1951).

For notes as to employees' death benefits and the relation between trust income and beneficiary income under the 1957 amendments, see 36 N.C.L. Rev. 163, 166 (1958).

For comment discussing state adoption of federal taxing concepts, see 51 N.C.L. Rev. 834 (1973).

For survey of 1977 tax law, see 56 N.C.L. Rev. 1128 (1978).

For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

For comment on the tax effects of equitable distribution upon divorce, see 18 Wake Forest L. Rev. 555 (1982).

For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

For note, "Stone v. Lynch: North Carolina Takes a Different Approach to Defining Gift," see 64 N.C.L. Rev. 677 (1986).

CASE NOTES

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I. GENERAL CONSIDERATION.

Cited in In re Dickinson, 281 N.C. 552, 189 S.E.2d 141 (1972); State v. Sinnott, 163 N.C. App. 268, 593 S.E.2d 439, 2004 N.C. App. LEXIS 370 (2004); Coley v. State, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

II. DECISIONS UNDER PRIOR LAW.

***Editor's Note.** — Session Laws 1989, c. 728, effective for taxable years beginning on or after January 1, 1989, repealed former sections 105-135 to 105-149, relating to individual income tax, and enacted new sections 105-134.1 to 105-134.8. The following annotations were taken from the repealed sections and arranged under this analysis for convenience.*

A. Individuals.

***Editor's Note.** — The cases cited below were decided under former G.S. 105-136.*

Former § 105-136 imposed a tax on all of a resident's net income. In re Dickinson, 281 N.C. 552, 189 S.E.2d 141 (1972).

Only Portion of Income Derived from This State Taxed. — Former G.S. 105-136 imposed a tax only on that portion of the net income of a nonresident which is derived from North Carolina sources. In re Dickinson, 281 N.C. 552, 189 S.E.2d 141 (1972).

Basis for Taxation of Nonresident Partner. — Former G.S. 105-142(c) determined the basis on which this section levied an income tax on a nonresident partner. In re Dickinson, 281 N.C. 552, 189 S.E.2d 141 (1972).

B. Gross Income Defined.

Editor's Note. *— The cases cited below were decided under former G.S. 105-141.*

This Division taxes income derived from any source whatever and in whatever form paid. Foreman Mfg. Co. v. Johnson, 261 N.C. 504, 135 S.E.2d 205 (1964).

Section Does Not Include Loans. — Neither former G.S. 105-141, which defined income, nor former G.S. 105-147, which specified deductions, included loans. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

Loans to a taxpayer do not constitute taxable income and should not, therefore, be included as gross income on his income tax return. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

Nor Value of Property Acquired by Gift. — The value of property acquired by gift is excluded from both State and federal income tax. Foreman Mfg. Co. v. Johnson, 261 N.C. 504, 135 S.E.2d 205 (1964).

Meaning of "Gift." — For North Carolina income tax purposes the definition of gift remains what it was at common law: "A voluntary transfer of property by one to another without any consideration therefor." Stone v. Lynch, 68 N.C. App. 441, 315 S.E.2d 350 (1984), aff'd, 312 N.C. 739, 325 S.E.2d 230 (1985).

Federal Practice Not Controlling. — Whereas the General Assembly has specifically provided at numerous places in the income tax statutes that the state shall follow federal practice, the absence of such language in former G.S. 105-141(b)(3) leads to the inference that, by exclusion, the legislature intended federal practice not to control it. Stone v. Lynch, 68 N.C. App. 441, 315 S.E.2d 350 (1984), aff'd, 312 N.C. 739, 325 S.E.2d 230 (1985).

Union strike benefits are not taxable as income to the recipient under North Carolina law; such strike benefits qualify as a gift, thereby allowing the taxpayer to exclude them from taxable income. Stone v. Lynch, 68 N.C. App. 441, 315 S.E.2d 350 (1984), aff'd, 312 N.C. 739, 325 S.E.2d 230 (1985).

Damages for Wrongful Death Not Exempt. — It is reversible error for the trial court to instruct the jury that damages awarded in a wrongful death action are exempt from federal and State income taxes. Scallon v. Hooper, 58 N.C. App. 551, 293 S.E.2d 843, cert. denied, 306 N.C. 744, 295 S.E.2d 480 (1982).

C. Basis of Return of Net Income.

Editor's Note. *— The cases cited below were decided under former G.S. 105-142.*

Statutes providing exemption from taxation are strictly construed. In re Dickinson, 281 N.C. 552, 189 S.E.2d 141 (1972).

Taxation is the rule; exemption the exception. In re Dickinson, 281 N.C. 552, 189 S.E.2d 141 (1972).

Former § 105-142(a) does not authorize any deductions not specifically authorized by North Carolina statute, nor does it require use of federal tax treatments. Stone v. Lynch, 68 N.C. App. 441, 315 S.E.2d 350 (1984), aff'd, 312 N.C. 739, 325 S.E.2d 230 (1985).

Former § 105-142(a) authorizes no deductions not included in former § 105-147. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

Accounting Practices. — While it is true that former G.S. 105-142(a) provided that accounting methods selected by the state shall follow as nearly as practicable the federal practice, this provision, however, does not mandate use of federal accounting practices. Stone v. Lynch, 68 N.C. App. 441, 315 S.E.2d 350 (1984), aff'd, 312 N.C. 739, 325 S.E.2d 230 (1985).

Determining Basis of Income Tax on Nonresident Partner. — Former G.S. 105-142(c) determined the basis on which former G.S. 105-136 levied an income tax on a nonresident partner. In re Dickinson, 281 N.C. 552, 189 S.E.2d 141 (1972).

Determination of Net Income of Multistate Partnerships Attributable to This State. — The proviso following the third sentence of former G.S. 105-142(c) relates solely to the second and third sentences of that subsection and its sole purpose was to provide how the net income of a multistate partnership attributable to North Carolina was to be determined. In re Dickinson, 281 N.C. 552, 189 S.E.2d 141 (1972).

The proviso of former G.S. 105-142(c) relates solely to the method for determining the portion of the net income attributable to North Carolina of a multistate partnership with nonresident members. In re Dickinson, 281 N.C. 552, 189 S.E.2d 141 (1972).

Proviso Not Enacted in Substitution for Former § 105-147(10)(b). — The contention that the proviso of former G.S. 105-142(c) was enacted in substitution for former G.S. 105-147(10)(b) is without substance. In re Dickinson, 281 N.C. 552, 189 S.E.2d 141 (1972).

Loan Not Income and Repayment Not Deductible. — The classification of a loan as income for the year in which the money was borrowed and as a deduction for the year in which the money was repaid, not only is not an approved and generally accepted method of accounting but also is a procedure directly contrary to "the context and intent" of this Article. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

A gain resulting from the involuntary conversion of a capital asset by fire was taxable under the State law as income, notwithstanding that the proceeds of the fire insurance plus additional cash were necessary for and used in the restoration of the building, under former G.S. 105-142 and 105-141, prior to the passage of former G.S. 105-144.1. State v. Speizman, 230 N.C. 459, 53 S.E.2d 533 (1949).

Requirement That Secretary of Revenue Follow Federal Practice. — Subsection (a) of former G.S. 105-142, stipulating that the Secretary of Revenue shall follow the federal practice as nearly as practicable in instances where the method of accounting of the taxpayer does not clearly reflect the income of the taxpayer, does not require the Secretary to apply the provisions of G.S. 112(f), 26 U.S.C.A. 95, in computing the income of a taxpayer from involuntary conversion of a capital asset. State v. Speizman, 230 N.C. 459, 53 S.E.2d 533 (1949).

Necessity of Reliance on Federal Tax Returns. — Recognizing the practical necessity for the North Carolina Department of Revenue to rely upon tax returns accepted by the Federal Internal Revenue Service for a proper reflection of taxable income upon foreign corporations, the General Assembly enacted this section. In re Virginia-Carolina Chem. Corp., 248 N.C. 531, 103 S.E.2d 823 (1958).

D. Determination of Gain or Loss.

Editor's Note. *— The cases cited below were decided under former G.S. 105-144.*

Former § 105-144 had to do only with fixing for tax purposes the mode of ascertaining realized gains or losses sustained in respect to the disposal of property. Hence the statute was not applicable to a gift of property to a charitable institution. Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 816 (1952).

Former G.S. 105-144 prescribed the method for ascertaining the amount of a loss resulting "from the sale or other disposition of property." Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

When Method for Ascertaining Loss Is Applicable. — The method for ascertaining the amount of a loss prescribed is applicable whenever property is disposed of by sale, casualty or otherwise, in such manner as to result in a taxable gain or a deductible loss. Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

Income tax law is concerned only with realized losses, as with realized gains. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969), aff'd, 276 N.C. 411, 172 S.E.2d 531 (1970).

Basis Where Loss Is from Sale or Other Disposition of Property. — Former G.S. 105-144 clearly provided that in ascertaining a loss from the sale or other disposition of property, the basis shall be the adjusted cost of the property. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969), aff'd, 276 N.C. 411, 172 S.E.2d 531 (1970).

Casualty loss is an "other disposition of property." Ward v. Clayton, 5 N.C. App. 53 167 S.E.2d 808 (1969), aff'd, 276 N.C. 411, 172 S.E.2d 531 (1970).

A taxpayer's loss of timber by fire is an "other disposition of property", and therefore the income tax deduction allowable under former G.S. 105-147 for such casualty loss may not exceed the taxpayer's cost basis of the property so destroyed. Ward v. Clayton, 276 N.C. 411 172 S.E.2d 531 (1970).

And Is Not Treated Differently Than a Loss from a Sale. — Nothing indicates the General Assembly intended a taxpayer's deductible loss by fire or other casualty to be treated differently from a loss resulting from a sale. Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

Taxpayer showed no cost basis whereby a realized loss could be measured. See Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969), aff'd, 276 N.C. 411, 172 S.E.2d 531 (1970).

E. Deductions.

1. In General.

Editor's Note. *— The cases cited below were decided under former G.S. 105-147.*

Deduction Defined. — A deduction is defined as "something that is or may be subtracted." Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969), aff'd, 276 N.C. 411, 172 S.E.2d 531 (1970).

Nature of Deductions. — Deductions are in the nature of exemptions; they are privileges, not matters of right, and are allowed as a matter of legislative grace. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969), aff'd, 276 N.C. 411, 172 S.E.2d 531 (1970).

Taxpayer claiming deduction must bring himself within the statutory provisions authorizing the deduction. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969), aff'd, 276 N.C. 411, 172 S.E.2d 531 (1970).

The allowance of a deduction in the computation of taxable income is a privilege granted as a matter of legislative grace. One claiming the deduction must bring himself within the statutory provisions authorizing it, and in general the deduction may be taken only by the taxpayer to whom it accrues. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367, cert. denied, 277 N.C. 351, 177 S.E.2d 900 (1970).

Deduction of Particular Charges, Expenses, or Disbursements. — The states may allow deductions in the computation of income for income tax purposes as they choose, and statutes imposing a tax on incomes ordinarily authorize the deduction from gross income of particular charges, expenses, or disbursements, in arriving at the income on which the tax is to be imposed. Ward v. Clayton, 5 N.C.

App. 53, 167 S.E.2d 808 (1969), aff'd, 276 N.C. 411, 172 S.E.2d 531 (1970).

Strict Accounting on Annual Basis Formerly Required. — The North Carolina income tax statutes formerly required all taxpayers to account strictly on an annual basis, reporting for each taxable year all items of gross income and claiming as deductions for that year only items properly pertaining to that accounting period. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367, cert. denied, 277 N.C. 351, 177 S.E.2d 900 (1970).

Burden of proof to establish a deductible loss and the amount of it is on the plaintiff. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969), aff'd, 276 N.C. 411, 172 S.E.2d 531 (1970).

Section Does Not Include Loans. — Neither former G.S. 105-141, which defined income, nor former G.S. 105-147, which specified deductions, included loans. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

Amounts expended to repay the principal of a loan are not allowed as deductions from taxable income. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

Income from Business Situated in Another State. — In order for a resident taxpayer to be entitled to deduct income derived from a business situated in another state from his income taxable by this State, the taxpayer must show that he has a business or investment in such other state, that the income therefrom is taxable in that state, and that the questioned income is derived from such business or investment. Sabine v. Gill, 229 N.C. 599, 51 S.E.2d 1 (1948).

2. Ordinary and Necessary Expenses.

What are "ordinary and necessary" expenses necessarily vary in individual cases, and depend upon the nature of a particular business, its size, its location, its mode of operations, and to some extent the business customs and practices prevailing at the time and in the locality or area where the taxpayer operates. Therefore, in order to take care of the varying situations as they arise, former G.S. 105-147 should be left flexible in form for application in individual cases according to the practical meaning of the statutory language. Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 816 (1952).

In order for an item of expense to be deductible it must be both an "ordinary" expense and a "necessary" expense, since these words are used conjunctively. Also of controlling significance is this phrase appearing in the section: "in carrying on any trade or business." Here, the connotation is that the expense in order to be deductible must relate to the cost of "carrying on" the business, and carrying on a business in plain language means operating the business. Therefore, it would seem that an expense in order to be deductible not only must be an "ordinary and necessary" business expense, but as a general rule it must relate in a substantial way to the costs of current operations, — to the cost of producing the gross income from which the deduction is sought. Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 816 (1952).

Business expenses are proper deductions from one's taxable income. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969), aff'd, 276 N.C. 411, 172 S.E.2d 531 (1970).

3. Capital Expenditures.

Capital Expenditures Not Deductible. — Former G.S. 105-147 did not sanction the deduction of an expenditure the underlying purpose and predominant effect of which are to provide permanent improvements or betterments reasonably calculated to enhance the value of the taxpayer's business or property for a period substantially beyond the year in which the outlay is made. Such an outlay is a capital expenditure, as distinguished from an item of normal operating business expense, and it is not deductible for income tax purposes. Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 816 (1952).

Ordinarily, the expense of installing sewers is treated as a capital expenditure and is not deductible. And the fact that the taxpayer does not own the property on which the mains were laid and did not by contractual arrangement with the city acquire some vested property rights therein in return for the sums paid to the city does not have the effect of transforming these capital expenditures into ordinary and necessary business expenses to be written off entirely within the year. Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 816 (1952).

4. Rentals or Other Payments.

Former § 105-147(4) was intended to provide for the deduction only of "rentals or other payments" as and when the items accrue from year to year, and in no event may it be interpreted as authorizing the deduction in one year of a prepayment of rentals or other like charges for a period of years in advance. Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 816 (1952).

Advance Rentals, Bonuses, etc., to Be Spread over Life of Lease. — Rentals required to be paid for the use or possession of business property, not owned by the taxpayer and in which he has no equity, may usually be deducted in computing income tax. However, where an expenditure made by a lessee is in the nature of an investment in property used in his trade or business, or is the cost, or part of the cost, of the lease itself, it cannot be deducted in toto from the lessee's taxable income as an expense for the year in which it occurred, but must be recovered in annual allowances. Thus, advances, rentals and bonuses, the price paid for an assignment of a lease, and other similar expenditures by a lessee are not deductible as ordinary and necessary business expenses in the year of payment but are required to be spread over the entire life of the lease. Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 816 (1952).

5. Interest.

Interest on Estate Tax Deficiency Not Part of Tax. — Although collected as part of the tax, interest paid on an estate or inheritance tax deficiency is not part of the tax, but something in addition to the tax. Holt v. Lynch, 307 N.C. 234, 297 S.E.2d 594 (1982).

No distinction between interest paid on debt created to pay taxes and interest paid on tax itself. To deny a deduction merely because the government is the lending party has the practical effect of treating such interest in the same manner as a penalty if the estate does not have sufficient taxable income to benefit from deducting the interest paid on its income tax returns. Interest in the tax law, as elsewhere, is merely the cost of the use of money and is not a penalty. Holt v. Lynch, 307 N.C. 234, 297 S.E.2d 594 (1982).

Interest on Tax Is Deductible. — Inasmuch as the definition of "tax" in former G.S. 105-241.1(i1) [repealed] specifically applied to the subchapter dealing with state inheritance taxes, interest on tax, although administratively treated as tax for assessment, collection and payment purposes, remains substantively interest paid for the use of money and was deductible. Holt v. Lynch, 307 N.C. 234, 297 S.E.2d 594 (1982).

6. Casualty Losses.

Former § 105-147 authorized a deduction for certain casualty losses, including fire, to property not connected with a trade or business. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969), aff'd, 276 N.C. 411, 172 S.E.2d 531 (1970).

Section Prescribed No Method for Ascertaining Amount of Casualty Loss. — Former G.S. 105-147 enumerated the items, including casualty losses, which were deductible, but prescribed no method for ascertaining the amount of such casualty loss. Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

Determining Deduction for Loss of Timber by Fire. — A taxpayer's loss of timber by fire was an "other disposition of property" within the meaning of former G.S. 105-144, and therefore the income tax deduction allowable for such casualty loss may not exceed the taxpayer's cost basis of the property so destroyed. Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

7. Carry-Over Losses.

Constitutionality of Carryover Losses Requirement. — The requirement that the taxpayer reduce his North Carolina carryover losses by his non-North Carolina income did not result in a sophisticated scheme which belatedly taxed the non-North Carolina income and did not violate either the due process clause of the United States Constitution or the law of the land clause of N.C. Const., Art. I, § 20. Aronov v. Secretary of Revenue, 323 N.C. 132, 371 S.E.2d 468, cert. denied, 323 N.C. 480, 373 S.E.2d 860 (1988), 489 U.S. 1096, 109 S. Ct. 1568, 103 L. Ed. 2d 935 (1989).

Requirement of Taxpayer to Reduce Carryover Losses Does Not Exceed Legislative Authority. — The Secretary's interpretation of former G.S. 105-147(9)(d)(2) to require a taxpayer to reduce his North Carolina carryover losses by his non-North Carolina income does not exceed legislative authority. Aronov v. Secretary of Revenue, 323 N.C. 132, 371 S.E.2d 468, cert. denied, 323 N.C. 480, 373 S.E.2d 860 (1988), 489 U.S. 1096, 109 S. Ct. 1568, 103 L. Ed. 2d 935 (1989).

Deductions, such as that authorized in former § 105-147(9)(d)(2), were in the nature of exemptions: they were privileges, not rights, and were allowed as a matter of legislative grace. Aronov v. Secretary of Revenue, 323 N.C. 132, 371 S.E.2d 468, cert. denied, 323 N.C. 480, 373 S.E.2d 860 (1988), 489 U.S. 1096, 109 S. Ct. 1568, 103 L. Ed. 2d 935 (1989).

Deduction of Prior Year's Net Economic Loss from Current Gross Income. — Subdivision (9)d of former G.S. 105-147 permits, under certain conditions, a deduction of a prior year's net economic loss from current gross income in order to determine taxable income. The legislature was under no constitutional or other legal compulsion to allow any carry-over to be deducted from taxable income in a future year. It enacted the carry-over provisions purely as a matter of grace, gratuitously conferring a benefit but limiting such benefit to the net economic loss of the taxpayer after deducting therefrom the allocable portion of such taxpayer's nontaxable income. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367, cert. denied, 277 N.C. 351, 177 S.E.2d 900 (1970).

Loss Carry-Over Provision Was Added for Purpose of Tax Relief. — For the purpose of granting some measure of relief to taxpayers who have incurred economic misfortune of who are otherwise materially affected by strict adherence to the annual accounting rule in the determination of taxable income, the legislature added a loss carry-over provision to the State income tax statute which was subdivision (9)d of former G.S. 105-147. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367, cert. denied, 277 N.C. 351, 177 S.E.2d 900 (1970).

Former § 105-147(9)d required the inclusion of nontaxable income in arriving at an allowable deduction for carry-over purposes to be deducted from taxable income in a succeeding year. Dayton Rubber Co. v. Shaw, 244 N.C. 170, 92 S.E.2d 799 (1956), decided prior to the 1963 amendment.

Deduction of Loss Carry-Over from Post-Merger Income Depends on Continuity of Business. — A corporation resulting from a merger may not deduct from its post-merger income the loss carry-over of one or more of its constituent corporations unless there is a continuity of business enterprise — that is, unless the income-producing business has not been altered, enlarged, or materially affected by the merger. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367, cert. denied, 277 N.C. 351, 177 S.E.2d 900 (1970).

Type of Merger Makes No Difference. — In determining whether there is a "continuity of business enterprise" after a merger, for purposes of determining the loss carry-over of the surviving corporation it makes no difference that there was a "vertical type" merger in which the several merged corporations were doing jobs in one continuous chain of processing, rather than a "horizontal type" in which each of the corporations was doing basically the same job. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367, cert. denied, 277 N.C. 351, 177 S.E.2d 900 (1970).

Nor Does Purpose of Merger. — The fact that mergers were made in pursuance of an overall plan to bring into being an "integrated" operation and were not for tax avoidance purposes is not determinative of the question of whether the surviving corporation can carry forward and deduct from its own gross income pre-merger losses incurred by corporations with which it merged. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367, cert. denied, 277 N.C. 351, 177 S.E.2d 900 (1970).

No Continuity of Business in Surviving Corporation after Merger. — There was no "continuity of business enterprise" where the net worth of the surviving corporation into which two other corporations were merged was increased substantially by each merger, and the surviving corporation was transformed from a manufacturer of poultry feeds into a combined manufacturing and feeding operation; consequently, the surviving corporation was not entitled to carry over and deduct for North Carolina income tax purposes the pre-merger net economic losses of the two submerged corporations from the post-merger income earned by the combined corporate businesses. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367, cert. denied, 277 N.C. 351, 177 S.E.2d 900 (1970).

A corporation resulting from the merger of several separate incorporated businesses was not entitled to carry over and deduct the pre-merger net operating losses of some of its constituent corporations from the post-merger income attributable to the other businesses, since the income against which the offset was claimed was not produced by substantially the same businesses which incurred the losses. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367, cert. denied, 277 N.C. 351, 177 S.E.2d 900 (1970).

Deduction by Successor Corporation of Loss Sustained by Submerged Corporation. — See Good Will Distribs. (N.), Inc. v. Shaw, 247 N.C. 157, 100 S.E.2d 334 (1957); Good Will Distribs., Inc. v. Currie, 251 N.C. 120, 110 S.E.2d 880 (1959).

Regulation in Respect to Carry-Over Losses Held to Comply. — The Supreme Court found no conflict between the Income Tax Regulation No. 2, promulgated on 10 February, 1944, by the Secretary of Revenue and followed by the Department of Revenue in its administrative practice with respect to carry-over losses, and the statutory provisions with respect thereto. Dayton Rubber Co. v. Shaw, 244 N.C. 170, 92 S.E.2d 799 (1956).

8. Depletion.

Deduction for Depletion Not Required to Be on Basis of Cost. — Deduction on basis of percentage of cost is applicable to depreciation and not to depletion. A reasonable allowance is provided for depletion. There is no requirement that it should be on the basis of cost. In re Virginia-Carolina Chem. Corp., 248 N.C. 531, 103 S.E.2d 823 (1958).

Prior to the 1953 amendment to former G.S. 105-147, the section permitted a reasonable allowance for depletion without requiring that it should be calculated on percentage of cost; the 1953 amendment made mandatory that which was permissible before. In re Virginia-Carolina Chem. Corp., 248 N.C. 531, 103 S.E.2d 823 (1958).

9. Gifts.

"Amount" of Gift. — Former G.S. 105-147(15) contained no technical language. Thus, it must be interpreted in accordance with the ordinary use and common understanding of the words used. According to ordinary use, the "amount" of a gift and the value of a gift have the same meaning and effect. It follows, then, that when a contribution was made in property rather than in cash, the amount of the gift, and the amount of the deduction, was the fair market value of the property at the time of the gift. Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 816 (1952).

10. Nonresident Individuals and Partnerships.

Constitutionality. — Subdivision (18) of former G.S. 105-147 limiting the right of a nonresident taxpayer, in computing his net income taxable by this State, to claim only those deductions which are related to his business in this State, was valid and did not constitute an unlawful discrimination in that residents of this State were permitted personal deductions not allowed to the nonresident, since only the income of the nonresident earned within this State was subject to income taxes here. Stiles v. Currie, 254 N.C. 197, 118 S.E.2d 428 (1961).

11. Payments to Estate or Heirs of Deceased Employee.

Legal Obligation Need Not Exist. — The contention that payments by an employer to the widow of an employee are allowable as deductions only when a legal obligation to make such payments exists would seem to render meaningless the 1957 amendment of subsection (23) of former G.S. 105-147. Boylan-Pearce, Inc. v. Johnson, 257 N.C. 582, 126 S.E.2d 492 (1962).

Preexisting Contract or Resolution Not Required. — The 1957 amendment of subsection (23) of former G.S. 105-147 made no reference to a previous or preexisting "contract, resolution of the board of directors, or custom," of the corporation with respect to payments by an employer to a deceased employee's estate, widow or heirs. Boylan-Pearce, Inc. v. Johnson, 257 N.C. 582, 126 S.E.2d 492 (1962).

Payments by an employer to the widow of a deceased executive were authorized and allowable as deductions in computing employer's net income, and were not taxable as gifts under G.S. 105-188, and no legal significance was attached to the fact that there was no preexisting plan or policy, or to the fact that the resolution authorizing the payments was not adopted until some 13 months after the death of the executive, or to the fact that the employer was a so-called family corporation. Boylan-Pearce, Inc. v. Johnson, 257 N.C. 582, 126 S.E.2d 492 (1962).

OPINIONS OF ATTORNEY GENERAL

Member of Religious Order Not Exempt from Tax. — See opinion of Attorney General to Mr. J.A. Porter, Jr., Director, Division of Auditing and Accounting, State Board of Education, 40 N.C.A.G. 841 (1970), decided under former G.S. 105-136.

Court May Not Assign Dependency Exemption to One Spouse Without Regard to Which Furnished More Than One Half the Support. — See opinion of Attorney General to Representative Marcus Short, 41 N.C.A.G. 866 (1972), decided under former G.S. 105-149.

§ 105-134. Purpose.

The general purpose of this Part is to impose a tax for the use of the State government upon the taxable income collectible annually:

(1) Of every resident of this State.

(2) Of every nonresident individual deriving income from North Carolina sources attributable to the ownership of any interest in real or tangible personal property in this State, deriving income from a business, trade, profession, or occupation carried on in this State, or deriving income from gambling activities in this State. (1939, c. 158, s. 301; 1967, c. 1110, s. 3; 1989, c. 728, s. 1.2; 1998-98, s. 69; 2005-276, s. 31.1(dd), (jj); 2005-344, s. 10.3; 2006-259, s. 8(j); 2006-264, s. 91(a).)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-344, s. 10.3, as added by Session Laws 2005-276, s. 31.1(dd), and as amended by Session Laws 2005-276, s. 31.1(jj), as added by Session Laws 2006-259, s. 8(j), and 2006-264, s. 91(a), effective for taxable years beginning on or after January 1, 2005, inserted "or deriving income from gambling activities in this state" at the end of subdivision (2), and made related, stylistic changes.

CASE NOTES

Cited in Aronov v. Secretary of Revenue, 323 N.C. 132, 371 S.E.2d 468 (1988).

§ 105-134.1. Definitions.

The following definitions apply in this Part:

(1) Code. — Defined in G.S. 105-228.90.

(2) Department. — The Department of Revenue.

(3) Educational institution. — An educational institution that normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on.

(4) Fiscal year. — Defined in section 441(e) of the Code.

(5) Gross income. — Defined in section 61 of the Code.

(6) Head of household. — Defined in section 2(b) of the Code.

(7) Individual. — A human being.

(7a) Limited liability company. — Either a domestic limited liability company organized under Chapter 57C of the General Statutes or a foreign limited liability company authorized by that Chapter to transact business in this State that is classified for federal income tax purposes as a partnership. As applied to a limited liability company that is a partnership under this Part, the term “partner” means a member of the limited liability company.

(7b) Repealed by Session Laws 1998-98, s. 9, effective August 14, 1998.

(8) Married individual. — An individual who is married and is considered married as provided in section 7703 of the Code.

(9) Nonresident individual. — An individual who is not a resident of this State.

(10) North Carolina taxable income. — Defined in G.S. 105-134.5.

(10a) Partnership. — A domestic partnership, a foreign partnership, or a limited liability company.

(11) Person. — Defined in G.S. 105-228.90.

(12) Resident. — An individual who is domiciled in this State at any time during the taxable year or who resides in this State during the taxable year for other than a temporary or transitory purpose. In the absence of convincing proof to the contrary, an individual who is present within the State for more than 183 days during the taxable year is presumed to be a resident, but the absence of an individual from the state for more than 183 days raises no presumption that the individual is not a resident. A resident who removes from the State during a taxable year is considered a resident until he has both established a definite domicile elsewhere and abandoned any domicile in this State. The fact of marriage does not raise any presumption as to domicile or residence.

(13) Retirement benefits. — Amounts paid to a former employee or the beneficiary of a former employee under a written retirement plan established by the employer to provide payments to an employee or the beneficiary of an employee after the end of the employee’s employment with the employer where the right to receive the payments is based upon the employment relationship. With respect to a self-employed individual or the beneficiary of a self-employed individual, the term means amounts paid to the individual or beneficiary of the individual under a written retirement plan established by the individual to provide payments to the individual or the beneficiary of

the individual after the end of the self-employment. In addition, the term includes amounts received from an individual retirement account described in section 408 of the Code or from an individual retirement annuity described in section 408 of the Code. For the purpose of this subdivision, the term "employee" includes a volunteer worker.

(14) S Corporation. — Defined in G.S. 105-131(b).
(15) Secretary. — The Secretary of Revenue.
(16) Taxable income. — Defined in section 63 of the Code.
(17) Taxable year. — Defined in section 441(b) of the Code.
(18) Taxpayer. — An individual subject to the tax imposed by this Part.
(19) This State. — The State of North Carolina. (1989, c. 728, s. 1.4; c. 792, s. 1.2; 1989 (Reg. Sess., 1990), c. 814, s. 15; c. 981, s. 5; 1991, c. 689, s. 252; 1991 (Reg. Sess., 1992), c. 922, s. 6; 1993, c. 12, s. 7; c. 354, s. 13; 1996, 2nd Ex. Sess., c. 13, s. 8.2; 1998-98, ss. 9, 69.)

CASE NOTES

Applied in Coley v. State, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

§ 105-134.2. Individual income tax imposed.

(a) **(Effective for taxable years beginning before January 1, 2007)** A tax is imposed upon the North Carolina taxable income of every individual. The tax shall be levied, collected, and paid annually and shall be computed at the following percentages of the taxpayer's North Carolina taxable income.

(1) For married individuals who file a joint return under G.S. 105-152 and for surviving spouses, as defined in section 2(a) of the Code:

Over	**Up To**	**Rate**
-0-	$21,250	6%
$21,250	$100,000	7%
$100,000	$200,000	7.75%
$200,000	NA	8.25%

(2) For heads of households, as defined in section 2(b) of the Code:

Over	**Up To**	**Rate**
-0-	$17,000	6%
$17,000	$80,000	7%
$80,000	$160,000	7.75%
$160,000	NA	8.25%

(3) For unmarried individuals other than surviving spouses and heads of households:

Over	**Up To**	**Rate**
-0-	$12,750	6%
$12,750	$60,000	7%
$60,000	$120,000	7.75%
$120,000	NA	8.25%

(4) For married individuals who do not file a joint return under G.S. 105-152:

G.S. 105-134.2(a) is set out three times. See note.

Over	Up To	Rate
-0-	$10,625	6%
$10,625	$50,000	7%
$50,000	$100,000	7.75%
$100,000	NA	8.25%

(a) **(Effective for taxable years beginning on or after January 1, 2007)** A tax is imposed upon the North Carolina taxable income of every individual. The tax shall be levied, collected, and paid annually and shall be computed at the following percentages of the taxpayer's North Carolina taxable income.

(1) For married individuals who file a joint return under G.S. 105-152 and for surviving spouses, as defined in section 2(a) of the Code:

Over	Up To	Rate
-0-	$21,250	6%
$21,250	$100,000	7%
$100,000	$200,000	7.75%
$200,000	NA	8%

(2) For heads of households, as defined in section 2(b) of the Code:

Over	Up To	Rate
-0-	$17,000	6%
$17,000	$80,000	7%
$80,000	$160,000	7.75%
$160,000	NA	8%

(3) For unmarried individuals other than surviving spouses and heads of households:

Over	Up To	Rate
-0-	$12,750	6%
$12,750	$60,000	7%
$60,000	$120,000	7.75%
$120,000	NA	8%

(4) For married individuals who do not file a joint return under G.S. 105-152:

Over	Up To	Rate
-0-	$10,625	6%
$10,625	$50,000	7%
$50,000	$100,000	7.75%
$100,000	NA	8%

(a) **(Effective for taxable years beginning on or after January 1, 2008)** A tax is imposed upon the North Carolina taxable income of every individual. The tax shall be levied, collected, and paid annually and shall be computed at the following percentages of the taxpayer's North Carolina taxable income.

(1) For married individuals who file a joint return under G.S. 105-152 and for surviving spouses, as defined in section 2(a) of the Code:

G.S. 105-134.2(a) is set out three times. See note.

Over	Up To	Rate
-0-	$21,250	6%
$21,250	$100,000	7%
$100,000	NA	7.75%

(2) For heads of households, as defined in section 2(b) of the Code:

Over	Up To	Rate
-0-	$17,000	6%
$17,000	$80,000	7%
$80,000	NA	7.75%

(3) For unmarried individuals other than surviving spouses and heads of households:

Over	Up To	Rate
-0-	$12,750	6%
$12,750	$60,000	7%
$60,000	NA	7.75%

(4) For married individuals who do not file a joint return under G.S. 105-152:

Over	Up To	Rate
-0-	$10,625	6%
$10,625	$50,000	7%
$50,000	NA	7.75%

(b) In lieu of the tax imposed by subsection (a) of this section, there is imposed for each taxable year upon the North Carolina taxable income of every individual a tax determined under tables, applicable to the taxable year, which may be prescribed by the Secretary. The amounts of the tax determined under the tables shall be computed on the basis of the rates prescribed by subsection (a) of this section. This subsection does not apply to an individual making a return under section 443(a)(1) of the Code for a period of less than 12 months on account of a change in the individual's annual accounting period, or to an estate or trust. The tax imposed by this subsection shall be treated as the tax imposed by subsection (a) of this section. (1989, c. 728, s. 1.4; 1989 (Reg. Sess., 1990), c. 814, s. 16; 1991, c. 45, s. 8; c. 689, s. 300; 1991 (Reg. Sess., 1992), c. 930, s. 15; 2001-424, s. 34.18(a); 2003-284, s. 39.1(a); 2003-284, ss. 39.1, 39.2; 2005-276, s. 36.1(a); 2006-66, ss. 24.2(a)-(c).)

Subsection (a) Set Out Three Times. — The first version of subsection (a) set out above is effective for taxable years beginning before January 1, 2007. The second version of subsection (a) set out above is effective for taxable years beginning on or after January 1, 2007. The third version of subsection (a) set out above is effective for taxable years beginning on or after January 1, 2008.

Editor's Note. — Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 39.1, and Session Laws 2005-276, s. 36.1(a), effective for taxable years beginning on or after January 1, 2008, rewrote subsection (a). Session Laws 2006-66, s. 24.2(a) repealed Session Laws 2003-284, s. 39.1, as amended by Session Laws 2005-276, s. 36.1(a).

Session Laws 2003-284, s. 39.1, as amended by Session Laws 2005-276, s. 36.1(a), effective for taxable years beginning on or after January 1, 2008, rewrote subsection (a).

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 24.2(b), effective for taxable years beginning on or after January 1, 2007, substituted "8%" for "8.25%" in subdivisions (a)(1) through (a)(4). Session Laws 2006-66, s. 24.2(c), effective for taxable years beginning on or after January 1, 2008, deleted the last column in subdivisions (a)(1) through (a)(4) and made related changes.

CASE NOTES

Constitutionality. — Midyear tax rate increase implemented by 2001 N.C. Sess. Laws 424, as codified in G.S. 105-134.2(a), was not levied until the conclusion of the taxable year; thus, the tax operated prospectively from the date of enactment and did not violate N.C. Const. art. I, § 16. Coley v. State, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

Cited in Dunn v. State, — N.C. App. —, 635 S.E.2d 604, 2006 N.C. App. LEXIS 2163 (2006).

§ 105-134.3. Year of assessment.

The tax imposed by this Part shall be assessed, collected, and paid in the taxable year following the taxable year for which the assessment is made, except as provided to the contrary in Article 4A of this Chapter. (1989, c. 728, s. 1.4; 1998-98, s. 69.)

§ 105-134.4. Taxable year.

A taxpayer shall compute North Carolina taxable income on the basis of the taxable year used in computing the taxpayer's income tax liability under the Code. (1989, c. 728, s. 1.4.)

CASE NOTES

Operation of tax increase. — Midyear tax rate increase implemented by 2001 N.C. Sess. Laws 424, as codified in G.S. 105-134.2(a), was not levied until the conclusion of the taxable year under G.S. 105-134.4; thus, the tax operated prospectively from the date of enactment and did not violate N.C. Const. art. I, § 16. Coley v. State, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

Cited in Union Carbide Corp. v. Offerman, 132 N.C. App. 665, 513 S.E.2d 341 (1999), aff'd, 351 N.C. 310, 526 S.E.2d 167 (2000).

§ 105-134.5. North Carolina taxable income defined.

(a) Residents. — For residents of this State, the term "North Carolina taxable income" means the taxpayer's taxable income as determined under the Code, adjusted as provided in G.S. 105-134.6 and G.S. 105-134.7.

(b) Nonresidents. — For nonresident individuals, the term "North Carolina taxable income" means the taxpayer's taxable income as determined under the Code, adjusted as provided in G.S. 105-134.6 and G.S. 105-134.7, multiplied by a fraction the denominator of which is the taxpayer's gross income as determined under the Code, adjusted as provided in G.S. 105-134.6 and G.S. 105-134.7, and the numerator of which is the amount of that gross income, as adjusted, that is derived from North Carolina sources and is attributable to the ownership of any interest in real or tangible personal property in this State, is derived from a business, trade, profession, or occupation carried on in this State, or is derived from gambling activities in this State.

(c) Part-year Residents. — If an individual was a resident of this State for only part of the taxable year, having moved into or removed from the State during the year, the term "North Carolina taxable income" has the same meaning as in subsection (b) except that the numerator shall include gross income, adjusted as provided in G.S. 105-134.6 and G.S. 105-134.7, derived from all sources during the period the individual was a resident.

(d) S Corporations and Partnerships. — In order to calculate the numerator of the fraction provided in subsection (b), the amount of a shareholder's pro rata share of S Corporation income that is includable in the numerator shall be the shareholder's pro rata share of the S Corporation's income attributable to the State, as defined in G.S. 105-131(b)(4). In order to calculate the numerator of the fraction provided in subsection (b) for a member of a partnership or other unincorporated business with one or more nonresident members that operates in one or more other states, the amount of the member's distributive share of income of the business that is includable in the numerator shall be determined by multiplying the total net income of the business by the ratio ascertained under the provisions of G.S. 105-130.4. As used in this subsection, total net income means the entire gross income of the business less all expenses, taxes, interest, and other deductions allowable under the Code which were incurred in the operation of the business. (1989, c. 728, s. 1.4; 1995, c. 17, s. 4; 2005-276, s. 31.1(aa); 2005-344, s. 10.4.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-344, s. 10.4, as added by Session Laws 2005-276, s. 31.1(aa), effective for taxable years beginning on or after January 1, 2005, inserted "or is derived from gambling activities in this state" at the end of subsection (b), and made related, stylistic changes.

CASE NOTES

Taxable income. — Resident taxpayer's North Carolina taxable income is one's federal taxable income determined under the Internal Revenue Code as adjusted by G.S. 105-134.6 and G.S. 105-134.7. Coley v. State, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

Cited in McKyer v. McKyer, 179 N.C. App. 132, 632 S.E.2d 828, 2006 N.C. App. LEXIS 1829 (2006); Dunn v. State, — N.C. App. —, 635 S.E.2d 604, 2006 N.C. App. LEXIS 2163 (2006).

§ 105-134.6. Adjustments to taxable income.

(a) S Corporations. — Each shareholder's pro rata share of an S Corporation's income is subject to the adjustments provided in this section.

(b) Deductions. — The following deductions from taxable income shall be made in calculating North Carolina taxable income, to the extent each item is included in taxable income:

(1) Interest upon the obligations of any of the following:
  a. The United States or its possessions.

b. This State, a political subdivision of this State, or a commission, an authority, or another agency of this State or of a political subdivision of this State.

c. A nonprofit educational institution organized or chartered under the laws of this State.

(2) Gain from the disposition of obligations issued before July 1, 1995, to the extent the gain is exempt from tax under the laws of this State.

(3) Benefits received under Title II of the Social Security Act and amounts received from retirement annuities or pensions paid under the provisions of the Railroad Retirement Act of 1937.

(4) Repealed by Session Laws 1989 (Reg. Sess., 1990), c. 1002, s. 2.

(5) Refunds of state, local, and foreign income taxes included in the taxpayer's gross income.

(5a) Reserved.

(5b) The amount received during the taxable year from one or more State, local, or federal government retirement plans to the extent the amount is exempt from tax under this Part pursuant to a court order in settlement of the following cases: Bailey v. State, 92 CVS 10221, 94 CVS 6904, 95 CVS 6625, 95 CVS 8230; Emory v. State, 98 CVS 0738; and Patton v. State, 95 CVS 04346. Amounts deducted under this subdivision may not also be deducted under subdivision (6) of this subsection.

(6)a. An amount, not to exceed four thousand dollars ($4,000), equal to the sum of the amount calculated in subparagraph b. plus the amount calculated in subparagraph c.

b. The amount calculated in this subparagraph is the amount received during the taxable year from one or more state, local, or federal government retirement plans.

c. The amount calculated in this subparagraph is the amount received during the taxable year from one or more retirement plans other than state, local, or federal government retirement plans, not to exceed a total of two thousand dollars ($2,000) in any taxable year.

d. In the case of a married couple filing a joint return where both spouses received retirement benefits during the taxable year, the maximum dollar amounts provided in this subdivision for various types of retirement benefits apply separately to each spouse's benefits.

(7) Recodified as G.S. 105-134.6(d)(1).

(8) Recodified as G.S. 105-134.6(d)(2).

(9) Income that is (i) earned or received by an enrolled member of a federally recognized Indian tribe and (ii) derived from activities on a federally recognized Indian reservation while the member resides on the reservation. Income from intangibles having a situs on the reservation and retirement income associated with activities on the reservation are considered income derived from activities on the reservation.

(10) The amount by which the basis of property under this Article exceeds the basis of the property under the Code, in the year the taxpayer disposes of the property.

(11) Severance wages received by a taxpayer from an employer as the result of the taxpayer's permanent, involuntary termination from employment through no fault of the employee. The amount of severance wages deducted as the result of the same termination may not exceed thirty-five thousand dollars ($35,000) for all taxable years in which the wages are received.

(12) Repealed by Session Laws 1998-171, s. 2, effective October 1, 1998.

(13) Repealed by Session Laws 2002-126, s. 30C.4, effective for taxable years beginning on or after January 1, 2002.

(14) The amount paid to the taxpayer by the State under G.S. 148-84 as compensation for pecuniary loss suffered by reason of erroneous conviction and imprisonment.

(15) Interest, investment earnings, and gains of a trust, the settlors of which are two or more manufacturers that signed a settlement agreement with this State to settle existing and potential claims of the State against the manufacturers for damages attributable to a product of the manufacturers, if the trust meets all of the following conditions:

a. The purpose of the trust is to address adverse economic consequences resulting from a decline in demand of the manufactured product potentially expected to occur because of market restrictions and other provisions in the settlement agreement.

b. A court of this State approves and retains jurisdiction over the trust.

c. Certain portions of the distributions from the trust are made in accordance with certifications that meet the criteria in the agreement creating the trust and are provided by a nonprofit entity, the governing board of which includes State officials.

(16) The amount paid to the taxpayer during the taxable year from the Hurricane Floyd Reserve Fund in the Office of State Budget and Management for hurricane relief or assistance, but not including payments for goods or services provided by the taxpayer.

(17) In each of the taxpayer's first five taxable years beginning on or after January 1, 2005, an amount equal to twenty percent (20%) of the amount added to taxable income in a previous year as accelerated depreciation under subdivision (c)(8) of this section.

(18) The amount paid to the taxpayer during the taxable year from the Disaster Relief Reserve Fund in the Office of State Budget and Management for hurricane relief or assistance, but not including payments for goods or services provided by the taxpayer.

(c) Additions. — The following additions to taxable income shall be made in calculating North Carolina taxable income, to the extent each item is not included in taxable income:

(1) Interest upon the obligations of states other than this State, political subdivisions of those states, and agencies of those states and their political subdivisions.

(2) Any amount allowed as a deduction from gross income under the Code that is taxed under the Code by a separate tax other than the tax imposed in section 1 of the Code.

(3) Any amount deducted from gross income under section 164 of the Code as state, local, or foreign income tax or as state or local general sales tax to the extent that the taxpayer's total itemized deductions deducted under the Code for the taxable year exceed the standard deduction allowable to the taxpayer under the Code reduced by the amount the taxpayer is required to add to taxable income under subdivision (4) of this subsection.

(3a) The amount by which a shareholder's share of S Corporation income is reduced under section 1366(f)(2) of the Code for the taxable year by the amount of built-in gains tax imposed on the S Corporation under section 1374 of the Code.

(4) The amount by which the taxpayer's additional standard deduction for aged and blind has been increased for inflation under section

63(c)(4)(A) of the Code plus the amount by which the taxpayer's basic standard deduction, including adjustments for inflation, under the Code exceeds the appropriate amount in the following chart based on the taxpayer's filing status:

Filing Status	**Standard Deduction**
Married filing jointly/Surviving Spouse	$6,000
Head of Household	4,400
Single	3,000
Married filing separately	3,000

(4a) The amount by which each of the taxpayer's personal exemptions has been increased for inflation under section 151(d)(4)(A) of the Code. This amount is reduced by five hundred dollars ($500.00) for each personal exemption if the taxpayer's adjusted gross income (AGI), as calculated under the Code, is less than the following amounts:

Filing Status	**AGI**
Married, filing jointly	$100,000
Head of Household	80,000
Single	60,000
Married, filing separately	50,000.

For the purposes of this subdivision, if the taxpayer's personal exemptions have been reduced by the applicable percentage under section 151(d)(3) of the Code, the amount by which the personal exemptions have been increased for inflation is also reduced by the applicable percentage.

(5) The market price of the gleaned crop for which the taxpayer claims a credit for the taxable year under G.S. 105-151.14.

(5a) **(Expires for taxable years beginning on or after January 1, 2011)** The market price of the oyster shells for which the taxpayer claims a credit for the taxable year under G.S. 105-151.30.

(5b) **(Effective for taxable years beginning on or after January 1, 2008)** The amount of a donation made to a nonprofit organization for which a credit is claimed under G.S. 105-129.16H.

(6) The amount by which the basis of property under the Code exceeds the basis of the property under this Article, in the year the taxpayer disposes of the property.

(7) The amount of federal estate tax that is attributable to an item of income in respect of a decedent and is deducted from gross income under section 691(c) of the Code.

(8) The applicable percentage of the amount allowed as a special accelerated depreciation deduction under section 168(k) or section 1400L of the Code, as set out in the table below. In addition, a taxpayer who was allowed a special accelerated depreciation deduction under section 168(k) or section 1400L of the Code in a taxable year beginning before January 1, 2002, and whose North Carolina taxable income in that earlier year reflected that accelerated depreciation deduction must add to federal taxable income in the taxpayer's first taxable year beginning on or after January 1, 2002, an amount equal to the amount of the deduction allowed in the earlier taxable year. These adjustments do not result in a difference in basis of the affected assets for State and federal income tax purposes. The applicable percentage is as follows:

Taxable Year	Percentage
2002	100%
2003	70%

Taxable Year	Percentage
2004	70%
2005 and thereafter	0%

(9) **(Repealed for taxable years beginning on or after January 1, 2007)** The amount of qualifying expenses for which the taxpayer claims a credit under G.S. 105-151.29.

(10) The amount excluded from gross income under section 199 of the Code.

(d) Other Adjustments. — The following adjustments to taxable income shall be made in calculating North Carolina taxable income:

(1) The amount of inheritance or estate tax attributable to an item of income in respect of a decedent required to be included in gross income under the Code, adjusted as provided in G.S. 105-134.5, 105-134.6, and 105-134.7, may be deducted in the year the item of income is included. The amount of inheritance or estate tax attributable to an item of income in respect of a decedent is (i) the amount by which the inheritance or estate tax paid under Article 1 or 1A of this Chapter on property transferred to a beneficiary by a decedent exceeds the amount of the tax that would have been payable by the beneficiary if the item of income in respect of a decedent had not been included in the property transferred to the beneficiary by the decedent, (ii) multiplied by a fraction, the numerator of which is the amount required to be included in gross income for the taxable year under the Code, adjusted as provided in G.S. 105-134.5, 105-134.6, and 105-134.7, and the denominator of which is the total amount of income in respect of a decedent transferred to the beneficiary by the decedent. For an estate or trust, the deduction allowed by this subdivision shall be computed by excluding from the gross income of the estate or trust the portion, if any, of the items of income in respect of a decedent that are properly paid, credited, or to be distributed to the beneficiaries during the taxable year.

The Secretary may provide to a beneficiary of an item of income in respect of a decedent any information contained on an inheritance or estate tax return that the beneficiary needs to compute the deduction allowed by this subdivision.

(2) The taxpayer may deduct the amount by which the taxpayer's deductions allowed under the Code were reduced, and the amount of the taxpayer's deductions that were not allowed, because the taxpayer elected a federal tax credit in lieu of a deduction. This deduction is allowed only to the extent that a similar credit is not allowed by this Part for the amount.

(3) The taxpayer shall add to taxable income the amount of any recovery during the taxable year not included in taxable income, to the extent the taxpayer's deduction of the recovered amount in a prior taxable year reduced the taxpayer's tax imposed by this Part but, due to differences between the Code and this Part, did not reduce the amount of the taxpayer's tax imposed by the Code. The taxpayer may deduct from taxable income the amount of any recovery during the taxable year included in taxable income under section 111 of the Code, to the extent the taxpayer's deduction of the recovered amount in a prior taxable year reduced the taxpayer's tax imposed by the Code but, due to differences between the Code and this Part, did not reduce the amount of the taxpayer's tax imposed by this Part.

G.S. 105-134.6(d)(4) is set out three times. See notes.

(4) **(Effective for taxable years beginning before January 1, 2007)** A taxpayer whose adjusted gross income (AGI), as calculated under the Code, is less than the amount listed in this subdivision may deduct from taxable income the amount, not to exceed seven hundred fifty dollars ($750.00), contributed to an account in the Parental Savings Trust Fund of the State Education Assistance Authority established pursuant to G.S. 116-209.25. In the case of a married couple filing a joint return, the maximum dollar amount of the deduction is one thousand five hundred dollars ($1,500).

Filing Status	**AGI**
Married, filing jointly	$100,000
Head of Household	80,000
Single	60,000
Married, filing separately	50,000

(4) (**Effective for taxable years beginning on or after January 1, 2007 and beginning before January 1, 2012**) A taxpayer may deduct from taxable income the amount, not to exceed two thousand five hundred dollars ($2,500), contributed to an account in the Parental Savings Trust Fund of the State Education Assistance Authority established pursuant to G.S. 116-209.25. In the case of a married couple filing a joint return, the maximum dollar amount of the deduction is five thousand dollars ($5,000).

(4) (**Effective for taxable years beginning on or after January 1, 2012**) A taxpayer whose adjusted gross income (AGI), as calculated under the Code, is less than the amount listed in this subdivision may deduct from taxable income the amount, not to exceed two thousand five hundred dollars ($2,500), contributed to an account in the Parental Savings Trust Fund of the State Education Assistance Authority established pursuant to G.S. 116-209.25. In the case of a married couple filing a joint return, the maximum dollar amount of the deduction is five thousand dollars ($5,000).

Filing Status	**AGI**
Married, filing jointly	$100,000
Head of Household	80,000
Single	60,000
Married, filing separately	50,000

(5) **(Effective for taxable years beginning on or after January 1, 2006)** The taxpayer shall add to taxable income the amount deducted from taxable income in a prior taxable year under subdivision (4) of this subsection to the extent this amount was withdrawn from the Parental Savings Trust Fund of the State Education Assistance Authority established pursuant to G.S. 116-209.25 and not used to pay for the qualified higher education expenses of the designated beneficiary, unless the withdrawal was made without penalty under section 529 of the Code due to the death or permanent disability of the designated beneficiary.

(6) (**Effective for taxable years beginning on or after January 1, 2007**) A taxpayer who is an eligible firefighter or an eligible rescue squad worker may deduct from taxable income the sum of two hundred fifty dollars ($250.00). In the case of a married couple filing a joint return, each spouse may qualify separately for the deduction allowed under this subdivision. In order to claim the deduction allowed under this subdivision, the taxpayer must submit with the tax return any documentation required by the Secretary. An individ-

ual may not claim a deduction as both an eligible firefighter and as an eligible rescue squad worker in a single taxable year. The following definitions apply in this subdivision:

a. Eligible firefighter. — An unpaid member of a volunteer fire department who attended at least 36 hours of fire department drills and meetings during the taxable year.

b. Eligible rescue squad worker. — An unpaid member of a volunteer rescue or emergency medical services squad who attended at least 36 hours of rescue squad training and meetings during the taxable year. (1989, c. 718, s. 2; c. 728, s. 1.4; c. 770, ss. 41.2, 41.3; c. 792, s. 1.1; 1989 (Reg. Sess., 1990), c. 984, s. 4; c. 1002, s. 2; 1991, c. 45, s. 9; c. 453, s. 1; c. 689, ss. 253, 254; 1991 (Reg. Sess., 1992), c. 1007, s. 3; 1993, c. 12, s. 8; c. 443, s. 8; c. 485, s. 9; 1993 (Reg. Sess., 1994), c. 745, s. 7; 1995, c. 17, s. 5; c. 42, ss. 1, 2(a), (b); c. 46, s. 3; c. 370, s. 3; 1996, 2nd Ex. Sess., c. 13, s. 8.1; c. 14, s. 9; 1997-226, s. 3; 1997-328, s. 1; 1997-388, s. 4; 1997-525, s. 1; 1998-98, s. 69; 1998-171, ss. 2, 3; 1998-212, ss. 29A.2(c), 29A.13(a); 1999-333, s. 3; 1999-463, Ex Sess., s. 4.6 (a); 2000-140, ss. 65, 93.1(a); 2001-424, ss. 12.2(b), 34.19(a), (b); 2002-126, ss. 30B.1(a), 30B.1(b), 30C.2(b), 30C.2(d), 30C.4; 2003-284, s. 37A.2; 2005-1, s. 5.7(a); 2005-276, ss. 35.1(e), 39.1(f); 2005-435, s. 55; 2006-17, ss. 2, 3; 2006-66, ss. 24.12(a), 24.18(e); 2006-220, s. 3; 2006-221, s. 27(a); 2007-323, ss. 31.19(a)-(d), 31.24(a); 2007-397, s. 13(c).)

Subdivision (d)(4) Set Out Three Times. — The first version of subdivision (d)(4) set out above is effective for taxable years beginning before January 1, 2007. The second version of subdivision (d)(4) set out above is effective for taxable years beginning on or after January 1, 2007 and before January 1, 2012. The third version of subdivision (d)(4) set out above is effective for taxable years beginning on or after January 1, 2012.

Delayed Repeal of Subdivisions. — Subdivision (c)(5a) expires for taxable years beginning on or after January 1, 2011. Subdivision (c)(9) is repealed for taxable years beginning on or after January 1, 2007.

Editor's note. — For the Hurricane Floyd Recovery Fund, see the Hurricane Floyd Recovery Act, Session Laws 1999-463.

Session Laws 1999-463, s. 4.5 and Session Laws 2005-1, s. 5.6, provide that a written statement of State and federal income tax treatment be included with the disbursement of funds or property for hurricane relief or assistance by each agency disbursing same.

Session Laws 2005-1, s. 1, provides that 2005-1 shall be known as "The Hurricane Recovery Act of 2005."

For Session Laws 2005-1, ss. 2.1 and 4, containing provisions for legislative findings regarding critical hurricane recovery needs not met by existing state and federal programs and funds, and establishment of the Disaster Relief Reserve Fund, see note at G.S. 143-1.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 35.1(f), provides: "Notwithstanding any other provision of law, a taxpayer whose federal taxable income for 2004 is reduced due to a charitable contribution of cash made in January 2005 for Indian Ocean tsunami relief efforts in accordance with P.L. 109-1 is not required to add back the amount of the deduction related to that contribution in determining North Carolina taxable income for 2004."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-221, s. 27(a), effective for taxable years beginning on or after January 1, 2007, which, in subdivision (d)(4), substituted "two thousand dollars ($2,000)" for "seven hundred fifty dollars ($750.00)" in the first sentence, and "four thousand dollars ($4,000)" for "one thousand five hundred dollars ($1,500)" in the last sentence, was repealed by Session

Laws 2007-323, s. 31.19(a), effective July 31, 2007.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2007-397, s. 15, is a severability clause.

Effect of Amendments. — Session Laws 2005-1, s. 5.7(a), effective for taxable years beginning on or after January 1, 2004, added subdivision (b)(18).

Session Laws 2005-276, s. 35.1(e), effective for taxable years beginning on or after January 1, 2005, in subdivision (c)(3), inserted "or as state or local general sales tax" and added subdivision (c)(9); because of a conflicting amendment, it was subsequently renumbered as subdivision (c)(10) at the direction of the Revisor of Statutes.

Session Laws 2005-276, s. 39.1(f), effective for taxable years beginning on or after January 1, 2005, and applicable to qualifying expenses incurred on or after July 1, 2005, added subdivision (c)(9).

Session Laws 2005-435, s. 55, effective September 27, 2005, substituted "G.S. 105-151.29" for "G.S. 105-130.47" in subdivision (c)(9).

Session Laws 2006-17, ss. 2 and 3, effective for taxable years beginning on or after January 1, 2006, rewrote subsection (a), and added subdivision (c)(3a).

Session Laws 2006-66, s. 24.12(a), as amended by Session Laws 2007-323, s. 31.19(b), effective for taxable years beginning on or after January 1, 2006, added subdivisions (d)(4), and (d)(5).

Session Laws 2006-66, s. 24.18(e), effective for taxable years beginning on or after January 1, 2006, and expiring for taxable years beginning on or after January 1, 2011, added subdivision (c)(5a).

Session Laws 2006-220, s. 3, effective for taxable years beginning on and after January 1, 2007, repealed subdivision (c)(9), which read: "The amount of qualifying expenses for which the taxpayer claims a credit under G.S. 105-151.29."

Session Laws 2007-323, ss. 31.19(c), (d) and 31.24(a), rewrote subdivision (d)(4); and added subdivision (d)(6). For effective dates, see Editor's note.

Session Laws 2007-397, s. 13(c), effective for taxable years beginning on or after January 1, 2008, added subdivision (c)(5b).

CASE NOTES

Tax Exemption for State and Local Government Employees' Retirement Benefits. — The tax exemption for retirement benefits of state and local employees was a term or condition of retirement systems to which the employees had a contractual right and it did not constitute an unconstitutional contracting away of the state's sovereign power of taxation. Bailey v. State, 348 N.C. 130, 500 S.E.2d 54 (1998).

Amendment placing a $4,000 annual exemption cap on retirement benefits of state and local employees substantially impaired the employees' contractual right to the exemption. Bailey v. State, 348 N.C. 130, 500 S.E.2d 54 (1998).

Removal of state and local employees' tax exemption for retirement benefits constituted a taking of property without just compensation. Bailey v. State, 348 N.C. 130, 500 S.E.2d 54 (1998).

Impairment of the contractual right of state and local employees' to the tax exemption for retirement benefits was not reasonable nor necessary for achieving an important state purpose. Bailey v. State, 348 N.C. 130, 500 S.E.2d 54 (1998).

Where the collection of taxes on retirement benefits of certain state and local government employees was held unconstitutional, the trial court erred by limiting relief only to those taxpayers who protested in accordance with G.S. 105-267 [repealed]. Bailey v. State, 348 N.C. 130, 500 S.E.2d 54 (1998).

Class Actions. — When individual taxpayers sued the state for a tax refund on behalf of themselves and others similarly situated, they could represent corporations and estates and trusts subjected to the same tax to which they objected, despite the fact that corporations and estates and trusts were taxed under different provisions, because they all alleged the unconstitutionality of G.S. 105-134.6(b)(1)b and (c)(1), so the individual taxpayers had more than a technical or official interest in the subject matter of the suit affecting the corporations or estates and trusts, and their interest was personal; thus, once they had standing, they could under G.S. 1A-1-23 represent both themselves and estates and trusts and corporations. Dunn v. State, — N.C. App. —, 635 S.E.2d 604, 2006 N.C. App. LEXIS 2163 (2006).

Cited in Coley v. State, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

§ 105-134.7. Transitional adjustments.

(a) The following adjustments to taxable income shall be made in calculating North Carolina taxable income:

(1) Amounts that were included in the basis of property under federal tax law but not under State tax law before January 1, 1989, shall be added to taxable income in the year the taxpayer disposes of the property.

(2) Amounts that were included in the basis of property under State tax law but not under federal tax law before January 1, 1989, shall be deducted from taxable income in the year the taxpayer disposes of the property.

(3) Amounts that were recognized as income under federal law but not under State law due to a taxpayer's use of the installment method set out in G.S. 105-142(f) prior to January 1, 1989, shall be added to taxable income in the taxpayer's first taxable year beginning on or after January 1, 1989. Amounts that were recognized as income under State law but not under federal law due to a taxpayer's use of a different installment method prior to January 1, 1989, shall be deducted from taxable income in the taxpayer's first taxable year beginning on or after January 1, 1989.

(4) Losses in the nature of net economic losses sustained in any or all of the five taxable years preceding the taxpayer's first taxable year beginning on or after January 1, 1989, arising from business transactions, business capital, or business property, may be deducted from taxable income subject to the limitations contained in former G.S. 105-147(9)a., c., and d. (repealed).

(5) If the taxpayer has a net operating loss for a taxable year beginning on or after January 1, 1989, that part of the loss that is carried back to and deducted in a taxable year beginning before January 1, 1989, pursuant to section 172 of the Code may be deducted from taxable income in the taxable year following the taxable year for which the loss occurred.

(6) A loss or deduction that was incurred or paid and deducted from State taxable income in a taxable year beginning before January 1, 1989, and is carried forward and deducted in a taxable year beginning on or after January 1, 1989, under the Code shall be added to taxable income.

(7) The transitional adjustments provided in Part 1A of this Article shall be made with respect to a shareholder's pro rata share of S Corporation income.

(b) The Secretary may by rule require other adjustments to be made to taxable income as necessary to assure that the transition to the tax changes effective January 1, 1989, will not result in double taxation of income, exemption of otherwise taxable income from taxation under this Division, or double allowance of deductions. (1989, c. 728, s. 1.4; 1993, c. 485, s. 10; 1998-98, s. 91.)

Editor's Note. — Sections 105-142 and 105-147, referred to in this section, were repealed by Session Laws 1989, c. 728, s. 1.3.

CASE NOTES

Cited in Coley v. State, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

§ 105-134.8. Inventory.

Whenever, in the opinion of the Secretary, it is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by the taxpayer as prescribed by the Secretary, conforming as nearly as possible to the best accounting practice in the trade or business and most clearly reflecting the income. (1989, c. 728, s. 1.4.)

§§ 105-135 through 105-149: Repealed by Session Laws 1989, c. 728, s. 1.3.

§ 105-150: Repealed by Session Laws 1973, c. 1287, s. 5.

§ 105-151. Tax credits for income taxes paid to other states by individuals.

(a) An individual who is a resident of this State is allowed a credit against the taxes imposed by this Part for income taxes imposed by and paid to another state or country on income taxed under this Part, subject to the following conditions:

(1) The credit is allowed only for taxes paid to another state or country on income derived from sources within that state or country that is taxed under its laws irrespective of the residence or domicile of the recipient, except that whenever a taxpayer who is deemed to be a resident of this State under the provisions of this Part is deemed also to be a resident of another state or country under the laws of that state or country, the Secretary may allow a credit against the taxes imposed by this Part for taxes imposed by and paid to the other state or country on income taxed under this Part.

(2) The fraction of the gross income, as calculated under the Code and adjusted as provided in G.S. 105-134.6 and G.S. 105-134.7, that is subject to income tax in another state or country shall be ascertained, and the North Carolina net income tax before credit under this section shall be multiplied by that fraction. The credit allowed is either the product thus calculated or the income tax actually paid the other state or country, whichever is smaller.

(3) Receipts showing the payment of income taxes to another state or country and a true copy of a return or returns upon the basis of which the taxes are assessed shall be filed with the Secretary when the credit is claimed. If credit is claimed on account of a deficiency assessment, a true copy of the notice assessing or proposing to assess the deficiency, as well as a receipt showing the payment of the deficiency, shall be filed.

(b) If any taxes paid to another state or country for which a taxpayer has been allowed a credit under this section are at any time credited or refunded to the taxpayer, a tax equal to that portion of the credit allowed for the taxes so credited or refunded is due and payable from the taxpayer and is subject to the penalties and interest provided in Subchapter I of this Chapter. (1939, c. 158, s. 325; 1941, c. 50, s. 5; c. 204, s. 1; 1943, c. 400, s. 4; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1989, c. 728, s. 1.5; 1989 (Reg. Sess., 1990), c. 814, s. 17; 1998-98, s. 92.)

Legal Periodicals. — For discussion of the provisions of this and other sections of the North Carolina income tax law designed to guard against excessive duplicate taxation, see 27 N.C.L. Rev. 582 (1949).

For note, “Stone v. Lynch: North Carolina

Takes a Different Approach to Defining Gift," see 64 N.C.L. Rev. 677 (1986).

CASE NOTES

Statutes providing exemption from taxation are strictly construed. In re Dickinson, 281 N.C. 552, 189 S.E.2d 141 (1972).

Taxation is the rule, exemption the exception. In re Dickinson, 281 N.C. 552, 189 S.E.2d 141 (1972).

Credit Allowed on Income Tax for Payments to Another State. — Under this section, instead of allowing a deduction in computing taxable net income, a credit is allowed against North Carolina tax for the amount of the tax paid to another state or country on the same income. In re Dickinson, 281 N.C. 552, 189 S.E.2d 141 (1972).

That "another state or country" can lawfully impose an income tax only on that portion of the income of a resident of North Carolina derived from sources in that "state or country," implies that such income is to be taxed by North Carolina, but allows a credit on the North Carolina income tax for payments, if any, to "another state or country." In re Dickinson, 281 N.C. 552, 189 S.E.2d 141 (1972).

Tax Computed on Basis of Resident's Entire Net Income. — The income tax of a resident is computed on the basis of his entire net income. In re Dickinson, 281 N.C. 552, 189 S.E.2d 141 (1972).

§ 105-151.1. Credit for construction of dwelling units for handicapped persons.

An owner of multifamily rental units located in this State is allowed a credit against the tax imposed by this Part equal to five hundred fifty dollars ($550.00) for each dwelling unit constructed by the owner that conforms to Volume I-C of the North Carolina Building Code for the taxable year within which the construction of the dwelling unit is completed. The credit is allowed only for dwelling units completed during the taxable year that were required to be built in compliance with Volume I-C of the North Carolina Building Code. If the credit allowed by this section exceeds the tax imposed by this Part reduced by all other credits allowed, the excess may be carried forward for the next succeeding year. In order to claim the credit allowed by this section, the taxpayer must file with the income tax return a copy of the occupancy permit on the face of which is recorded by the building inspector the number of units completed during the taxable year that conform to Volume I-C of the North Carolina Building Code. After recording the number of these units on the face of the occupancy permit, the building inspector shall promptly forward a copy of the permit to the Building Accessibility Section of the Department of Insurance. (1973, c. 910, s. 2; 1979, c. 803, ss. 3, 4; 1981, c. 682, s. 17; 1989, c. 728, s. 1.6; 1997-6, s. 4; 1998-98, s. 69; 1998-100, s. 1.)

§ 105-151.2: Repealed by Session Laws 1999-342, s. 1, effective for taxable years beginning on or after January 1, 2000.

§ 105-151.3: Repealed by Session Laws 1983 (Regular Session 1984), c. 1004, s. 2.

§ 105-151.4: Repealed by Session Laws 1989, c. 728, s. 1.8.

§ 105-151.5: Repealed by Session Laws 1999-342, s. 1, effective for taxable years beginning on or after January 1, 2000.

§ 105-151.6: Expired.

Editor's Note. — Pursuant to former subsection (g) of this section, this section applied only to costs incurred during taxable years beginning prior to January 1, 1998.

§ 105-151.6A: Repealed by Session Laws 1989, c. 728, s. 1.11.

§§ 105-151.7 through 105-151.10: Repealed by Session Laws 1999-342, s. 1, effective for taxable years beginning on or after January 1, 2000.

§ 105-151.11. Credit for child care and certain employment-related expenses.

(a) Credit. — A person who is allowed a credit against federal income tax for a percentage of employment-related expenses under section 21 of the Code shall be allowed as a credit against the tax imposed by this Part an amount equal to the applicable percentage of the employment-related expenses as defined in section 21(b)(2) of the Code. In order to claim the credit allowed by this section, the taxpayer must provide with the tax return the information required by the Secretary.

(a1) Applicable Percentage. — For employment-related expenses that are incurred only with respect to one or more dependents who are seven years old or older and are not physically or mentally incapable of caring for themselves, the applicable percentage is the appropriate percentage in the column labeled "Percentage A" in the table below, based on the taxpayer's adjusted gross income determined under the Code. For employment-related expenses with respect to any other qualifying individual, the applicable percentage is the appropriate percentage in the column labeled "Percentage B" in the table below, based on the taxpayer's adjusted gross income determined under the Code.

Filing Status	Adjusted Gross Income	Percentage A	Percentage B
Head of Household	Up to $20,000	9%	13%
	Over $20,000 Up to $32,000	8%	11.5%
	Over $32,000	7%	10%
Surviving Spouse or Joint Return	Up to $25,000	9%	13%
	Over $25,000 Up to $40,000	8%	11.5%
	Over $40,000	7%	10%
Single	Up to $15,000	9%	13%
	Over $15,000 Up to $24,000	8%	11.5%
	Over $24,000	7%	10%
Married Filing Separately	Up to $12,500	9%	13%
	Over $12,500 Up to $20,000	8%	11.5%
	Over $20,000	7%	10%

(b) Employment Related Expenses. — The amount of employment-related expenses for which a credit may be claimed may not exceed three thousand dollars ($3,000) if the taxpayer's household includes one qualifying individual, as defined in section 21(b)(1) of the Code, and may not exceed six thousand dollars ($6,000) if the taxpayer's household includes more than one qualifying individual. The amount of employment-related expenses for which a credit may be claimed is reduced by the amount of employer-provided dependent care assistance excluded from gross income.

(c) Limitations. — A nonresident or part-year resident who claims the credit allowed by this section shall reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate. No credit shall be allowed under this section for amounts deducted from gross income in calculating taxable income under the Code. The credit allowed by this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except for payments of tax made by or on behalf of the taxpayer. (1981, c. 899, s. 1; 1985, c. 656, ss. 8-11; 1989, c. 728, s. 1.16; 1993, c. 432, s. 1; 1998-98, ss. 69, 99; 1998-100, s. 2; 2006-18, s. 9.)

Effect of Amendments. — Session Laws 2006-18, s. 9, effective for taxable years beginning on or after January 1, 2006, substituted "three thousand dollars ($3,000)" for "two thousand four hundred dollars ($2,400)" and "six thousand dollars ($6,000)" for "four thousand eight hundred dollars ($4,800)" in the first sentence and added the second sentence in subsection (b).

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

CASE NOTES

Conformity with Federal Tax Law. — Section 105-149 was repealed in an apparent effort by the General Assembly to bring North Carolina's personal income tax laws into conformity with the 1984 revisions of federal tax statutes. Under federal law, the custodial parent, not the parent paying primary support, is entitled to claim the support exemption for the child under circumstances such as those in the case at bar. However, federal law also provides that the custodial parent may waive the right to claim an exemption. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990), decided under former § 105-149.

Trial court may order custodial parent to waive right to claim federal and state tax exemptions. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990), decided under former § 105-149.

Court order assigning federal and state tax dependency exemptions to payor of child support for all income tax purposes was valid. Cohen v. Cohen, 100 N.C. App. 334, 396 S.E.2d 344 (1990), decided under former § 105-149.

§ 105-151.12. (Effective for taxable years beginning before January 1, 2007) Credit for certain real property donations.

(a) A person who makes a qualified donation of an interest in real property located in North Carolina during the taxable year that is useful for (i) public beach access or use, (ii) public access to public waters or trails, (iii) fish and wildlife conservation, or (iv) other similar land conservation purposes is allowed a credit against the tax imposed by this Part equal to twenty-five percent (25%) of the fair market value of the donated property interest. To be eligible for this credit, the interest in property must be donated in perpetuity to and accepted by the State, a local government, or a body that is both organized to receive and administer lands for conservation purposes and qualified to receive charitable contributions under the Code. Lands required to be dedicated pursuant to local governmental regulation or ordinance and dedications made to increase building density levels permitted under a regulation or ordinance are not eligible for this credit. The credit allowed under this section may not exceed two hundred fifty thousand dollars ($250,000). To support the credit allowed by this section, the taxpayer must file with the

G.S. 105-151.12 is set out twice. See notes.

income tax return for the taxable year in which the credit is claimed a certification by the Department of Environment and Natural Resources that the property donated is suitable for one or more of the valid public benefits set forth in this subsection.

(b) The credit allowed by this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer.

Any unused portion of this credit may be carried forward for the next succeeding five years.

(c) Repealed by Session Laws 1998-212, s. 29A.13(b).

(d) In the case of property owned by a married couple, if both spouses are required to file North Carolina income tax returns, the credit allowed by this section may be claimed only if the spouses file a joint return. If only one spouse is required to file a North Carolina income tax return, that spouse may claim the credit allowed by this section on a separate return.

(e) In the case of marshland for which a claim has been filed pursuant to G.S. 113-205, the offer of donation must be made before December 31, 2003 to qualify for the credit allowed by this section.

(f) **(Expires for taxable years beginning on or after January 1, 2007)** Notwithstanding G.S. 105-269.15, the maximum dollar limit that applies in determining the amount of the credit applicable to a partnership that qualifies for the credit applies separately to each partner. (1983, c. 793, s. 3; 1985, c. 278, s. 2; 1989, c. 716, s. 2; c. 727, s. 218(43); c. 728, s. 1.17; 1989 (Reg. Sess., 1990), c. 869, s. 3; 1991, c. 45, s. 10; c. 453, ss. 2, 4; 1991 (Reg. Sess., 1992), c. 930, s. 21; 1993 (Reg. Sess., 1994), c. 717, s. 4; 1997-226, s. 2; 1997-443, s. 11A.119(a); 1998-98, s. 69; 1998-179, s. 2; 1998-212, s. 29A.13(b), (d); 2001-335, s. 2; 2002-72, s. 15(b); 2004-134, s. 1; 2006-66, s. 24.15(a).)

Section Set Out Twice. — The section above is effective for taxable years beginning before January 1, 2007. For this section as in effect for taxable years beginning on or after January 1, 2007, see the following section, also numbered G.S. 105-151.12.

Editor's Note. — "December 31, 2003" was substituted for "31 December 2003" in subsection (e) at the direction of the Revisor of Statutes.

Session Laws 2001-335, s. 3, as amended by Session Laws 2004-134, s. 1, and as amended by Session Laws 2006-66, s. 24.15(a), provides that s. 2 of the 2001 act, which added subsection (f), expires for taxable years beginning on or after January 1, 2007.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 105-151.12. (Effective for taxable years beginning on or after January 1, 2007) Credit for certain real property donations.

(a) An individual or pass-through entity that makes a qualified donation of an interest in real property located in North Carolina during the taxable year that is useful for (i) public beach access or use, (ii) public access to public waters or trails, (iii) fish and wildlife conservation, (iv) forestland or farmland conservation, (v) watershed protection, (vi) conservation of natural areas as that term is defined in G.S. 113A-164.3(3), (vii) conservation of natural or scenic river areas as those terms are used in G.S. 113A-34, (viii) conservation of predominantly natural parkland, or (ix) historic landscape conservation is

G.S. 105-151.12 is set out twice. See notes.

allowed a credit against the tax imposed by this Part equal to twenty-five percent (25%) of the fair market value of the donated property interest. To be eligible for this credit, the interest in property must be donated in perpetuity to and accepted by the State, a local government, or a body that is both organized to receive and administer lands for conservation purposes and qualified to receive charitable contributions under the Code. Lands required to be dedicated pursuant to local governmental regulation or ordinance and dedications made to increase building density levels permitted under a regulation or ordinance are not eligible for this credit. To support the credit allowed by this section, the taxpayer must file with the income tax return for the taxable year in which the credit is claimed the following:

(1) A certification by the Department of Environment and Natural Resources that the property donated is suitable for one or more of the valid public benefits set forth in this subsection. The certification for a qualified donation made by a pass-through entity must be filed by the pass-through entity.

(2) A self-contained or summary appraisal report as defined in Standards Rule 2-2 in the latest edition of the Uniform Standards of Professional Appraisal Practice as promulgated by the Appraisal Foundation for the property. For fee simple absolute donations of real property, a taxpayer may submit documentation of the county's appraised value of the donated property, as adjusted by the sales assessment ratio, in lieu of an appraisal report.

(a1) Individuals. — The aggregate amount of credit allowed to an individual in a taxable year under this section for one or more qualified donations, whether made directly or indirectly as owner of a pass-through entity, may not exceed two hundred fifty thousand dollars ($250,000). In the case of property owned by a married couple, if both spouses are required to file North Carolina income tax returns, the credit allowed by this section may be claimed only if the spouses file a joint return. The aggregate amount of credit allowed to a husband and wife filing a joint tax return may not exceed five hundred thousand dollars ($500,000). If only one spouse is required to file a North Carolina income tax return, that spouse may claim the credit allowed by this section on a separate return.

(a2) Pass-Through Entities. — The aggregate amount of credit allowed to a pass-through entity in a taxable year under this section for one or more qualified donations, whether made directly or indirectly as owner of another pass-through entity, may not exceed five hundred thousand dollars ($500,000). Each individual who is an owner of a pass-through entity is allowed as a credit an amount equal to the owner's allocated share of the credit to which the pass-through entity is eligible under this subsection, not to exceed two hundred fifty thousand dollars ($250,000). Each corporation that is an owner of a pass-through entity is allowed as a credit an amount equal to the owner's allocated share of the credit to which the pass-through entity is eligible under this subsection, not to exceed five hundred thousand dollars ($500,000). If an owner's share of the pass-through entity's credit is limited due to the maximum allowable credit under this section for a taxable year, the pass-through entity and its owners may not reallocate the unused credit among the other owners.

(b) The credit allowed by this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer.

Any unused portion of this credit may be carried forward for the next succeeding five years.

G.S. 105-151.12 is set out twice. See notes.

(c) Repealed by Session Laws 1998-212, s. 29A.13(b).

(d) Repealed by Session Laws 2007-309, s. 2, effective for taxable years beginning on or after January 1, 2007.

(e) In the case of marshland for which a claim has been filed pursuant to G.S. 113-205, the offer of donation must be made before December 31, 2003 to qualify for the credit allowed by this section.

(f) Repealed by Session Laws 2007-309, s. 2, effective for taxable years beginning on or after January 1, 2007. (1983, c. 793, s. 3; 1985, c. 278, s. 2; 1989, c. 716, s. 2; c. 727, s. 218(43); c. 728, s. 1.17; 1989 (Reg. Sess., 1990), c. 869, s. 3; 1991, c. 45, s. 10; c. 453, ss. 2, 4; 1991 (Reg. Sess., 1992), c. 930, s. 21; 1993 (Reg. Sess., 1994), c. 717, s. 4; 1997-226, s. 2; 1997-443, s. 11A.119(a); 1998-98, s. 69; 1998-179, s. 2; 1998-212, s. 29A.13(b), (d); 2001-335, s. 2; 2002-72, s. 15(b); 2004-134, s. 1; 2006-66, s. 24.15(a); 2007-309, s. 2.)

Section Set Out Twice. — The section above is effective for taxable years beginning on or after January 1, 2007. For this section as in effect for taxable years beginning before January 1, 2007, see the preceding section, also numbered G.S. 105-151.12.

Editor's Note. — "December 31, 2003" was substituted for "31 December 2003" in subsection (e) at the direction of the Revisor of Statutes.

Session Laws 2001-335, s. 3, as amended by Session Laws 2004-134, s. 1, and as amended by Session Laws 2006-66, s. 24.15(a), provides that s. 2 of the 2001 act, which added subsection (f), expires for taxable years beginning on or after January 1, 2007.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2007-309, s. 2, effective for taxable years beginning on or after January 1, 2007, rewrote subsection (a); and deleted subsections (d) and (f) related to tax credits for spouses filing joint returns.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 105-151.13. Credit for conservation tillage equipment.

(a) A taxpayer who purchases conservation tillage equipment for use in a farming business, including tree farming, shall be allowed as a credit against the tax imposed by this Part an amount equal to twenty-five percent (25%) of the cost of the equipment paid during the taxable year. This credit may not exceed two thousand five hundred dollars ($2,500) for any taxable year. The credit may be claimed only by the first purchaser of the equipment and may not be claimed by a person who purchases the equipment for resale or for use outside this State. This credit may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except tax payments made by or on behalf of the taxpayer. If the credit allowed by this section exceeds the tax imposed under this Part, the excess may be carried forward for the next succeeding five years. The basis in any equipment for which a credit is allowed under this section shall be reduced by the amount of the credit allowable.

(b) As used in this section, "conservation tillage equipment" means:

(1) A planter such as a planter commonly known as a "no-till" planter designed to minimize disturbance of the soil in planting crops or trees, including equipment that may be attached to equipment already owned by the taxpayer; or

(2) Equipment designed to minimize disturbance of the soil in reforestation site preparation, including equipment that may be attached to equipment already owned by the taxpayer; provided, however, this

shall include only those items of equipment generally known as a "KG-Blade", a "drum-chopper", or a "V-Blade".

(c) In the case of conservation tillage equipment owned jointly by a husband and wife, if both spouses are required to file North Carolina income tax returns, the credit allowed by this section may be claimed only if the spouses file a joint return. If only one spouse is required to file a North Carolina income tax return, that spouse may claim the credit allowed by this section on a separate return. (1983 (Reg. Sess., 1984), c. 969, s. 2; 1989, c. 728, s. 1.18; 1991 (Reg. Sess., 1992), c. 930, s. 22; 1998-98, s. 100.)

§ 105-151.14. Credit for gleaned crop.

(a) A taxpayer who grows a crop and permits the gleaning of the crop during the taxable year shall be allowed as a credit against the tax imposed by this Part an amount equal to ten percent (10%) of the market price of the quantity of the gleaned crop. This credit may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except tax payments made by or on behalf of the taxpayer. In order to claim the credit allowed under this section, the taxpayer must add the market price of the gleaned crop to taxable income as provided in G.S. 105-134.6(c). Any unused portion of the credit may be carried forward for the next succeeding five years.

(b) The following definitions apply to this section:

(1) "Gleaning" means the harvesting of a crop that has been donated by the grower to a nonprofit organization which will distribute the crop to individuals or other nonprofit organizations it considers appropriate recipients of the food.

(2) "Market price" means the season average price of the crop as determined by the North Carolina Crop and Livestock Reporting Service in the Department of Agriculture and Consumer Services, or the average price of the crop in the nearest local market for the month in which the crop is gleaned if the Crop and Livestock Reporting Service does not determine the season average price for that crop; and

(3) "Nonprofit organization" means an organization to which charitable contributions are deductible from gross income under the Code. (1983 (Reg. Sess., 1984), c. 1018, s. 2; 1989, c. 728, s. 1.19; 1991, c. 453, s. 3; 1997-261, s. 13; 1998-98, s. 101.)

§ 105-151.15: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 1, effective for taxable years beginning on or after January 1, 1996.

§ 105-151.16: Repealed by Session Laws 1989, c. 728, s. 1.21.

§ 105-151.17: Recodified as § 105-129.8 by Session Laws 1996, Second Extra Session, c. 13, s. 3.4, effective for taxable years beginning on or after January 1, 1996.

§ 105-151.18. Credit for the disabled.

(a) Disabled Taxpayer. — A taxpayer who (i) is retired on disability, (ii) at the time of retirement, was permanently and totally disabled, and (iii) claims a federal income tax credit under section 22 of the Code for the taxable year, is allowed as a credit against the tax imposed by this Part an amount equal to one-third of the amount of the federal income tax credit for which the taxpayer is eligible under section 22 of the Code.

(b) Disabled Dependent. — If a dependent or spouse for whom a taxpayer is allowed an exemption under the Code is permanently and totally disabled, the taxpayer is allowed a credit against the tax imposed by this Part. In order to claim the credit allowed by this subsection, the taxpayer must attach to the tax return on which the credit is claimed a statement from a physician or local health department certifying that the dependent or spouse for whom the credit is claimed is permanently and totally disabled, as defined in this section. The amount of the credit allowed shall be determined as follows: For a taxpayer whose North Carolina adjusted gross income does not exceed the appropriate income amount provided in the table below, based on the taxpayer's filing status, the credit allowed is the appropriate initial credit provided in the table below. For a taxpayer whose North Carolina adjusted gross income does exceed the appropriate income amount, the credit allowed is the appropriate initial credit reduced by four dollars ($4.00) for every one thousand dollars ($1,000) by which the taxpayer's North Carolina adjusted gross income exceeds the appropriate income amount.

Filing Status	**Initial Credit**	**Income Amount**
Head of Household	$64.00	$16,000
Surviving Spouse or Joint Return	$80.00	$20,000
Single	$48.00	$12,000
Married Filing Separately	$40.00	$10,000

(c) Definitions. — The following definitions apply in this section:

(1) North Carolina Adjusted Gross Income. Adjusted gross income, as determined under the Code, adjusted as provided in G.S. 105-134.6 and G.S. 105-134.7.

(2) Permanently and Totally Disabled. Unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months. For the purpose of this section, a minor is permanently and totally disabled if the impact of the impairment on the minor's ability to function is equivalent in severity to that which would make an adult unable to engage in any substantial gainful activity.

(d) Limitations. — A nonresident or part-year resident who claims the credit allowed by this section shall reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate. The credit allowed under this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except payments of tax made by or on behalf of the taxpayer. (1989, c. 728, s. 1.22; 1989 (Reg. Sess., 1990), c. 984, s. 5; 1998-98, ss. 69, 102.)

§ 105-151.19: Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 2, effective for taxable years beginning on or after January 1, 1996.

§ 105-151.20. Credit or partial refund for tax paid on certain federal retirement benefits.

(a) Purpose; Definitions. — The purpose of this section is to benefit certain retired federal government workers on account of their public service. The following definitions apply in this section:

(1) Federal retirement benefits. — Retirement benefits received from one or more federal government retirement plans.

(2) Net pension tax. — The amount of tax a taxpayer paid under this Part for the 1985, 1986, 1987, and 1988 tax years on federal retirement benefits, without interest, less any part of the tax for which the taxpayer received a credit under this section before 1997 and any part of the tax refunded to the taxpayer before 1997.

(3) Tax year. — The taxpayer's taxable year beginning on a day in the applicable calendar year.

(b) Credit. — A taxpayer who received federal retirement benefits during the 1985, 1986, 1987, or 1988 tax year may claim a credit against the tax imposed by this Part equal to the net pension tax on those benefits. The credit allowed under this section shall be taken in equal installments over the taxpayer's first three taxable years beginning on or after January 1, 1996. The credit allowed under this section may not exceed the amount of tax imposed by this Part reduced by the sum of all credits allowed against the tax, except payments of tax made by or on behalf of the taxpayer; any unused portion of a credit installment may be carried forward to the 1999 and 2000 tax years.

(c) Partial Refund Alternative. — If the amount of tax imposed by this Part on the taxpayer for the taxpayer's 1996 tax year, reduced by the sum of all credits allowed against the tax except payments of tax made by or on behalf of the taxpayer, is less than five percent (5%) of the taxpayer's net pension tax for which credit is allowed, the taxpayer is eligible to elect a partial refund under this subsection in lieu of claiming the credit. The partial refund allowed under this subsection is equal to the lesser of eighty-five percent (85%) of the taxpayer's net pension tax or the reduced amount determined by the Secretary as provided in this subsection. To elect the partial refund, an eligible taxpayer must file with the Secretary on or before April 15, 1997, a written request for a partial refund of the taxpayer's net pension. The Secretary shall calculate from these requests eighty-five percent (85%) of the total amount of net pension tax for which partial refunds have been claimed and, if this sum exceeds the amount in the Federal Retiree Refund Account created in this section, shall allocate the amount in the Account among the eligible taxpayers claiming partial refunds by reducing each taxpayer's claimed refund in proportion to the size of the claimed refund. The Secretary shall remit these partial refunds before January 1, 1998.

(d) Substantiation; Deceased Taxpayers. — In order to claim a refund or credit under this section, a taxpayer must provide any information required by the Secretary to establish the taxpayer's eligibility for tax benefit and the amount of the tax benefit. In the case of a taxpayer who is deceased, the representative of the taxpayer's estate may claim the refund in the name of the deceased taxpayer and, if the taxpayer does not qualify for a refund, the surviving spouse may claim the deceased taxpayer's credit. If there is no surviving spouse, the representative of the taxpayer's estate may claim the credit in the name of the taxpayer but may not carry forward any unused portion of the credit to the 1999 or 2000 tax year.

(e) Federal Retiree Accounts. — There are created in the Department of Revenue two special accounts to be known as the Federal Retiree Refund Account and the Federal Retiree Administration Account. Funds in the Federal Retiree Refund Account shall be spent only for partial refunds pursuant to subsection (c) of this section. The Department of Revenue may use funds in the Federal Retiree Administration Account only for the costs of administering this section. Funds in the Federal Retiree Refund Account and the Federal Retiree Administration Account shall not revert to the General Fund until the Director of the Budget certifies that the Department of Revenue has completed all duties necessary to implement this section, including processing the escheat of refund checks that have not been cashed. (1989 (Reg. Sess., 1990), c. 984, s. 6; 1991, c. 45, s. 11; 1996, 2nd Ex. Sess., c. 19, s. 1; 1997-499, ss. 1, 2; 1998-98, s. 69.)

CASE NOTES

Cited in Swanson v. State, 335 N.C. 674, 441 S.E.2d 537 (1994).

§ 105-151.21. Credit for property taxes paid on farm machinery.

(a) Credit. — An individual engaged in the business of farming is allowed a credit against the tax imposed by this Part equal to the amount of property taxes the individual paid at par during the taxable year on farm machinery and on attachments and repair parts for farm machinery. In addition, an individual shareholder of an S Corporation engaged in the business of farming is allowed a credit against the tax imposed by this Part equal to the shareholder's pro rata share of the amount of property taxes the S Corporation paid at par during the taxable year on farm machinery and on attachments and repair parts for farm machinery. The total credit allowed under this section may not exceed one thousand dollars ($1,000) for the taxable year and may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except payments of tax made by or on behalf of the taxpayer. To claim the credit, the taxpayer shall attach to the return a copy of the tax receipt for the property taxes for which credit is claimed. The receipt must indicate that the taxes have been paid and the amount and date of the payment.

(b) Definitions. — The following definitions apply in this section:

(1) Farm machinery. — Machinery exempt from State sales tax under G.S. 105-164.13(1)b.

(2) Property taxes. — The principal amount of taxes levied and assessed by a taxing unit under Subchapter II of this Chapter. The term does not include costs, penalties, interest, or other charges that may be added to the principal amount.

(3) Taxing unit. — Defined in G.S. 105-273.

(c) Adjustment. If a taxing unit gives a taxpayer a credit or refund for any of the property taxes for which the taxpayer claimed a credit under this section, the taxpayer shall notify the Secretary within 90 days. The Secretary shall then recompute the credit allowed under this section and make any resulting adjustment of income tax for the taxable year for which the credit was claimed. (1985, c. 656, s. 13(3); 1987, c. 804, s. 6; 1991, c. 45, s. 14(a); 1998-98, s. 103; 2001-414, s. 11; 2005-276, s. 33.25.)

Editor's Note. — This section is G.S. 105-163.07, as recodified as G.S. 105-151.21 and amended by Session Laws 1991, c. 45, s. 14(a).

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, as amended by Session Laws 2005-435, s. 58, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 33.25, effective for taxable years beginning on or after January 1, 2006, rewrote subdivision (b)(1); and made minor punctuation changes.

§ 105-151.22. (Effective for taxable years ending before January 1, 2009) Credit for North Carolina State Ports Authority wharfage, handling, and throughput charges.

(a) Credit. — A taxpayer whose waterborne cargo is loaded onto or unloaded from an ocean carrier calling at the State-owned port terminal at Wilmington or Morehead City, without consideration of the terms under which the cargo is moved, is allowed a credit against the tax imposed by this Part. The amount of credit allowed is equal to the excess of the wharfage, handling (in or out), and throughput charges assessed on the cargo for the current taxable year over an amount equal to the average of the charges for the current taxable year and the two preceding taxable years. The credit applies to forest products, break-bulk cargo and container cargo, including less-than-container-load cargo, that is loaded onto or unloaded from an ocean carrier calling at either the Wilmington or Morehead City port terminal and to bulk cargo that is loaded onto or unloaded from an ocean carrier calling at the Morehead City port terminal. To obtain the credit, taxpayers must provide to the Secretary a statement from the State Ports Authority certifying the amount of charges for which a credit is claimed and any other information required by the Secretary.

(b) Limitations. — This credit may not exceed fifty percent (50%) of the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except tax payments made by or on behalf of the taxpayer. Any unused portion of the credit may be carried forward for the succeeding five years. The maximum cumulative credit that may be claimed by a taxpayer under this section is two million dollars ($2,000,000).

(c) Definitions. — For purposes of this section, the terms "handling" (in or out) and "wharfage" have the meanings provided in the State Ports Tariff Publications, "Wilmington Tariff, Terminal Tariff #6," and "Morehead City Tariff, Terminal Tariff #1." For purposes of this section, the term "throughput" has the same meaning as "wharfage" but applies only to bulk products, both dry and liquid.

(c1) Report. — The Department of Revenue must publish by May 1 of each year the following information itemized by taxpayer for the 12-month period ending the preceding December 31:

(1) The number of taxpayers taking a credit allowed in this section.
(2) The total amount of charges assessed for the taxable year.
(3) The total cost to the General Fund of the credits taken.

(d) Sunset. — This section is repealed effective for taxable years beginning on or after January 1, 2009. (1991 (Reg. Sess., 1992), c. 977, s. 2; 1993 (Reg. Sess., 1994), c. 681, s. 2; 1995, c. 17, s. 17; c. 495, ss. 2-4; 1996, 2nd Ex. Sess., c. 18, s. 15.3(b); 1997-443, s. 29.1 (a), (b), (d); 1998-98, s. 69; 2001-517, ss. 1, 2; 2002-99, s. 6(d); 2003-414, s. 8; 2005-429, s. 2.11; 2007-527, s. 26(b).)

Editor's Note. — Session Laws 2002-99, s. 6(a), effective August 29, 2002, amended Session Laws 1991 (Reg. Sess., 1992), c. 977, s. 4, which, as amended by Session Laws 1995, c. 17, s. 17, by Session Laws 1995, c. 495, s. 3, by Session Laws 1997-443, s. 29.1(a), and by Session Laws 2001-517, s. 1, made this section effective for taxable years beginning on or after March 1, 1992, and provided for its expiration for taxable years beginning on or after January 1, 2003, by deleting the sunset provision. For sunset, see now subsection (d) of this section.

Session Laws 2002-99, s. 6(b), effective August 29, 2002, amended Session Laws 1993, c. 681, s. 4, which, as amended by Session Laws 1995, c. 17, s. 17, by Session Laws 1995, c. 495, s. 4, by Session Laws 1997-443, s. 29.1(b), and by Session Laws 2001-517, s. 2, made the amendments to this section by the 1993 act effective for taxable years beginning on or after January 1, 1994, by deleting the sunset provision. For sunset, see now subsection (d) of this section.

Session Laws 1991 (Reg. Sess., 1992), c. 977, s. 4, as amended by Session Laws 1995, c. 495, s. 3, by Session Laws 1997-443, s. 29.1(a), and by Session Laws 2001-517, s. 1, and by Session Laws 2002-99, s. 6(a), made this section effective for taxable years beginning on or after March 1, 1992.

Session Laws 1993, c. 681, s. 4, as amended by Session Laws 1995, c. 17, s. 17, by Session Laws 1995, c. 495, s. 4, by Session Laws 1997-443, s. 29.1(b), and by Session Laws 2001-517, s. 2, and by Session Laws 2002-99, s. 6(b), made the amendments to this section by the 1993 act effective for taxable years beginning on or after January 1, 1994.

Session Laws 2001-517, s. 3, provides that the act, which extended the sunset for this section, is effective for taxable years beginning on or after March 2, 2000.

Session Laws 2005-429, s. 3, provides: "The Economic Development Oversight Committee shall study the issue of public disclosure as it relates to economic development efforts. Specifically, the Committee shall study ways of providing the public information about the employment levels, and any changes in employment levels, of businesses that receive economic development incentives from the State or local governments. The Committee may make an interim report on this study, including any recommendations for legislative proposals, to the 2006 Regular Session of the 2005 General Assembly and shall make a final report on this study to the 2007 General Assembly."

Effect of Amendments. — Session Laws 2005-429, s. 2.11, effective January 1, 2007, added subsection (c1).

Session Laws 2007-527, s. 26(b), effective August 31, 2007, substituted "assessed for the taxable year" for "with respect to which credits were taken" in subdivision (c1)(2).

§ **105-151.23:** Recodified as §§ 105-129.35 through 105-129.37 by Session Laws 1999-389, s. 6, effective for taxable years beginning on or after January 1, 1999.

Editor's Note. — Session Laws 1999-389, s. 6 provides that Article 3D of Chapter 105, as amended by Session Laws 1999-389, incorporates both G.S. 105-130.42 and G.S. 105-151.23.

§ 105-151.24. Credit for children.

(a) Credit. — An individual who is allowed a federal child tax credit under section 24 of the Code for the taxable year and whose adjusted gross income (AGI), as calculated under the Code, is less than the amount listed below is allowed a credit against the tax imposed by this Part in an amount equal to one hundred dollars ($100.00) for each dependent child for whom the individual is allowed the federal credit for the taxable year:

Filing Status	AGI
Married, filing jointly	$100,000
Head of Household	80,000
Single	60,000
Married, filing separately	50,000.

(b) Limitations. — A nonresident or part-year resident who claims the credit allowed by this section shall reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate. The credit allowed under this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer. (1995, c. 42, s. 3; 1998-98, s. 69; 2001-424, s. 34.20(a); 2002-126, s. 30B.2(a), (b); 2003-284, s. 39B.2.)

Editor's Note. — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

§ 105-151.25. Credit for construction of a poultry composting facility.

(a) Credit. — A taxpayer who constructs in this State a poultry composting facility as defined in G.S. 106-549.51 for the composting of whole, unprocessed poultry carcasses from commercial operations in which poultry is raised or produced is allowed as a credit against the tax imposed by this Division an amount equal to twenty-five percent (25%) of the installation, materials, and equipment costs of construction paid during the taxable year. This credit may not exceed one thousand dollars ($1,000) for any single installation. The credit allowed by this section may not exceed the amount of tax imposed by this Division for the taxable year reduced by the sum of all credits allowable, except payments of tax by or on behalf of the taxpayer. The credit allowed by this section does not apply to costs paid with funds provided the taxpayer by a State or federal agency.

(b) Property Owned by the Entirety. — In the case of property owned by the entirety, if both spouses are required to file North Carolina income tax returns, the credit allowed by this section may be claimed only if the spouses file a joint return. If only one spouse is required to file a North Carolina income tax return, that spouse may claim the credit allowed by this section on a separate return. (1995, c. 543, s. 1; 1998-134, ss. 2, 3.)

§ 105-151.26. (Effective for taxable years beginning on or after January 1, 2011) Credit for charitable contributions by nonitemizers.

A taxpayer who elects the standard deduction under section 63 of the Code for federal tax purposes is allowed as a credit against the tax imposed by this Part an amount equal to seven percent (7%) of the taxpayer's excess charitable contributions. The taxpayer's excess charitable contributions are the amount by which the taxpayer's charitable contributions for the taxable year that would have been deductible under section 170 of the Code if the taxpayer had not elected the standard deduction exceed two percent (2%) of the taxpayer's adjusted gross income as calculated under the Code.

No credit shall be allowed under this section for amounts deducted from gross income in calculating taxable income under the Code or for contributions for which a credit was claimed under G.S. 105-151.12 or G.S. 105-151.14. A nonresident or part-year resident who claims the credit allowed by this section shall reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate. The credit allowed under this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer. (1996, 2nd Ex. Sess., c. 13, s. 7.1; 1998-98, s. 69; 1998-183, s. 1.)

Section Set Out Twice. — The section above is in effect for taxable years beginning on or after January 1, 2011. For this section as in effect for taxable years beginning on or after January 1, 2006, and expires for taxable years beginning on or after January 1, 2011, see the following section.

§ 105-151.26. (Expires for taxable years beginning on or after January 1, 2011) Credit for charitable contributions by nonitemizers.

A taxpayer who elects the standard deduction under section 63 of the Code for federal tax purposes is allowed as a credit against the tax imposed by this

G.S. 105-151.26 is set out twice. See notes.

Part an amount equal to seven percent (7%) of the taxpayer's excess charitable contributions. The taxpayer's excess charitable contributions are the amount by which the taxpayer's charitable contributions for the taxable year that would have been deductible under section 170 of the Code if the taxpayer had not elected the standard deduction exceed two percent (2%) of the taxpayer's adjusted gross income as calculated under the Code.

No credit shall be allowed under this section for amounts deducted from gross income in calculating taxable income under the Code or for contributions for which a credit was claimed under G.S. 105-151.12, 105-151.14, or 151.30. A nonresident or part-year resident who claims the credit allowed by this section shall reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate. The credit allowed under this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer. (1996, 2nd Ex. Sess., c. 13, s. 7.1; 1998-98, s. 69; 1998-183, s. 1; 2006-66, s. 24.18(d).)

Section Set Out Twice. — The section above is effective for taxable years beginning on or after January 1, 2006, and expires for taxable years beginning on or after January 1, 2011. For this section as in effect for taxable years beginning on or after January 1, 2011, see the preceding section.

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 24.18(d), effective for taxable years beginning on or after January 1, 2006, and expires for taxable years beginning on or after January 1, 2011, substituted "G.S. 105-151.12, 105-151.14, or 151.30" for "G.S. 105-151.12 or G.S. 105-151.14" in the first sentence of the second paragraph.

§ 105-151.27: Repealed by Session Laws 2001-424, s. 34.21(a), effective for taxable years beginning on or after January 1, 2001.

§ 105-151.28. (Repealed for taxable years beginning on or after January 1, 2013) Credit for premiums paid on long-term care insurance.

(a) Credit. — A taxpayer whose adjusted gross income (AGI), as calculated under the Code, is less than the amount listed in this section is allowed, as a credit against the tax imposed by this Part, an amount equal to fifteen percent (15%) of the premium costs the taxpayer paid during the taxable year on a qualified long-term care insurance contract that offers coverage to either the taxpayer, the taxpayer's spouse, or a dependent for whom the taxpayer was allowed to deduct a personal exemption under section 151(c) of the Code for the taxable year. The credit allowed by this section may not exceed three hundred fifty dollars ($350.00) for each qualified long-term care insurance contract for which a credit is claimed. The credit allowed under this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer. A nonresident or part-year resident who claims the credit allowed by this subsection shall reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate.

Filing Status	AGI
Married, filing jointly	$100,000

Filing Status	AGI
Head of Household	80,000
Single	60,000
Married, filing separately	50,000

(b) No Double Benefit. — No credit is allowed for payments that are deducted from, or not included in, the taxpayer's gross income for the taxable year. If the taxpayer claimed a deduction for health insurance costs of self-employed individuals under section 162(l) of the Code for the taxable year, the amount of credit otherwise allowed the taxpayer under this section is reduced by the applicable percentage provided in section 162(l) of the Code. If the taxpayer claimed a deduction for medical care expenses under section 213 of the Code for the taxable year, the taxpayer is not allowed a credit under this section. A taxpayer who claims the credit allowed by this section must provide any information required by the Secretary to demonstrate that the amount paid for premiums for which the credit is claimed was not excluded from the taxpayer's gross income for the taxable year.

(c) Definition. — For purposes of this section, the term "qualified long-term care insurance contract" has the same meaning as defined in section 7702B of the Code.

(d) Sunset. — This section is repealed for taxable years beginning on or after January 1, 2013. (1998-212, s. 29A.6(a); 2007-323, s. 31.5(a).)

Editor's Note. — Session Laws 1998-212, s. 29A.6(d), made this section effective for taxable years beginning on or after January 1, 1999, and provided that it expires for taxable years beginning on or after January 1, 2004. This section was reenacted by Session Laws 2007-323, s. 31.5(a), effective for taxable years beginning on or after January 1, 2007.

Session Laws 1998-212, s. 30.2 provides "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year."

Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 29A.3 contains a savings clause.

Session Laws 1998-212, s. 30.5 contains a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 31.5(a), effective for taxable years beginning on or after January 1, 2007, reenacted the section; in subsection (a), in the first sentence, substituted "A taxpayer whose adjusted gross income (AGI), as calculated under the Code, is less than the amount listed in this section is" for "An individual is", substituted "taxpayer" for "individual" three times, substituted "taxpayer's spouse" for "individual's spouse" and deleted "(1)(A)" following "section 151(c)," and added the table showing filing status and AGI; and added subsection (d).

§ 105-151.29. (Repealed for qualifying expenses occurring on or after January 1, 2010) Credit for qualifying expenses of a production company.

(a) Definitions. — The following definitions apply in this section:

(1) Highly compensated individual. — An individual who directly or indirectly receives compensation in excess of one million dollars ($1,000,000) for personal services with respect to a single production. An individual receives compensation indirectly when a production company pays a personal service company or an employee leasing company that pays the individual.

(2) Live sporting event. — A scheduled sporting competition, game, or race that is not originated by a production company, but originated solely by an amateur, collegiate, or professional organization, institution, or association for live or tape-delayed television or satellite broadcast. A live sporting event does not include commercial advertising, an episodic television series, a television pilot, a music video, a motion picture, or a documentary production in which sporting events are presented through archived historical footage or similar footage taken at least 30 days before it is used.

(3) Production company. — Defined in G.S. 105-164.3.

(4) Qualifying expenses. — The sum of the following amounts spent in this State by a production company in connection with a production, less the amount paid to a highly compensated individual:

a. Goods and services leased or purchased. For goods with a purchase price of twenty-five thousand dollars ($25,000) or more, the amount included in qualifying expenses is the purchase price less the fair market value of the good at the time the production is completed.

b. Compensation and wages on which withholding payments are remitted to the Department of Revenue under Article 4A of this Chapter.

(b) Credit. — A taxpayer that is a production company and has qualifying expenses of at least two hundred fifty thousand dollars ($250,000) with respect to a production is allowed a credit against the taxes imposed by this Part equal to fifteen percent (15%) of the production company's qualifying expenses. For the purposes of this section, in the case of an episodic television series, an entire season of episodes is one production. The credit is computed based on all of the taxpayer's qualifying expenses incurred with respect to the production, not just the qualifying expenses incurred during the taxable year.

(c) Pass-Through Entity. — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this section does not distribute the credit among any of its owners. The pass-through entity is considered the taxpayer for purposes of claiming the credit allowed by this section. If a return filed by a pass-through entity indicates that the entity is paying tax on behalf of the owners of the entity, the credit allowed under this section does not affect the entity's payment of tax on behalf of its owners.

(d) Return. — A taxpayer may claim the credit allowed by this section on a return filed for the taxable year in which the production activities are completed. The return must state the name of the production, a description of the production, and a detailed accounting of the qualifying expenses with respect to which a credit is claimed.

(e) Credit Refundable. — If the credit allowed by this section exceeds the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, the Secretary must refund the excess to the taxpayer. The refundable excess is governed by the provisions governing a refund of an overpayment by the taxpayer of the tax imposed in this Part. In computing the amount of tax against which multiple credits are allowed, nonrefundable credits are subtracted before refundable credits.

(f) Limitations. — The amount of credit allowed under this section with respect to a production that is a feature film may not exceed seven million five hundred thousand dollars ($7,500,000). No credit is allowed under this section for any production that satisfies one of the following conditions:

(1) It is political advertising.

(2) It is a television production of a news program or live sporting event.

(3) It contains material that is obscene, as defined in G.S. 14-190.1.

(4) It is a radio production.

(g) Substantiation. — A taxpayer allowed a credit under this section must maintain and make available for inspection any information or records required by the Secretary of Revenue. The taxpayer has the burden of proving eligibility for a credit and the amount of the credit. The Secretary may consult with the North Carolina Film Office of the Department of Commerce and the regional film commissions in order to determine the amount of qualifying expenses.

(h) Report. — The Department of Revenue must publish by May 1 of each year the following information, itemized by taxpayer for the 12-month period ending the preceding December 31:

(1) The location of sites used in a production for which a credit was claimed.

(2) The qualifying expenses for which a credit was claimed, classified by whether the expenses were for goods, services, or compensation paid by the production company.

(3) The number of people employed in the State with respect to credits claimed.

(4) The total cost to the General Fund of the credits claimed.

(i) **(Repealed effective for taxable years beginning on and after January 1, 2007)** No Double Benefit. — A taxpayer may not claim a credit under this section for qualifying expenses for which it claimed a deduction under the Code. A taxpayer that claims a credit provided under this section must adjust taxable income as provided in G.S. 105-134.6(c)(9).

(j) Sunset. — This section is repealed for qualifying expenses occurring on or after January 1, 2010. (2005-276, s. 39.1(b); 2005-345, ss. 47(c), 47(d); 2006-162, s. 4(b); 2006-220, s. 4; 2007-527, s. 24.)

Editor's Note. — Session Laws 2005-276, s. 39.1(g), made this section effective for taxable years beginning on or after January 1, 2005, and applicable to qualifying expenses incurred on or after July 1, 2005.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-345, ss. 47(c) and (d), effective for taxable years beginning on or after January 1, 2005, and applicable to qualifying expenses incurred on or after July 1, 2005, added subdivision (a)(2); and inserted "live" preceding "sporting event" in subdivision (f)(2).

Session Laws 2006-162, s. 4(b), as amended by Session Laws 2007-527, s. 24, effective July 24, 2006, and applicable for taxable years beginning on or after January 1, 2006, in subdivision (a)(1), inserted "directly or indirectly" in the middle of the first sentence and added the second sentence; rewrote the last sentence of subdivision (a)(2) which read: "A live sporting event shall not include commercial advertising, an episodic television series, a television pilot, music video, motion picture, or documentary production where any sporting events are presented through archived historical footage or similar footage depicting earlier live sporting events that originated more than thirty days before the time of such usage."; and, in subdivision (a)(4), in the introductory paragraph, substituted "following amounts" for "total amount" near the beginning, deleted "for the following" following "this State" and added ", less the amount paid to a highly compensated individual", deleted "by the production company" following "purchased" at the end of the first sentence in subdivision (a)(1)(a), and, in subdivision (a)(4)(b), substituted "wages on which" for "wages paid by the production company, other than amounts paid to a highly compensated individual, on which the production company remitted" and inserted "are remitted" near the end.

Session Laws 2006-220, s. 4, effective for taxable years beginning on and after January 1, 2007, repealed subsection (i), which read: "No Double Benefit. — A taxpayer may not claim a credit under this section for qualifying expenses for which it claimed a deduction under the Code. A taxpayer that claims a credit provided under this section must adjust taxable income as provided in G.S. 105-134.6(c)(9)."

§ 105-151.30. (Repealed for taxable years beginning on or after January 1, 2011) Credit for recycling oyster shells.

(a) Credit. — A taxpayer who donates oyster shells to the Division of Marine Fisheries of the Department of Environment and Natural Resources is eligible for a credit against the tax imposed by this Part. The amount of the credit is equal to one dollar ($1.00) per bushel of oyster shells donated.

(b) Limitation. — The credit allowed under this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except tax payment made by or on behalf of the taxpayer.

(c) Carryforward. — Any unused portion of a credit allowed in this section may be carried forward for the succeeding five years.

(d) Documentation of Credit. — Upon request, to support the credit allowed by this section, the taxpayer must file with its income tax return, for the taxable year in which the credit is claimed, a certification by the Department of Environment and Natural Resources stating the number of bushels of oyster shells donated by the taxpayer.

(e) No Double Benefit. — A taxpayer who claims a credit under this section must add back to taxable income any amount deducted under the Code for the donation of the oyster shells.

(f) Sunset. — This section is repealed effective for taxable years beginning on or after January 1, 2011. (2006-66, s. 24.18(c); 2007-527, s. 9(b).)

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 24.18(g) provides that this section is effective for taxable years beginning on or after January 1, 2006, and expires for taxable years beginning on or after January 1, 2011.

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2007-527, s. 9(b), effective August 31, 2007, added "Upon request" at the beginning of subsection (d).

§ 105-151.31. (Repealed for taxable years beginning on or after January 1, 2013) Earned income tax credit.

(a) Credit. — An individual who claims for the taxable year an earned income tax credit under section 32 of the Code is allowed a credit against the tax imposed by this Part equal to three and one-half percent (3.5%) of the amount of credit the individual qualified for under section 32 of the Code. A nonresident or part-year resident who claims the credit allowed by this section must reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate.

(b) Credit Refundable. — If the credit allowed by this section exceeds the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, the Secretary must refund the excess to the taxpayer. The refundable excess is governed by the provisions governing a refund of an overpayment by the taxpayer of the tax imposed in this Part. Section 3507 of the Code, Advance Payment of Earned Income Credit, does not apply to the credit allowed by this section. In computing the amount of tax against which multiple credits are allowed, nonrefundable credits are subtracted before refundable credits.

(c) Sunset. — This section is repealed effective for taxable years beginning on or after January 1, 2013. (2007-323, s. 31.4(a).)

Editor's Note. — Session Laws 2007-323, s. 31.4(c), makes this section effective for taxable years beginning on or after January 1, 2008.

Session Laws 2007-323, s. 24.3(a), as amended by Session Laws 2007-345, s. 14.3, provides: "The Department of Revenue shall include language in its printed booklets for the individual income tax return that identifies the availability of the State and federal earned income tax credit."

Session Laws 2007-323, s. 24.3(b), as amended by Session Laws 2007-345, s. 14.3, provides: "In order to better ensure taxpayers receive the tax benefits for which they qualify, software companies producing computer programs for tax calculation should design all tax calculation software, other than forms library products, to automatically compute an individual's eligibility for the State and federal earned income tax credit when (i) the taxpayer is a North Carolina resident and (ii) the taxpayer is preparing both the federal and North Carolina individual income tax returns with the tax calculation software."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 105-151.32. (Repealed for taxable years beginning on or after January 1, 2013) Credit for adoption expenses.

(a) Credit. — An individual who is allowed a federal adoption tax credit under section 23 of the Code for the taxable year is allowed a credit against the tax imposed by this Part. The credit is equal to fifty percent (50%) of the amount of credit allowed under section 23 of the Code.

(b) Limitations. — A nonresident or part-year resident who claims the credit allowed by this section shall reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate. The credit allowed under this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer. Any unused portion of this credit may be carried forward for the next succeeding five years.

(c) Sunset. — This section is repealed effective for taxable years beginning on or after January 1, 2013. (2007-323, s. 31.6(a).)

Editor's Note. — Session Laws 2007-323, s. 31.6(c), made this section effective for taxable years beginning on or after January 1, 2007.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 105-152. Income tax returns.

(a) Who Must File. — The following individuals shall file with the Secretary an income tax return under affirmation:

(1) Every resident required to file an income tax return for the taxable year under the Code and every nonresident who (i) derived gross income from North Carolina sources during the taxable year attributable to the ownership of any interest in real or tangible personal property in this State or derived from a business, trade, profession, or occupation carried on in this State and (ii) is required to file an income tax return for the taxable year under the Code.

(2) Repealed by Session Laws 1991 (Reg. Sess., 1992), c. 930, s. 1.

(3) Any individual whom the Secretary believes to be liable for a tax under this Part, when so notified by the Secretary and requested to file a return.

(b) Taxpayer Deceased or Unable to Make Return. — If the taxpayer is unable to file the income tax return, the return shall be filed by a duly authorized agent or by a guardian or other person charged with the care of the person or property of the taxpayer. If an individual who was required to file an income tax return for the taxable year while living has died before making the return, the administrator or executor of the estate shall file the return in the decedent's name and behalf, and the tax shall be levied upon and collected from the estate.

(c) Information Required With Return. — The income tax return shall show the taxable income and adjustments required by this Part and any other information the Secretary requires. The Secretary may require some or all individuals required to file an income tax return to attach to the return a copy of their federal income tax return for the taxable year. The Secretary may require a taxpayer to provide the Department with copies of any other return the taxpayer has filed with the Internal Revenue Service and to verify any information in the return.

(d) Secretary May Require Additional Information. — When the Secretary has reason to believe that any taxpayer conducts a trade or business in a way that directly or indirectly distorts the taxpayer's taxable income or North Carolina taxable income, the Secretary may require any additional information for the proper computation of the taxpayer's taxable income and North Carolina taxable income. In computing the taxpayer's taxable income and North Carolina taxable income, the Secretary shall consider the fair profit that would normally arise from the conduct of the trade or business.

(e) Joint Returns. — A husband and wife whose federal taxable income is determined on a joint federal return shall file a single income tax return jointly if each spouse either is a resident of this State or has North Carolina taxable income and may file a single income tax return jointly if one spouse is not a resident and has no North Carolina taxable income. Except as otherwise provided in this Part, a wife and husband filing jointly are treated as one taxpayer for the purpose of determining the tax imposed by this Part. A husband and wife filing jointly are jointly and severally liable for the tax imposed by this Part reduced by the sum of all credits allowable including tax payments made by or on behalf of the husband and wife. However, if a spouse has been relieved of liability for federal tax attributable to a substantial understatement by the other spouse pursuant to section 6015 of the Code, that spouse is not liable for the corresponding tax imposed by this Part attributable to the same substantial understatement by the other spouse. A wife and husband filing jointly have expressly agreed that if the amount of the payments made by them with respect to the taxes for which they are liable, including withheld and estimated taxes, exceeds the total of the taxes due, refund of the excess may be made payable to both spouses jointly or, if either is deceased, to the survivor alone.

(f) Repealed by Session Laws 1991 (Reg. Sess., 1992), c. 930, s. 1. (1939, c. 158, s. 326; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1951, c. 643, s. 4; 1957, c. 1340, s. 4; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 903, s. 1; c. 1287, s. 5; 1977, c. 315; 1989, c. 728, s. 1.23; 1991 (Reg. Sess., 1992), c. 930, s. 1; 1998-98, ss. 69, 104; 1999-337, s. 25; 2006-66, s. 24.11(a).)

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 24.11(a), effective for taxable years beginning on or after January 1, 2006, rewrote the first sentence in subsection (e).

CASE NOTES

Cited in Garrou Knitting Mills v. Gill, 228 N.C. 764, 47 S.E.2d 240 (1948); State v. Sinnott, 163 N.C. App. 268, 593 S.E.2d 439, 2004 N.C. App. LEXIS 370 (2004).

Deduction of Tax Refunds Received from Estate Share Proper. — Order allowing an estate to deduct one-half of the federal income tax refund and a portion of the state income tax refund received by a widow from joint tax returns from the widow's share of the estate was proper. Bryant v. Bowers, — N.C. App. —, 641 S.E.2d 855, 2007 N.C. App. LEXIS 583 (2007).

§ **105-152.1:** Repealed by Session Laws 1991 (Reg. Sess., 1992), c. 930, s. 12.

§ **105-153:** Repealed by Session Laws 1967, c. 1110, s. 3.

§ 105-154. Information at the source returns.

(a) Repealed by Session Laws 1993, c. 354, s. 14.

(b) Information Returns of Payers. — A person who is a resident of this State, has a place of business in this State, or has an employee, an agent, or another representative in any capacity in this State shall file an information return as required by the Secretary if the person directly or indirectly pays or controls the payment of any income to any taxpayer. The return shall contain all information required by the Secretary. The filing of any return in compliance with this section by a foreign corporation is not evidence that the corporation is doing business in this State.

(c) Information Returns of Partnerships. — A partnership doing business in this State and required to file a return under the Code shall file an information return with the Secretary. A partnership that the Secretary believes to be doing business in this State and to be required to file a return under the Code shall file an information return when requested to do so by the Secretary. The information return shall contain all information required by the Secretary. It shall state specifically the items of the partnership's gross income, the deductions allowed under the Code, and the adjustments required by this Part. The information return shall also include the name and address of each person who would be entitled to share in the partnership's net income, if distributable, and the amount each person's distributive share would be. The information return shall specify the part of each person's distributive share of the net income that represents corporation dividends. The information return shall be signed by one of the partners under affirmation in the form required by the Secretary.

A partnership that files an information return under this subsection shall furnish to each person who would be entitled to share in the partnership's net income, if distributable, any information necessary for that person to properly file a State income tax return. The information shall be in the form prescribed by the Secretary and must be furnished on or before the due date of the information return.

(d) Payment of Tax on Behalf of Nonresident Owner or Partner. — If a business conducted in this State is owned by a nonresident individual or by a partnership having one or more nonresident members, the manager of the business shall report the earnings of the business in this State, the distributive share of the income of each nonresident owner or partner, and any other information required by the Secretary. The manager of the business shall pay with the return the tax on each nonresident owner or partner's share of the income computed at the rate levied on individuals under G.S. 105-134.2(a)(3). The business may deduct the payment for each nonresident owner or partner from the owner or partner's distributive share of the profits of the business in this State. If the nonresident partner is not an individual and the partner has executed an affirmation that the partner will pay the tax with its corporate, partnership, trust, or estate income tax return, the manager of the business is not required to pay the tax on the partner's share. In this case, the manager shall include a copy of the affirmation with the report required by this subsection. (1939, c. 158, s. 328; 1945, c. 708, s. 4; 1957, c. 1340, s. 4; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 1287, s. 5; 1989, c. 728, s. 1.25; 1989 (Reg. Sess., 1990), c. 814, s. 19; 1991 (Reg. Sess., 1992), c. 930, s. 2; 1993, c. 314, s. 1; c. 354, s. 14; 1998-98, s. 69; 1999-337, s. 26.)

CASE NOTES

Applied in Reddington v. Thomas, 45 N.C. App. 236, 262 S.E.2d 841 (1980).

Cited in Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981); Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268 (1982).

§ 105-155. Time and place of filing returns; extensions; affirmation.

(a) Return. — An income tax return shall be filed at the place and in the form prescribed by the Secretary. The income tax return of every taxpayer reporting on a calendar year basis is due on or before the fifteenth day of April in each year. The income tax return of every taxpayer reporting on a fiscal year basis is due on or before the fifteenth day of the fourth month following the close of the fiscal year. These dates do not apply to a nonresident alien whose federal income tax return is due at a later date under section 6072(c) of the Code. The return of a nonresident alien affected by that Code section is due on or before the fifteenth day of the sixth month following the close of the taxable year. An information return shall be filed at the times prescribed by the Secretary. A taxpayer may ask the Secretary for an extension of time to file a return under G.S. 105-263.

(b) Repealed by 1991 (Regular Session, 1992), c. 930, s. 3.

(c) Repealed by Session Laws 1998-217, s. 44, effective October 31, 1998.

(d) Forms. — Returns and affirmations shall be in the form prescribed by the Secretary. (1939, c. 158, s. 329; 1943, c. 400, s. 4; 1951, c. 643, s. 4; 1953, c. 1302, s. 4; 1955, c. 17, s. 1; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1989, c. 728, s. 1.26; 1989 (Reg. Sess., 1990), c. 984, s. 10; 1991, c. 45, s. 12; 1991 (Reg. Sess., 1992), c. 930, s. 3; 1998-217, s. 44; 2006-18, s. 8.)

Effect of Amendments. — Session Laws 2006-18, s. 8, effective for taxable years beginning on or after January 1, 2006, rewrote subsection (a).

Legal Periodicals. — For brief comment on the 1953 amendment which rewrote the second paragraph, see 31 N.C.L. Rev. 441 (1953).

CASE NOTES

Applied in City of Winston-Salem v. Powell Paving Co., 7 F. Supp. 424 (M.D.N.C. 1934).

§ 105-156. Failure to file returns; supplementary returns.

If the Secretary is of the opinion that any taxpayer has failed to file a return or to include in a return filed, either intentionally or through error, taxable income, the Secretary may require from the taxpayer a return or supplementary return, under oath, in such form as the Secretary shall prescribe, of all the items of gross income the taxpayer received during the year for which the return is made, whether or not taxable under the provisions of this Part. If from a supplementary return or otherwise the Secretary finds that any taxable income has been omitted from the original return, he may require the taxable income so omitted to be disclosed to him under oath of the taxpayer, and to be added to the original return. The supplementary return and the correction of the original return shall not relieve the taxpayer from any of the penalties under any provision of G.S. 105-236. The Secretary may proceed under the provisions of G.S. 105-241.1 whether or not he requires a return or a supplementary return under this section. (1939, c. 158, s. 331; 1959, c. 1259, s. 8; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1989, c. 728, s. 1.27; 1989 (Reg. Sess., 1990), c. 814, s. 20; 1998-98, s. 69.)

Editor's Note. — G.S. 105-241.1, referred to in this section, was repealed by Session Laws 2007-491, s. 2.

§ **105-156.1:** Repealed by Session Laws 1989, c. 728, s. 1.28.

§ 105-157. When tax must be paid.

(a) Except as otherwise provided in this section and in Article 4A of this Chapter, the full amount of the tax payable as shown on the return must be paid to the Secretary within the time allowed for filing the return. If the amount shown to be due is less than one dollar ($1.00), no payment need be made.

(b) Repealed by Session Laws 1993, c. 450, s. 4. (1939, c. 158, s. 332; 1943, c. 400, s. 4; 1947, c. 501, s. 4; 1951, c. 643, s. 4; 1955, c. 17, s. 2; 1959, c. 1259, s. 2; 1963, c. 1169, s. 2; 1967, c. 702, s. 1; c. 1110, s. 3; 1973, c. 476, s. 193; c. 903, s. 2; c. 1287, s. 5; 1989, c. 728, s. 1.29; 1989 (Reg. Sess., 1990), c. 984, s. 11; 1991 (Reg. Sess., 1992), c. 930, s. 4; 1993, c. 450, s. 4.)

CASE NOTES

Applied in City of Winston-Salem v. Powell Paving Co., 7 F. Supp. 424 (M.D.N.C. 1934).

§ 105-158. Taxation of certain armed forces personnel and other individuals upon death.

An individual is not subject to the tax imposed by this Part for a taxable year if, under section 692 of the Code, the individual is not subject to federal income tax for that same taxable year. (1969, c. 1116; 1979, c. 179, s. 2; 1989, c. 728, s. 1.30; 1991, c. 439, s. 2; 1998-98, s. 69.)

Editor's Note. — Former G.S. 105-158 was repealed by Session Laws 1959, c. 1259, s. 9.

§ 105-159. (Effective for taxable years beginning before January 1, 2007) Federal corrections.

If a taxpayer's federal taxable income is corrected or otherwise determined by the federal government, the taxpayer must, within six months after being notified of the correction or final determination by the federal government, file an income tax return with the Secretary reflecting the corrected or determined taxable income. The Secretary shall determine from all available evidence the taxpayer's correct tax liability for the taxable year. As used in this section, the term 'all available evidence' means evidence of any kind that becomes available to the Secretary from any source, whether or not the evidence was considered in the federal correction or determination.

The Secretary shall assess and collect any additional tax due from the taxpayer as provided in Article 9 of this Chapter. The Secretary shall refund any overpayment of tax as provided in Article 9 of this Chapter. A taxpayer who fails to comply with this section is subject to the penalties in G.S. 105-236 and forfeits the right to any refund due by reason of the determination. (1939, c. 158, s. 334; 1947, c. 501, s. 4; 1949, c. 392, s. 3; 1957, c. 1340, s. 14; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1989, c. 728, s. 1.31; 1993 (Reg. Sess., 1994), c. 582, s. 1; 2006-18, s. 5.)

Section Set Out Twice. — The section above is effective for taxable years beginning before January 1, 2007. For section as in effect for taxable years beginning on or after January 1, 2007, see the following section, also numbered G.S. 105-159.

Effect of Amendments. — Session Laws 2006-18, s. 5, effective July 1, 2006, and applicable to federal determinations made on or after that date, substituted "six months" for "two years" in the first sentence of the first undesignated paragraph.

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

CASE NOTES

This section imposes on the taxpayer a positive duty with respect to his income tax liability beyond that required by G.S. 105-152, respecting his original return; it is his duty not only to report the change made by the federal department but to file another return under oath reflecting it. Garrou Knitting Mills v. Gill, 228 N.C. 764, 47 S.E.2d 240 (1948).

This section imposes a positive duty upon taxpayers beyond the requirements as to their original return. State v. Patton, 57 N.C. App. 702, 292 S.E.2d 172 (1982).

Correction of Net Income by Federal Officer Requires New Return. — The taxpayer whose net income for any year is corrected by the Commissioner of Internal Revenue or other authorized federal officer must file a new return reflecting his corrected net income within two years [now 6 months] after receipt of the federal agent's report. Failure to make such a new return within the time specified subjects the taxpayer to all penalties provided by G.S. 105-236 including, when applicable, the criminal penalty provided by G.S. 105-236(7). State v. Patton, 57 N.C. App. 702, 292 S.E.2d 172 (1982).

Effect on North Carolina Net Income Not Required. — This section does not require that the taxpayer's North Carolina net income be affected before it governs a taxpayer's duty to report changes in his federal net income. McFarland v. Justus, 113 N.C. App. 107, 437 S.E.2d 668 (1993), decision based on pre-1989 law.

Procedure Under Former Statute Exclusive. — The procedure prescribed by the former statute requiring that a new return be made within 30 days of the receipt of the redetermination of the taxpayer's income tax by the federal government was held exclusive and had to be followed to entitle the taxpayer to the relief therein provided. State ex rel. Maxwell v. Hinsdale, 207 N.C. 37, 175 S.E. 847 (1934).

Statute of Limitations Extended. — Failure to notify the Secretary of Revenue of the assessment of additional taxes by the Commissioner of Internal Revenue pursuant to this section extended the statute of limitations. McFarland v. Justus, 113 N.C. App. 107, 437 S.E.2d 668 (1993), decision based on pre-1989 law.

Cited in American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963); Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

§ 105-159. (Effective for taxable years beginning on or after January 1, 2007) Federal corrections.

If a taxpayer's federal taxable income is corrected or otherwise determined by the federal government, the taxpayer must, within six months after being notified of the correction or final determination by the federal government, file an income tax return with the Secretary reflecting the corrected or determined taxable income. The Secretary must propose an assessment for any additional tax due from the taxpayer as provided in Article 9 of this Chapter. The Secretary must refund any overpayment of tax as provided in Article 9 of this Chapter. A taxpayer who fails to comply with this section is subject to the penalties in G.S. 105-236 and forfeits the right to any refund due by reason of the determination. (1939, c. 158, s. 334; 1947, c. 501, s. 4; 1949, c. 392, s. 3; 1957, c. 1340, s. 14; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1989, c. 728, s. 1.31; 1993 (Reg. Sess., 1994), c. 582, s. 1; 2006-18, s. 5; 2007-491, s. 16.)

Section Set Out Twice. — The section above is effective for taxable years beginning on or after January 1, 2007. For section effective for taxable years beginning before January 1, 2007, see the preceding section, also numbered G.S. 105-159.

Editor's Note. — Session Laws 2007-491, s. 47 provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2006-18, s. 5, effective July 1, 2006, and applicable to federal determinations made on or after that date, substituted "six months" for "two years" in the first sentence of the first undesignated paragraph.

Session Laws 2007-491, s. 16, effective for taxable years beginning on or after January 1, 2007, rewrote the second and third sentences of the former first paragraph; and substituted "Secretary must either refund" for "Secretary shall either refund" in the present third sentence. For applicability, see Editor's note

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

CASE NOTES

This section imposes on the taxpayer a positive duty with respect to his income tax liability beyond that required by G.S. 105-152, respecting his original return; it is his duty not only to report the change made by the federal department but to file another return under oath reflecting it. Garrou Knitting Mills v. Gill, 228 N.C. 764, 47 S.E.2d 240 (1948).

This section imposes a positive duty upon taxpayers beyond the requirements as to their original return. State v. Patton, 57 N.C. App. 702, 292 S.E.2d 172 (1982).

Correction of Net Income by Federal Officer Requires New Return. — The taxpayer whose net income for any year is corrected by the Commissioner of Internal Revenue or other authorized federal officer must file a new return reflecting his corrected net income within two years [now 6 months] after receipt of the federal agent's report. Failure to make such a new return within the time specified subjects the taxpayer to all penalties provided by G.S. 105-236 including, when applicable, the criminal penalty provided by G.S. 105-236(7). State v. Patton, 57 N.C. App. 702, 292 S.E.2d 172 (1982).

Effect on North Carolina Net Income Not Required. — This section does not require that the taxpayer's North Carolina net income be affected before it governs a taxpayer's duty to report changes in his federal net income. McFarland v. Justus, 113 N.C. App. 107, 437 S.E.2d 668 (1993), decision based on pre-1989 law.

Procedure Under Former Statute Exclusive. — The procedure prescribed by the former statute requiring that a new return be made within 30 days of the receipt of the redetermination of the taxpayer's income tax by the federal government was held exclusive and had to be followed to entitle the taxpayer to the relief therein provided. State ex rel. Maxwell v. Hinsdale, 207 N.C. 37, 175 S.E. 847 (1934).

Statute of Limitations Extended. — Failure to notify the Secretary of Revenue of the assessment of additional taxes by the Commissioner of Internal Revenue pursuant to this section extended the statute of limitations. McFarland v. Justus, 113 N.C. App. 107, 437 S.E.2d 668 (1993), decision based on pre-1989 law.

Cited in American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963); Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

§ 105-159.1. Designation of tax by individual to political party.

(a) Every individual whose income tax liability for the taxable year is three dollars ($3.00) or more may designate on his or her income tax return that three dollars ($3.00) of the tax shall be credited to the North Carolina Political Parties Financing Fund for the use of the political party designated by the taxpayer. In the case of a married couple filing a joint return whose income tax liability for the taxable year is six dollars ($6.00) or more, each spouse may designate on the income tax return that three dollars ($3.00) of the tax shall be credited to the North Carolina Political Parties Financing Fund for the use of the political party designated by the taxpayer. Amounts credited to the Fund shall be allocated among the political parties according to the designation of the taxpayer. Where any taxpayer elects to designate but does not specify a particular political party, those funds shall be distributed among the political parties on a pro rata basis according to their respective party voter registrations as determined by the most recent certification of the State Board of Elections. As used in this section, the term "political party" means one of the following that has at least one percent (1%) of the total number of registered voters in the State:

(1) A political party that at the last preceding general State election received at least ten percent (10%) of the entire vote cast in the State for Governor or for presidential electors.

(2) A group of voters who by July 1 of the preceding calendar year, by virtue of a petition as a new political party, had duly qualified as a new political party within the meaning of Chapter 163 of the General Statutes.

(b) Amounts designated under subsection (a) shall be credited to the North Carolina Political Parties Financing Fund on a quarterly basis. Interest earned by the Fund shall be credited to the Fund and shall be allocated among the political parties on the same basis as the principal of the Fund. The State Board of Elections, which administers the Fund, shall make a quarterly report to each State party chairman stating the amount of funds allocated to each party for that quarter, the cumulative total of funds allocated to each party to date for the year, and an estimate of the probable total amount to be collected and allocated to each party for that calendar year.

(c) Repealed by Session Laws 1983, c. 481.

(d) Return. — The first page of the income tax return must give an individual the opportunity to make the political contribution authorized in this section. The return or its accompanying explanatory instructions must readily indicate that a contribution neither increases nor decreases an individual's tax liability.

(e) An income tax return preparer may not designate on a return that the taxpayer does or does not desire to make the political contribution authorized in this section unless the taxpayer or the taxpayer's spouse has consented to the designation. (1977, 2nd Sess., c. 1298, s. 1; 1979, c. 801, s. 69; 1981, c. 963, s. 1; 1983, cc. 139, 480, 481; 1989, c. 37, s. 4; c. 713; c. 728, s. 1.32; c. 770, s. 41.1; 1991, c. 45, s. 13; c. 347, s. 3; c. 690, ss. 8, 9; 1997-515, s. 10(a); 1999-438, s. 3; 2002-106, s. 3; 2005-345, s. 46.)

Editor's Note. — Section 105-159.1 was originally enacted by Session Laws 1975, c. 775, s. 1, and expired by its own terms Dec. 31, 1977. See Session Laws 1975, c. 775, s. 3. The above G.S. 105-159.1 was enacted by Session Laws 1977, 2nd Sess., c. 1298, s. 1, effective with respect to taxable years beginning on or after Jan. 1, 1978.

Effect of Amendments. — Session Laws 2005-345, s. 46, effective for taxable years beginning on or after January 1, 2006, in the introductory language in subsection (a), substituted "three dollars ($3.00)" for "one dollar ($1.00)" twice in the first sentence and once in the second sentence and substituted "six dollars ($6.00)" for "two dollars ($2.00)" in the second sentence.

OPINIONS OF ATTORNEY GENERAL

Regarding the designation of funds for political parties by 1998 taxpayers where a third party was erroneously included on the income tax forms, see opinion of Attorney General to Gary O. Bartlett, Executive Secretary-Director (now the Executive Director), State Board of Elections, N.C. General Assembly, 1999 N.C.A.G. 16 (6/14/99).

§ 105-159.2. Designation of tax to North Carolina Public Campaign Fund.

(a) Allocation to the North Carolina Public Campaign Fund. — To ensure the financial viability of the North Carolina Public Campaign Fund established in Article 22D of Chapter 163 of the General Statutes, the Department must allocate to that Fund three dollars ($3.00) from the income taxes paid each year by each individual with an income tax liability of at least that amount, if the individual agrees. A taxpayer must be given the opportunity to indicate an agreement or objection to that allocation in the manner described in subsection (b) of this section. In the case of a married couple filing a joint return, each individual must have the option of agreeing or objecting to the allocation. The amounts allocated under this subsection to the Fund must be credited to it on a monthly basis.

(b) Returns. — Individual income tax returns must give an individual an opportunity to agree to the allocation of three dollars ($3.00) of the individual's tax liability to the North Carolina Public Campaign Fund. The Department must make it clear to the taxpayer that the dollars will support a nonpartisan court system, that the dollars will go to the Fund if the taxpayer marks an agreement, and that allocation of the dollars neither increases nor decreases the individual's tax liability. The following statement must be used to meet this requirement: "Mark 'Yes' if you want to designate $3 of taxes to this special Fund for voter education materials and for candidates who accept spending limits. Marking 'Yes' does not change your tax or refund." The Department must consult with the State Board of Elections to ensure that the information given to taxpayers complies with the intent of this section.

The Department must inform the entities it approves to reproduce the return that they must comply with the requirements of this section and that a return may not reflect an agreement or objection unless the individual completing the return decided to agree or object after being presented with the statement required by subsection (b) of this section and, as available background information or instructions, the information required by subsection (c) of this section. No software package used in preparing North Carolina income tax returns may default to an agreement or objection. A paid preparer of tax returns may not mark an agreement or objection for a taxpayer without the taxpayer's consent.

(c) Instructions. — The instruction for individual income tax returns must include the following explanatory statement: "The N.C. Public Campaign Fund provides an alternative source of campaign money to qualified candidates who accept strict campaign spending and fund-raising limits. The Fund also helps finance a Voter Guide with educational materials about voter registration, the role of the appellate courts, and the candidates seeking election as appellate judges in North Carolina. Three dollars from the taxes you pay will go to the Fund if you mark an agreement. Regardless of what choice you make, your tax will not increase, nor will any refund be reduced." (2002-158, s. 4; 2005-276, s. 23A.1(d); 2006-192, s. 18.)

Editor's Note. — Session Laws 2002-158, s. 16, made this section effective for taxable years beginning on or after January 1, 2003.

Session Laws 2002-158, s. 15, contains a severability clause.

Session Laws 2002-158, s. 15.1, provides that nothing in the act obligates the General Assembly to appropriate funds to implement the act now or in the future.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 23A.1(d), effective July 1, 2005, substituted "Public Campaign Fund" for "Public Campaign Financing Fund" in the section heading and throughout the section.

Session Laws 2006-192, s. 18, effective for taxable years beginning on or after January 1, 2006, rewrote the section.

Part 3. Income Tax — Estates, Trusts, and Beneficiaries.

§ 105-160. Short title.

This Part shall be known as the Income Tax Act for Estates, Trusts, and Beneficiaries. (1967, c. 1110, s. 3; 1989, c. 728, s. 1.36; 1998-98, ss. 45, 68.)

§ 105-160.1. Definitions.

The definitions provided in Part 2 of this Article shall apply in this Part except where the context clearly indicates a different meaning. (1989, c. 728, s. 1.38; 1998-98, ss. 69, 71.)

§ 105-160.2. Imposition of tax.

The tax imposed by this Part shall apply to the taxable income of estates and trusts as determined under the provisions of the Code except as otherwise provided in this Part. The taxable income of an estate or trust shall be the same as taxable income for such an estate or trust under the provisions of the Code, adjusted as provided in G.S. 105-134.6 and G.S. 105-134.7, except that the adjustments provided in G.S. 105-134.6 and G.S. 105-134.7 shall be apportioned between the estate or trust and the beneficiaries based on the distributions made during the taxable year. The tax shall be computed on the amount of the taxable income of the estate or trust that is for the benefit of a resident of this State, or for the benefit of a nonresident to the extent that the income (i) is derived from North Carolina sources and is attributable to the ownership of any interest in real or tangible personal property in this State or (ii) is derived from a business, trade, profession, or occupation carried on in this State. For purposes of the preceding sentence, taxable income and gross income shall be computed subject to the adjustments provided in G.S. 105-134.6 and G.S. 105-134.7. The tax on the amount computed above shall be at the rates levied in G.S. 105-134.2(a)(3). The tax computed under the provisions of this Part shall be paid by the fiduciary responsible for administering the estate or trust. (1989, c. 728, s. 1.38; 1989 (Reg. Sess., 1990), c. 814, s. 21; 1991, c. 689, s. 302; 1998-98, s. 69.)

CASE NOTES

Cited in Dunn v. State, — N.C. App. —, 635 S.E.2d 604, 2006 N.C. App. LEXIS 2163 (2006).

§ 105-160.3. Tax credits.

(a) Except as otherwise provided in this section, the credits allowed to an individual against the tax imposed by Part 2 of this Article shall be allowed to the same extent to an estate or a trust against the tax imposed by this Part. Any credit computed as a percentage of income received shall be apportioned between the estate or trust and the beneficiaries based on the distributions made during the taxable year. No credit may exceed the amount of the tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except for payments of tax made by or on behalf of the estate or trust.

(b) The following credits are not allowed to an estate or trust:

(1) G.S. 105-151. Tax credits for income taxes paid to other states by individuals.

(2) G.S. 105-151.11. Credit for child care and certain employment-related expenses.

(3) G.S. 105-151.18. Credit for the disabled.

(4) G.S. 105-151.24. Credit for children.

(5) G.S. 105-151.26. Credit for charitable contributions by nonitemizers.

(6) Repealed by Session Laws 2004-170, s. 17, effective August 2, 2004.

(7) **(Effective for taxable years beginning on or after January 1, 2007)** G.S. 105-151.28. Credit for long-term care insurance.

(8) **(Expires for taxable years beginning on or after January 1, 2011)** G.S. 105-151.30. Credit for recycling oyster shells.

(9) **(Effective for taxable years beginning on or after January 1, 2007)** G.S. 105-151.31. Earned income tax credit.

(10) **(Effective for taxable years beginning on or after January 1, 2007)** G.S. 105-151.32. Credit for adoption expenses. (1989, c. 728, s. 1.38; 1998-1, s. 5(b); 1998-98, ss. 10, 105; 1998-212, s. 29A.6(b); 2004-170, s. 17; 2006-66, s. 24.18(f); 2007-323, ss. 31.4(b), 31.5(b), 31.6(b).)

Cross References. — For the Health Insurance Program for Children, see G.S. 108A-70.18 et seq.

Editor's Note. — Session Laws 1998-1, s. 5(d) provides that s. 5 of the act which added subdivision (b)(6) of G.S. 105-160.3, is effective for taxable years beginning on or after January 1, 1999, and expires on the effective date of an act repealing the Health Insurance Program for Children established under the act.

Session Laws 1998-1, s. 5(e) provides that s. 5 of the act becomes effective only if the United States Secretary of Health and Human Services approves the State Plan to implement the Health Insurance Program for Children established under this act. The Program was approved by letter dated July 14, 1998 from Secretary Donna E. Shalala.

Session Laws 1998-212, s. 29A.6(d), provides that subdivision (b)(7), as enacted by that act, is repealed effective for taxable years beginning on or after January 1, 2004.

Session Laws 2004-170, s. 17, effective August 2, 2004, repealed subdivision (b)(6).

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 24.18(g), provides that this section, which added subdivision (b)(8), expires for taxable years beginning on or after January 1, 2011.

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 24.18(f), effective for taxable years beginning on or after January 1, 2006, and expires for taxable years beginning on or after January 1, 2011, added new subdivision (b)(8).

Session Laws 2007-323, ss. 31.4(b), 31.5(b), and 31.6(b), effective for taxable years beginning on or after January 1, 2007, reenacted subdivision (b)(7); and added subdivisions (b)(9) and (b)(10).

§ 105-160.4. Tax credits for income taxes paid to other states by estates and trusts.

(a) If a fiduciary is required to pay income tax to this State for an estate or a trust, the fiduciary shall be allowed a credit against the tax imposed by this Part for income taxes imposed by and paid to another state or country on income derived from sources within that other state or country in accordance with the formula contained in subsection (b) and the requirements of subsection (c).

(b) The fraction of the gross income for North Carolina income tax purposes that is derived from sources within and subject to income tax in another state or country shall be ascertained and the North Carolina income tax before credit under this section shall be multiplied by that fraction. The credit allowed shall be either the product thus calculated or the income tax actually paid the other state or country, whichever is smaller.

(c) Receipts showing the payment of income taxes to another state or country and a true copy of the return upon the basis of which the taxes are assessed shall be filed with the Secretary at or before the time credit is claimed. If credit is claimed on account of a deficiency assessment, a true copy of the notice assessing or proposing to assess the deficiency, as well as a receipt showing the payment of the deficiency, shall be filed with the Secretary.

(d) If any taxes paid to another state or country for which a fiduciary has been allowed a credit under this section are at any time credited or refunded to the fiduciary, a tax equal to that portion of the credit allowed for the taxes so credited or refunded shall be due and payable from the fiduciary and shall be subject to the penalties and interest on delinquent payments provided in G.S. 105-236 and G.S. 105-241.21.

(e) A resident beneficiary of an estate or trust who is taxed under the provisions of Part 2 of this Article on income from an estate or trust determined to be includable in the resident's gross income is allowed a credit against the tax imposed for income taxes paid by the fiduciary to another state or country on the income in accordance with the formula contained in subsection (b) of this section and the requirements of subsection (c) of this section; provided, that if any taxes paid to another state or country for which a beneficiary has been allowed credit under this section are at any time credited or refunded to the beneficiary, a tax equal to that portion of the credit allowed for the taxes so credited or refunded shall be due and payable from the beneficiary and shall be subject to the penalties and interest on delinquent payments provided in G.S. 105-236 and G.S. 105-241.21. (1989, c. 728, s. 1.38; 1998-98, ss. 69, 71; 2007-491, s. 44(1)b.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 44(1)b., effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1" in subsections (d) and (e). For applicability, see Editor's note.

§ 105-160.5. Returns.

The fiduciary of an estate or trust described below shall file an income tax return under affirmation, showing specifically the taxable income and the adjustments required by this Part and such other facts as the Secretary may require for the purpose of making any computation required by this Part:

(1) Every estate or trust which has taxable income under this Part during the taxable year and is required to file an income tax return for the taxable year under the Code.

(2) Every estate or trust which the Secretary believes to be liable for a tax under this Part, when so notified by the Secretary and requested to file a return. (1989, c. 728, s. 1.38; 1998-98, s. 69.)

§ 105-160.6. Time and place of filing returns.

An income tax return of an estate or a trust shall be filed as prescribed by the Secretary at the place prescribed by the Secretary. The return of every fiduciary reporting on a calendar year basis shall be filed on or before the 15th day of April in each year, and the return of every fiduciary reporting on a fiscal year basis shall be filed on or before the 15th day of the fourth month following the close of the fiscal year. A fiduciary may ask the Secretary for an extension of time to file a return under G.S. 105-263. (1989, c. 728, s. 1.38; 1989 (Reg. Sess., 1990), c. 984, s. 12; 1991 (Reg. Sess., 1992), c. 930, s. 7.)

§ 105-160.7. When tax must be paid.

(a) The full amount of the tax payable as shown on the return must be paid to the Secretary within the time allowed for filing the return. However, if the amount shown to be due after all credits is less than one dollar ($1.00), no payment need be made.

(b) Repealed by Session Laws 1993, c. 450, s. 5. (1989, c. 728, s. 1.38; 1989 (Reg. Sess., 1990), c. 984, s. 13; 1991 (Reg. Sess., 1992), c. 930, s. 8; 1993, c. 450, s. 5.)

§ 105-160.8. Federal corrections.

For purposes of this Part, the provisions of G.S. 105-159 requiring an individual to report the correction or determination of taxable income by the federal government apply to fiduciaries required to file returns for estates and trusts. (1989, c. 728, s. 1.38; 1993 (Reg. Sess., 1994), c. 582, s. 3; 1998-98, s. 69.)

§§ 105-161 through 105-163: Repealed by Session Laws 1989, c. 728, s. 1.37.

Part 4. Income Tax Credits for Property Taxes.

§§ 105-163.01 through 105-163.06: Repealed by Session Laws 1991, c. 45, s. 14(b).

Editor's Note. — G.S. 105-163.01 was formerly repealed by Session Laws 1985, c. 656, s. 14. G.S. 105-163.03 was formerly repealed by Session Laws 1987, c. 622, s. 3. G.S. 105-163.05 was formerly repealed by Session Laws 1989, c. 37, s. 5. G.S. 105-163.06 was formerly repealed by Session Laws 1987, c. 622, s. 3.

§ 105-163.07: Recodified as § 105-151.21 by Session Laws 1991, c. 45, s. 14.

§§ 105-163.08, 105-163.09: Repealed by Session Laws 1991, c. 45, s. 14(b).

Part 5. Tax Credits for Qualified Business Investments.

(Repealed effective for investments made on or after January 1, 2011)

§ 105-163.010. (Repealed effective for investments made on or after January 1, 2011) Definitions.

The following definitions apply in this Part:

(1) Affiliate. — An individual or business that controls, is controlled by, or is under common control with another individual or business.

(2) Business. — A corporation, partnership, limited liability company, association, or sole proprietorship operated for profit.

(3) Control. — A person controls an entity if the person owns, directly or indirectly, more than ten percent (10%) of the voting securities of that entity. As used in this subdivision, the term "voting security" means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive upon its exercise, a security that confers such a right to vote. A general partnership interest is a voting security.

(4) Equity security. — Common stock, preferred stock, or an interest in a partnership, or subordinated debt that is convertible into, or entitles the holder to receive upon its exercise, common stock, preferred stock, or an interest in a partnership.

(5) Financial institution. — A business that is (i) a bank holding company, as defined in the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841, et seq., or its wholly owned subsidiary, (ii) registered as a broker-dealer under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, et seq., or its wholly owned subsidiary, (iii) an investment company as defined in the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1, et seq., whether or not it is required to register under that act, (iv) a small business investment company as defined in the Small Business Investment Act of 1958, 15 U.S.C. §§ 661, et seq., (v) a pension or profit-sharing fund or trust, or (vi) a bank, savings institution, trust company, financial services company, or insurance

company. The term does not include, however, a business, other than a small business investment company, whose net worth, when added to the net worth of all of its affiliates, is less than ten million dollars ($10,000,000). The term also does not include a business that does not generally market its services to the public and is controlled by a business that is not a financial institution.

(5a) Granting entity. — Any of the following:

a. A domestic or foreign corporation that (i) is tax-exempt pursuant to section 501(c)(3) of the Code, (ii) has as its principal purpose the stimulation of the development of the biotechnology industry, and (iii) in furtherance of that purpose has received, or is a successor in interest to an organization that has received, direct appropriations from the State in at least three fiscal years.

b. A domestic or foreign corporation that meets the following three conditions:

1. It is tax-exempt pursuant to section 501(c)(3) of the Code, is a private foundation pursuant to section 509 of the Code, or is an affiliate of either of the foregoing.
2. It has as its principal purpose one of the following: conducting research and development in, or stimulating the development of, electronic, photonic, information, or other technologies, which may include investing in companies that provide research, development, products, or services in these technologies.
3. It meets one of the following conditions:
   I. It received direct appropriations in furtherance of one of these purposes from the State in at least three fiscal years.
   II. It was organized to perform one of these purposes for an organization that meets condition I of this sub-subdivision.
   III. It is an affiliate of an entity that meets condition II of this sub-subdivision.

c. An institute that (i) is administratively located within a constituent institution of The University of North Carolina, (ii) is financed in part by a domestic or foreign corporation that is tax-exempt pursuant to section 501(c)(3) of the Code, (iii) has as a principal purpose the stimulation of economic development based on the advancement of science, engineering, and technology, and (iv) funds, either directly or in collaboration with other entities, small businesses engaging in developing technology.

(6) North Carolina Enterprise Corporation. — A corporation established in accordance with Article 3 of Chapter 53A of the General Statutes or a limited partnership in which a North Carolina Enterprise Corporation is the only general partner.

(7) Pass-through entity. — Defined in G.S. 105-228.90.

(7b) Qualified business. — A qualified business venture, a qualified grantee business, or a qualified licensee business.

(8) Qualified business venture. — A business that (i) engages primarily in manufacturing, processing, warehousing, wholesaling, research and development, or a service-related industry, and (ii) is registered with the Secretary of State under G.S. 105-163.013.

(9) Qualified grantee business. — A business that (i) is registered with the Secretary of State under G.S. 105-163.013, and (ii) has received

during the current year or any of the preceding three years a grant, an investment, or other funding from a federal agency under the Small Business Innovation Research Program administered by the United States Small Business Administration or from a granting entity as defined in this section.

(9a) Qualified licensee business. — A business that meets all of the following conditions:
  a. It is registered with the Secretary of State under G.S. 105-163.013.
  b. During its most recent fiscal year before filing an application for registration under G.S. 105-163.013, it had gross revenues, as determined in accordance with generally accepted accounting principles, of one million dollars ($1,000,000) or less on a consolidated basis.
  c. It has been certified by a constituent institution of The University of North Carolina or a research university as currently performing under a licensing agreement with the institution or university for the purpose of commercializing technology developed at the institution or university. For the purpose of this section, a research university is an institution of higher education classified as a Doctoral/Research University, Extensive or Intensive, in the most recent edition of "A Classification of Institutions of Higher Education", the official report of The Carnegie Foundation for the Advancement of Teaching.

(10) Real estate-related business. — A business that is involved in or related to the brokerage, selling, purchasing, leasing, operating, or managing of hotels, motels, nursing homes or other lodging facilities, golf courses, sports or social clubs, restaurants, storage facilities, or commercial or residential lots or buildings is a real estate-related business, except that a real estate-related business does not include (i) a business that purchases or leases real estate from others for the purpose of providing itself with facilities from which to conduct a business that is not itself a real estate-related business or (ii) a business that is not otherwise a real estate-related business but that leases, subleases, or otherwise provides to one or more other persons a number of square feet of space which in the aggregate does not exceed fifty percent (50%) of the number of square feet of space occupied by the business for its other activities.

(10a) Related person. — A person described in one of the relationships set forth in section 267(b) or 707(b) of the Code.

(11) Security. — A security as defined in Section 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1).

(12) Selling or leasing at retail. — A business is selling or leasing at retail if the business either (i) sells or leases any product or service of any nature from a store or other location open to the public generally or (ii) sells or leases products or services of any nature by means other than to or through one or more other businesses.

(13) Service-related industry. — A business is engaged in a service-related industry, whether or not it also sells a product, if it provides services to customers or clients and does not as a substantial part of its business engage in a business described in G.S. 105-163.013(b)(4). A business is engaged as a substantial part of its business in an activity described in G.S. 105-163.013(b)(4) if (i) its gross revenues derived from all activities described in that subdivision exceed twenty-five percent (25%) of its gross revenues in any fiscal year or (ii) it is

established as one of its primary purposes to engage in any activities described in that subdivision, whether or not its purposes were stated in its articles of incorporation or similar organization documents.

(14) Subordinated debt. — Indebtedness that is not secured and is subordinated to all other indebtedness of the issuer issued or to be issued to a financial institution other than a financial institution described in subdivisions (5)(ii) through (5)(v) of this section. Except as provided in G.S. 105-163.014(d1), any portion of indebtedness that matures earlier than five years after its issuance is not subordinated debt. (1987, c. 852, s. 1; 1987 (Reg. Sess., 1988), c. 882, s. 2; 1989 (Reg. Sess., 1990), c. 848, s. 2; 1991, c. 637, s. 1; 1993, c. 443, s. 1; 1996, 2nd Ex. Sess., c. 14, s. 7; 1997-6, s. 5; 1998-98, ss. 46, 69; 1998-212, ss. 29A.15(a), 29A.16(c), (d); 1999-369, s. 5.6; 2002-99, s. 3; 2003-414, s. 2; 2003-416, s. 4(a).)

Repeal of Part. — Session Laws 2002-99, s. 1, effective August 29, 2002, repealed Session Laws 1993, c. 443, s. 7, which, as amended by Session Laws 1998-212, s. 29A.15(a), would have repealed Part 5 of Article 4 of Chapter 105 effective for investments made on or after January 1, 2003. See G.S. 105-163.015 for current sunset date.

Editor's Note. — Session Laws 2002-99, s. 8, provides in part: "Notwithstanding the amendments to G.S. 105-163.010 and G.S. 105-163.013 in Sections 3 and 4 of this act, a business to which a grant or other funding was committed before January 1, 2003, by the North Carolina Technological Development Authority, the North Carolina Technological Development Authority, Inc., North Carolina First Flight, Inc., the North Carolina Biotechnology Center, the Microelectronics Center of North Carolina, the Kenan Institute for Engineering, Technology and Science, or the Federal Small Business Innovation Research Program may still qualify as a qualified grantee business under the provisions of G.S. 105-163.010 and G.S. 105-163.013 as they existed before the enactment of this act."

OPINIONS OF ATTORNEY GENERAL

On the subject of whether North Carolina Enterprise Corporations are entitled to a tax credit pursuant to this section, see the Attorney General Opinion dated 17 December 1996 and advisory letter dated 28 October 1996, attached to and incorporated by reference in the opinion of Attorney General to The Honorable David W. Hoyle Senator, 1998 N.C.A.G. 44 (10/22/98).

§ 105-163.011. (Repealed effective for investments made on or after January 1, 2011) Tax credits allowed.

(a) No Credit for Brokered Investments. — No credit is allowed under this section for a purchase of equity securities or subordinated debt if a broker's fee or commission or other similar remuneration is paid or given directly or indirectly for soliciting the purchase.

(b) Individuals. — Subject to the limitations contained in G.S. 105-163.012, an individual who purchases the equity securities or subordinated debt of a qualified business directly from that business is allowed as a credit against the tax imposed by Part 2 of this Article for the taxable year an amount equal to twenty-five percent (25%) of the amount invested. The aggregate amount of credit allowed an individual for one or more investments in a single taxable year under this Part, whether directly or indirectly as owner of a pass-through entity, may not exceed fifty thousand dollars ($50,000). The credit may not be taken for the year in which the investment is made but shall be taken for the taxable year beginning during the calendar year in which the application for the credit becomes effective as provided in subsection (c) of this section.

(b1) Pass-Through Entities. — This subsection does not apply to a pass-through entity that has committed capital under management in excess of five million dollars ($5,000,000) or to a pass-through entity that is a qualified business or a North Carolina Enterprise Corporation. Subject to the limitations provided in G.S. 105-163.012, a pass-through entity that purchases the equity securities or subordinated debt of a qualified business directly from the business is eligible for a tax credit equal to twenty-five percent (25%) of the amount invested. The aggregate amount of credit allowed a pass-through entity for one or more investments in a single taxable year under this Part, whether directly or indirectly as owner of another pass-through entity, may not exceed seven hundred fifty thousand dollars ($750,000). The pass-through entity is not eligible for the credit for the year in which the investment by the pass-through entity is made but shall be eligible for the credit for the taxable year beginning during the calendar year in which the application for the credit becomes effective as provided in subsection (c) of this section.

Each individual who is an owner of a pass-through entity is allowed as a credit against the tax imposed by Part 2 of this Article for the taxable year an amount equal to the owner's allocated share of the credits for which the pass-through entity is eligible under this subsection. The aggregate amount of credit allowed an individual for one or more investments in a single taxable year under this Part, whether directly or indirectly as owner of a pass-through entity, may not exceed fifty thousand dollars ($50,000).

If an owner's share of the pass-through entity's credit is limited due to the maximum allowable credit under this section for a taxable year, the pass-through entity and its owners may not reallocate the unused credit among the other owners.

(c) **(Effective until January 1, 2008)** Application. — To be eligible for the tax credit provided in this section, the taxpayer must file an application for the credit with the Secretary on or before April 15 of the year following the calendar year in which the investment was made. The Secretary may grant extensions of this deadline, as the Secretary finds appropriate, upon the request of the taxpayer, except that the application may not be filed after September 15 of the year following the calendar year in which the investment was made. An application is effective for the year in which it is timely filed. The application shall be on a form prescribed by the Secretary and shall include any supporting documentation that the Secretary may require. If an investment for which a credit is applied for was paid for other than in money, the taxpayer shall include with the application a certified appraisal of the value of the property used to pay for the investment. The application for a credit for an investment made by a pass-through entity must be filed by the pass-through entity.

(c) **(Effective January 1, 2008, and applicable to applications filed on or after that date)** Application. — To be eligible for the tax credit provided in this section, the taxpayer must file an application for the credit with the Secretary. The application should be filed on or before April 15 of the year following the calendar year in which the investment was made. The Secretary may not accept an application filed after October 15 of the year following the calendar year in which the investment was made. An application is effective for the year in which it is timely filed. The application shall be on a form prescribed by the Secretary and shall include any supporting documentation that the Secretary may require. If an investment for which a credit is applied for was paid for other than in money, the taxpayer shall include with the application a certified appraisal of the value of the property used to pay for the investment. The application for a credit for an investment made by a pass-through entity must be filed by the pass-through entity.

(d) Penalties. — The penalties provided in G.S. 105-236 apply in this Part. (1987, c. 852, s. 1; 1987 (Reg. Sess., 1988), c. 882, ss. 3, 3.1; 1989 (Reg. Sess., 1990), c. 848, s. 3; 1991, c. 637, s. 2; 1993, c. 443, s. 2; 1995, c. 491, s. 1; 1996, 2nd Ex. Sess., c. 14, s. 7; 1998-98, s. 71; 1998-212, s. 29A.15(a); 1999-337, s. 27; 2003-414, s. 3; 2007-422, s. 2.)

Subsection (c) Set Out Twice. — The first version of subsection (c) set out above is effective until January 1, 2008. The second version of subsection (c) set out above is effective January 1, 2008, and applicable to applications filed on or after that date.

Repeal of Part. — Session Laws 2002-99, s. 1, effective August 29, 2002, repealed Session Laws 1993, c. 443, s. 7, which, as amended by Session Laws 1998-212, s. 29A.15(a), would have repealed Part 5 of Article 4 of Chapter 105 effective for investments made on or after January 1, 2003. See G.S. 105-163.015 for current sunset date.

Editor's Note. — Session Laws 1999-337, s. 46 provides that the act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by the act before the effective date of its amendment or repeal (July 22, 1999); nor does it affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal.

Effect of Amendments. — Session Laws 2007-422, s. 2, effective January 1, 2008, and applicable to applications filed on or after that date, in subsection (c), substituted "Secretary. The application should be filed" for "Secretary" near the beginning and substituted "The Secretary may not accept an application filed after October" for "The Secretary may grant extensions of this deadline, as the Secretary finds appropriate, upon the request of the taxpayer, except that the application may not be filed after September 15" near the middle.

§ 105-163.012. (Repealed effective for investments made on or after January 1, 2011) Limit; carry-over; ceiling; reduction in basis.

(a) The credit allowed a taxpayer under G.S. 105-163.011 may not exceed the amount of income tax imposed by Part 2 of this Article for the taxable year reduced by the sum of all other credits allowable except tax payments made by or on behalf of the taxpayer. The amount of unused credit allowed under G.S. 105-163.011 may be carried forward for the next five succeeding years. The fifty thousand dollar ($50,000) limitation on the amount of credit allowed a taxpayer under G.S. 105-163.011 does not apply to unused amounts carried forward under this subsection.

(b) The total amount of all tax credits allowed to taxpayers under G.S. 105-163.011 for investments made in a calendar year may not exceed seven million dollars ($7,000,000). The Secretary of Revenue shall calculate the total amount of tax credits claimed from the applications filed pursuant to G.S. 105-163.011(c). If the total amount of tax credits claimed for investments made in a calendar year exceeds this maximum amount, the Secretary shall allow a portion of the credits claimed by allocating the maximum amount in tax credits in proportion to the size of the credit claimed by each taxpayer.

(c) If a credit claimed under G.S. 105-163.011 is reduced as provided in this section, the Secretary shall notify the taxpayer of the amount of the reduction of the credit on or before December 31 of the year following the calendar year in which the investment was made. The Secretary's allocations based on applications filed pursuant to G.S. 105-163.011(c) are final and shall not be adjusted to account for credits applied for but not claimed.

Part 5 has a delayed repeal date. See notes.

(d) The taxpayer's basis in the equity securities or subordinated debt acquired as a result of an investment in a qualified business shall be reduced for the purposes of this Article by the amount of allowable credit. "Allowable credit" means the amount of credit allowed under G.S. 105-163.011 reduced as provided in subsection (c) of this section. (1987, c. 852, s. 1; 1987 (Reg. Sess., 1988), c. 882, ss. 4, 4.1; 1989 (Reg. Sess., 1990), c. 848, s. 4; 1991, c. 637, s. 3; 1993, c. 443, s. 3; 1993 (Reg. Sess., 1994), c. 745, s. 8; 1996, 2nd Ex. Sess., c. 14, ss. 6, 7; 1998-98, s. 71; 1998-212, s. 29A.15(a); 2003-414, s. 4; 2004-124, s. 32C.1.)

Repeal of Part. — Session Laws 2002-99, s. 1, effective August 29, 2002, repealed Session Laws 1993, c. 443, s. 7, which, as amended by Session Laws 1998-212, s. 29A.15(a), would have repealed Part 5 of Article 4 of Chapter 105 effective for investments made on or after January 1, 2003. See G.S. 105-163.015 for current sunset date.

§ 105-163.013. (Repealed for investments made on or after January 1, 2011) Registration.

(a) Repealed by Session Laws 1993, c. 443, s. 4.

(b) Qualified Business Ventures. — In order to qualify as a qualified business venture under this Part, a business must be registered with the Securities Division of the Department of the Secretary of State. To register, the business must file with the Secretary of State an application and any supporting documents the Secretary of State may require from time to time to determine that the business meets the requirements for registration as a qualified business venture. A business meets the requirements for registration as a qualified business venture if all of the following are true as of the date the business files the required application:

(1) Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 7.

(1a) Reserved for future codification purposes.

(1b) Either (i) it was organized after January 1 of the calendar year in which its application is filed or (ii) during its most recent fiscal year before filing the application, it had gross revenues, as determined in accordance with generally accepted accounting principles, of five million dollars ($5,000,000) or less on a consolidated basis.

(2) Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 7.

(3) It is organized to engage primarily in manufacturing, processing, warehousing, wholesaling, research and development, or a service-related industry.

(4) It does not engage as a substantial part of its business in any of the following:

  a. Providing a professional service as defined in Chapter 55B of the General Statutes.

  b. Construction or contracting.

  c. Selling or leasing at retail.

  d. The purchase, sale, or development, or purchasing, selling, or holding for investment of commercial paper, notes, other indebtedness, financial instruments, securities, or real property, or otherwise make investments.

  e. Providing personal grooming or cosmetics services.

  f. Offering any form of entertainment, amusement, recreation, or athletic or fitness activity for which an admission or a membership is charged.

(5) It was not formed for the primary purpose of acquiring all or part of the stock or assets of one or more existing businesses.

(6) It is not a real estate-related business.

The effective date of registration for a qualified business venture whose application is accepted for registration is 60 days before the date its application is filed. No credit is allowed under this Part for an investment made before the effective date of the registration or after the registration is revoked. For the purpose of this Article, if a taxpayer's investment is placed initially in escrow conditioned upon other investors' commitment of additional funds, the date of the investment is the date escrowed funds are transferred to the qualified business venture free of the condition.

To remain qualified as a qualified business venture, the business must renew its registration annually as prescribed by rule by filing a financial statement for the most recent fiscal year showing gross revenues, as determined in accordance with generally accepted accounting principles, of five million dollars ($5,000,000) or less on a consolidated basis and an application for renewal in which the business certifies the facts required in the original application.

Failure of a qualified business venture to renew its registration by the applicable deadline shall result in revocation of its registration effective as of the next day after the renewal deadline, but shall not result in forfeiture of tax credits previously allowed to taxpayers who invested in the business except as provided in G.S. 105-163.014. The Secretary of State shall send the qualified business venture notice of revocation within 60 days after the renewal deadline. A qualified business venture may apply to have its registration reinstated by the Secretary of State by filing an application for reinstatement, accompanied by the reinstatement application fee and a late filing penalty of one thousand dollars ($1,000), within 30 days after receipt of the revocation notice from the Secretary of State. A business that seeks approval of a new application for registration after its registration has been revoked must also pay a penalty of one thousand dollars ($1,000). A registration that has been reinstated is treated as if it had not been revoked.

If the gross revenues of a qualified business venture exceed five million dollars ($5,000,000) in a fiscal year, the business must notify the Secretary of State in writing of this fact by filing a financial statement showing the revenues of the business for that year.

(b1) Qualified Licensee Businesses. — In order to qualify as a qualified licensee business under this Part, a business must be registered with the Securities Division of the Department of the Secretary of State. To register, the business must file with the Secretary of State an application and any supporting documents the Secretary of State may require from time to time to determine that the business meets the requirements for registration as a qualified licensee business. The requirements for registration as a qualified licensee business are set out in G.S. 105-163.010.

The effective date of registration for a qualified licensee business whose application is accepted for registration is the filing date of its application. No credit is allowed under this Part for an investment made before the effective date of the registration or after the registration is revoked.

To remain qualified as a qualified licensee business, the business must renew its registration annually as prescribed by rule by filing a financial statement for the most recent fiscal year showing gross revenues, as determined in accordance with generally accepted accounting principles, of one million dollars ($1,000,000) or less on a consolidated basis and an application for renewal in which the business certifies the facts required in the original application.

Failure of a qualified licensee venture to renew its registration by the applicable deadline results in revocation of its registration effective as of the next day after the renewal deadline, but does not result in forfeiture of tax credits previously allowed to taxpayers who invested in the business except as provided in G.S. 105-163.014. The Secretary of State shall send the qualified licensee business notice of revocation within 60 days after the renewal deadline. A qualified licensee business may apply to have its registration reinstated by the Secretary of State by filing an application for reinstatement, accompanied by the reinstatement application fee and a late filing penalty of one thousand dollars ($1,000), within 30 days after receipt of the revocation notice from the Secretary of State. A business that seeks approval of a new application for registration after its registration has been revoked must also pay a penalty of one thousand dollars ($1,000). A registration that has been reinstated is treated as if it had not been revoked.

If the gross revenues of a qualified business venture exceed one million dollars ($1,000,000) in a fiscal year, the business must notify the Secretary of State in writing of this fact by filing a financial statement showing the revenues of the business for that year.

(c) Qualified Grantee Businesses. — In order to qualify as a qualified grantee business under this Part, a business must be registered with the Securities Division of the Department of the Secretary of State. To register, the business must file with the Secretary of State an application and any supporting documents the Secretary of State may require from time to time to determine that the business meets the requirements for registration as a qualified grantee business. The requirements for registration as a qualified grantee business are set out in G.S. 105-163.010.

The effective date of registration for a qualified grantee business whose application is accepted for registration is the filing date of its application. No credit is allowed under this Part for an investment made before the effective date of the registration or after the registration is revoked.

To remain qualified as a qualified grantee business, the business must renew its registration annually as prescribed by rule by filing an application for renewal in which the business certifies the facts demonstrating that it continues to meet the applicable requirements for qualification.

(d) Application Forms; Rules; Fees. — Applications for registration, renewal of registration, and reinstatement of registration under this section shall be in the form required by the Secretary of State. The Secretary of State may, by rule, require applicants to furnish supporting information in addition to the information required by subsections (b), (b1), and (c) of this section. The Secretary of State may adopt rules in accordance with Chapter 150B of the General Statutes that are needed to carry out the Secretary's responsibilities under this Part. The Secretary of State shall prepare blank forms for the applications and shall distribute them throughout the State and furnish them on request. Each application shall be signed by the owners of the business or, in the case of a corporation, by its president, vice-president, treasurer, or secretary. There shall be annexed to the application the affirmation of the person making the application in the following form: "Under penalties prescribed by law, I certify and affirm that to the best of my knowledge and belief this application is true and complete." A person who submits a false application is guilty of a Class 1 misdemeanor.

The fee for filing an application for registration under this section is one hundred dollars ($100.00). The fee for filing an application for renewal of registration under this section is fifty dollars ($50.00). The fee for filing an application for reinstatement of registration under this section is fifty dollars ($50.00).

An application for renewal of registration under this section must indicate whether the applicant is a minority business, as defined in G.S. 143-128, and include a report of the number of jobs the business created during the preceding year that are attributable to investments that qualify under this section for a tax credit and the average wages paid by each job. An application that does not contain this information is incomplete and the applicant's registration may not be renewed until the information is provided.

(e) Revocation of Registration. — If the Securities Division of the Department of the Secretary of State finds that any of the information contained in an application of a business registered under this section is false, it shall revoke the registration of the business. The Secretary of State shall not revoke the registration of a business solely because it ceases business operations for an indefinite period of time, as long as the business renews its registration each year as required under this section.

(f) Transfer of Registration. — A registration as a qualified business may not be sold or otherwise transferred, except that if a qualified business enters into a merger, conversion, consolidation, or other similar transaction with another business and the surviving company would otherwise meet the criteria for being a qualified business, the surviving company retains the registration without further application to the Secretary of State. In such a case, the qualified business must provide the Secretary of State with written notice of the merger, conversion, consolidation, or similar transaction and the name, address, and jurisdiction of incorporation or organization of the surviving company.

(g) Report by Secretary of State. — The Secretary of State shall report to the Revenue Laws Study Committee by October 1 of each year all of the businesses that have registered with the Secretary of State as qualified business ventures, qualified licensee businesses, and qualified grantee businesses. The report shall include the name and address of each business, the location of its headquarters and principal place of business, a detailed description of the types of business in which it engages, whether the business is a minority business as defined in G.S. 143-128, the number of jobs created by the business during the period covered by the report, and the average wages paid by these jobs. (1987, c. 852, s. 1; 1991, c. 637, s. 4; 1993, c. 443, ss. 4, 9; c. 485, s. 12; c. 553, s. 80.1; 1994, Ex. Sess., c. 14, s. 50; 1993 (Reg. Sess., 1994), c. 745, ss. 9, 10; 1996, 2nd Ex. Sess., c. 14, s. 7; 1998-98, s. 69; 1998-212, ss. 29A.15(a), 29A.16(e); 1999-369, s. 5.7; 2001-414, s. 12; 2002-99, s. 4; 2003-414, s. 5.)

Repeal of Part. — Session Laws 2002-99, s. 1, effective August 29, 2002, repealed Session Laws 1993, c. 443, s. 7, which, as amended by Session Laws 1998-212, s. 29A.15(a), would have repealed Part 5 of Article 4 of Chapter 105 effective for investments made on or after January 1, 2003. See G.S. 105-163.015 for current sunset date.

Editor's Note — Session Laws 1993, c. 443, s. 9 was codified as subsection (g) of this section at the direction of the Revisor of Statutes.

§ 105-163.014. (Repealed for investments made on or after January 1, 2011) Forfeiture of credit.

(a) Participation in Business. — A taxpayer who has received a credit under this Part for an investment in a qualified business forfeits the credit if, within three years after the investment was made, the taxpayer participates in the operation of the qualified business. For the purpose of this section, a taxpayer participates in the operation of a qualified business if the taxpayer, the taxpayer's spouse, parent, sibling, or child, or an employee of any of these individuals or of a business controlled by any of these individuals, provides services of any nature to the qualified business for compensation, whether as an employee, a contractor, or otherwise. However, a person who provides services to a qualified business, whether as an officer, a member of the board of directors, or otherwise does not participate in its operation if the person receives as compensation only reasonable reimbursement of expenses incurred in providing the services, participation in a stock option or stock bonus plan, or both.

(b) False Application. — A taxpayer who has received a credit under this Part for an investment in a qualified business forfeits the credit if the registration of the qualified business is revoked because information in the registration application was false at the time the application was filed with the Secretary of State.

(c) Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 7.

(d) Transfer or Redemption of Investment. — A taxpayer who has received a credit under this Part for an investment in a qualified business forfeits the credit in the following cases:

(1) Within one year after the investment was made, the taxpayer transfers any of the securities received in the investment that qualified for the tax credit to another person or entity, other than in a transfer resulting from one of the following:
   a. The death of the taxpayer.
   b. A final distribution in liquidation to the owners of a taxpayer that is a corporation or other entity.
   c. A merger, conversion, consolidation, or similar transaction requiring approval by the owners of the qualified business under applicable State law, to the extent the taxpayer does not receive cash or tangible property in the merger, conversion, consolidation, or other similar transaction.

(2) Except as provided in subsection (d1) of this section, within five years after the investment was made, the qualified business in which the investment was made makes a redemption with respect to the securities received in the investment.

In the event the taxpayer transfers fewer than all the securities in a manner that would result in a forfeiture, the amount of the credit that is forfeited is the product obtained by multiplying the aggregate credit attributable to the investment by a fraction whose numerator equals the number of securities transferred and whose denominator equals the number of securities received on account of the investment to which the credit was attributable. In addition, if the redemption amount is less than the amount invested by the taxpayer in the securities to which the redemption is attributable, the amount of the credit that is forfeited is further reduced by multiplying it by a fraction whose numerator equals the redemption amount and whose denominator equals the aggregate amount invested by the taxpayer in the securities involved in the redemption. The term "redemption amount" means all amounts paid that are treated as a distribution in part or full payment in exchange for securities under section 302(a) of the Code.

(d1) Certain Redemptions Allowed. — Forfeiture of a credit does not occur under this section if a qualified business venture that engages primarily in motion picture film production makes a redemption with respect to securities received in an investment and the following conditions are met:

(1) The redemption occurred because the qualified business venture completed production of a film, sold the film, and was liquidated.

(2) Neither the qualified business venture nor a related person continues to engage in business with respect to the film produced by the qualified business venture.

Part 5 has a delayed repeal date. See notes.

(e) Effect of Forfeiture. — A taxpayer who forfeits a credit under this section is liable for all past taxes avoided as a result of the credit plus interest at the rate established under G.S. 105-241.21, computed from the date the taxes would have been due if the credit had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited; a taxpayer who fails to pay the past taxes and interest by the due date is subject to the penalties provided in G.S. 105-236. (1987, c. 852, s. 1; 1991, c. 637, s. 5; 1993, c. 443, s. 5; 1996, 2nd Ex. Sess., c. 14, s. 7; 1998-98, s. 69; 1998-212, ss. 29A.15(a), 29A.16(a), (b); 1999-369, s. 5.8; 2003-414, s. 6; 2007-491, s. 44(1)a.)

Repeal of Part. — Session Laws 2002-99, s. 1, effective August 29, 2002, repealed Session Laws 1993, c. 443, s. 7, which, as amended by Session Laws 1998-212, s. 29A.15(a), would have repealed Part 5 of Article 4 of Chapter 105 effective for investments made on or after January 1, 2003. See G.S. 105-163.015 for current sunset date.

Editor's Note. — Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year."

Session Laws 1998-212, s. 29A.3 contains a savings clause.

Session Laws 1998-212, s. 30.5 contains a severability clause.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 44(1)a, effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in subsection (e). For applicability, see Editor's note.

§ 105-163.015. Sunset.

This Part is repealed effective for investments made on or after January 1, 2011. (2002-99, s. 5; 2003-414, s. 1; 2004-124, s. 32C.2; 2007-422, s. 1.)

Editor's Note. — Session Laws 2002-99, s. 8, made this section effective August 29, 2002.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Effect of Amendments. — Session Laws 2007-422, s. 1, effective August 23, 2007, substituted "2011" for "2008."

ARTICLE 4A.

Withholding; Estimated Income Tax for Individuals.

§ 105-163.1. Definitions.

The following definitions apply in this Article:

(1) Compensation. — Consideration a payer pays a nonresident individual or nonresident entity for personal services performed in this State.

(2) Contractor. — Either of the following:
  a. A nonresident individual who performs in this State for compensation other than wages any personal services in connection with a performance, an entertainment, an athletic event, a speech, or the creation of a film, radio, or television program.
  b. A nonresident entity that provides for the performance in this State for compensation of any personal services in connection with a performance, an entertainment, an athletic event, a speech, or the creation of a film, radio, or television program.

(3) Dependent. — An individual with respect to whom an income tax exemption is allowed under the Code.

(4) Employee. — An individual, whether a resident or a nonresident of this State, who performs services in this State for wages or an individual who is a resident of this State and performs services outside this State for wages. The term includes an ordained or licensed member of the clergy who elects to be considered an employee under G.S. 105-163.1A, an officer of a corporation, and an elected public official.

(5) Employer. — A person for whom an individual performs services for wages. In applying the requirements to withhold income taxes from wages and pay the withheld taxes, the term includes a person who:
  a. Controls the payment of wages to an individual for services performed for another.
  b. Pays wages on behalf of a person who is not engaged in trade or business in this State.
  c. Pays wages on behalf of a unit of government that is not located in this State.
  d. Pays wages for any other reason.

(6) Individual. — Defined in G.S. 105-134.1.

(7) Miscellaneous payroll period. — A payroll period other than a daily, weekly, biweekly, semimonthly, monthly, quarterly, semiannual, or annual payroll period.

(8) Nonresident entity. — Any of the following:
  a. A foreign limited liability company, as defined in G.S. 57C-1-03, that has not obtained a certificate of authority from the Secretary of State pursuant to Article 7 of Chapter 57C of the General Statutes.
  b. A foreign limited partnership as defined in G.S. 59-102 or a general partnership formed under the laws of any jurisdiction other than this State, unless the partnership maintains a permanent place of business in this State.
  c. A foreign corporation, as defined in G.S. 55-1-40, that has not obtained a certificate of authority from the Secretary of State pursuant to Article 15 of Chapter 55 of the General Statutes.

(9) Pass-through entity. — Defined in G.S. 105-228.90.

(10) Payer. — A person who, in the course of a trade or business, pays a nonresident individual or a nonresident entity compensation for personal services performed in this State.

(11) Payroll period. — A period for which an employer ordinarily pays wages to an employee of the employer.

(11a) Pension payer. — A payor or a plan administrator with respect to a pension payment under section 3405 of the Code.

(11b) Pension payment. — A periodic payment or a nonperiodic distribution as those terms are defined in section 3405 of the Code.

(12) Taxable year. — Defined in section 441(b) of the Code.

(13) Wages. — The term has the same meaning as in section 3401 of the Code except it does not include either of the following:

a. The amount of severance wages paid to an employee during the taxable year that is exempt from State income tax for that taxable year under G.S. 105-134.6(b)(11).

b. The amount an employer pays an employee as reimbursement for ordinary and necessary expenses incurred by the employee on behalf of the employer and in the furtherance of the business of the employer.

(14) Withholding agent. — An employer, a pension payer, or a payer. (1959, c. 1259, s. 1; 1967, c. 716, s. 3; 1973, c. 476, s. 193; 1977, c. 657, s. 5; 1979, c. 801, s. 70; 1983, c. 713, ss. 79, 82; 1985, c. 394, s. 1; c. 656, s. 7; 1985 (Reg. Sess., 1986), c. 853, s. 1; 1987, c. 778, s. 1; 1987 (Reg. Sess., 1988), c. 1015, s. 5; 1989, c. 36, s. 5; c. 728, s. 1.40; 1989 (Reg. Sess., 1990), c. 945, s. 5; c. 981, s. 6; 1991, c. 689, s. 255; 1991 (Reg. Sess., 1992), c. 922, s. 7; 1993, c. 12, s. 9; c. 354, s. 15; 1997-6, s. 6; 1997-109, ss. 1, 2, 4; 1998-162, ss. 1, 2; 1999-414, ss. 1, 2; 2000-126, s. 2; 2003-416, s. 4(b).)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 481.

CASE NOTES

Cited in Allen v. Currie, 254 N.C. 636, 119 S.E.2d 917 (1961).

§ 105-163.1A. Ordained or licensed clergyman may elect to be considered an employee.

An ordained or licensed clergyman who performs services for a church of any religious denomination may file an election with the Secretary and the church he serves to be considered an employee of the church instead of self-employed. Until a clergyman files an election, amounts paid by a church to a clergyman are not subject to withholding. A church shall withhold taxes from a clergyman's wages after the clergyman files an election with it under this section. (1985, c. 394, s. 2; 1985 (Reg. Sess., 1986), c. 826, s. 9; 1989 (Reg. Sess., 1990), c. 945, s. 6.)

§ 105-163.2. Employers must withhold taxes.

(a) Withholding Required. — An employer shall deduct and withhold from the wages of each employee the State income taxes payable by the employee on the wages. For each payroll period, the employer shall withhold from the employee's wages an amount that would approximate the employee's income tax liability under Article 4 of this Chapter if the employer withheld the same amount from the employee's wages for each similar payroll period in a calendar year. In calculating an employee's anticipated income tax liability, the employer shall allow for the exemptions, deductions, and credits to which the employee is entitled under Article 4 of this Chapter. The amount of State income taxes withheld by an employer is held in trust for the Secretary.

(b) Withholding Tables. — The manner of withholding and the amount to be withheld shall be determined in accordance with tables and rules adopted by the Secretary. The withholding exemption allowed by these tables and rules shall, as nearly as possible, approximate the exemptions, deductions, and credits to which an employee would be entitled under Article 4 of this Chapter. The Secretary shall promulgate tables for computing amounts to be withheld with respect to different rates of wages for different payroll periods applicable to the various combinations of exemptions to which an employee may be entitled and taking into account the appropriate standard deduction. The tables may provide for the same amount to be withheld within reasonable salary brackets or ranges so designed as to result in the withholding during a year of approximately the amount of an employee's indicated income tax liability for that year. The withholding of wages pursuant to and in accordance with these tables shall be deemed as a matter of law to constitute compliance with the provisions of subsection (a) of this section, notwithstanding any other provisions of this Article.

(c) Withholding if No Payroll Period. — If wages are paid with respect to a period that is not a payroll period, the amount to be deducted and withheld shall be that applicable in the case of a miscellaneous payroll period containing a number of days, excluding Sundays and holidays, equal to the number of days in the period with respect to which such wages are paid. In any case in which wages are paid by an employer without regard to any payroll period or other period, the amount to be deducted and withheld shall be that applicable in the case of a miscellaneous payroll period containing a number of days equal to the number of days, excluding Sundays and holidays, which have elapsed since the date of the last payment of such wages by such employer during the calendar year, or the date of commencement of employment with such employer during such year, or January 1 of such year, whichever is the later.

(d) Estimated Withholding. — The Secretary may, by rule, authorize employers to estimate the wages to be paid to an employee during a calendar quarter, calculate the amount to be withheld for each period based on the estimated wages, and, upon payment of wages to the employee, adjust the withholding so that the amount actually withheld is the amount that would be required to be withheld if the employee's payroll period were quarterly.

(e) Alternatives to Tables. — If the Secretary determines that use of the withholding tables would be impractical, would impose an unreasonable burden on an employer, or would produce substantially incorrect results, the Secretary may authorize or require an employer to use some other method of determining the amounts to be withheld under this Article. The alternative method authorized by the Secretary must reasonably approximate the predicted income tax liability of the affected employees. In addition, with the agreement of the employer and employee, the Secretary may authorize an employer to use an alternative method that results in withholding of a greater amount than otherwise required under this section.

The Secretary's authorization of an alternative method is discretionary and may be cancelled at any time without advance notice if the Secretary finds that the method is being abused or is not resulting in the withholding of an amount reasonably approximating the predicted income tax liability of the affected employees. The Secretary shall give an employer written notice of any cancellation and the findings upon which the cancellation is based. The cancellation becomes effective upon the employer's receipt of this notice or on the third day after the notice was mailed to the employer, whichever occurs first. If the employer requests a hearing on the cancellation within 30 days after the cancellation, the Secretary shall grant a hearing. After a hearing, the Secretary's findings are conclusive. (1959, c. 1259, s. 1; 1973, c. 476, s. 193; 1981, c. 13; 1989, c. 728, s. 1.41; 1989 (Reg. Sess., 1990), c. 945, s. 7; 1997-109, s. 2.)

CASE NOTES

Cited in Coley v. State, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

§ 105-163.2A. Pension payers must withhold taxes.

(a) Definitions. — The definitions provided in section 3405 of the Code apply in this section.

(b) Withholding Required. — A pension payer required to withhold federal taxes under section 3405 of the Code on a pension payment to a resident of this State must deduct and withhold from the payment the State income taxes payable on the payment. Liability for withholding and paying taxes under this section on a pension payment falls on the person who would be liable under section 3405 of the Code for withholding federal taxes on the payment.

Except as otherwise provided in this section, the provisions of this Article apply to a pension payer's pension payment to a resident of this State as if it were an employer's payment of wages to an employee. If a pension payer has more than one arrangement under which it may make pension payments to a resident of this State, each arrangement must be treated separately under this section.

(c) Amount. — In the case of a periodic payment, the pension payer must withhold the amount that would be required to be withheld under this Article if the payment were a payment of wages by an employer to an employee for the appropriate payroll period. If the recipient of periodic payments fails to file an exemption certificate under G.S. 105-163.5, the pension payer must compute the amount to be withheld as if the recipient were a married individual claiming three withholding exemptions.

In the case of a nonperiodic distribution, the pension payer must withhold taxes equal to four percent (4%) of the nonperiodic distribution.

(d) Election of No Withholding. — The recipient may elect not to have taxes withheld under this section to the extent permitted by section 3405 of the Code. The election must be in the form required by the Secretary. In the case of periodic payments, the election remains in effect until revoked by the recipient. In the case of a nonperiodic distribution, the election applies on a distribution-by-distribution basis unless it meets conditions prescribed by the Secretary for it to apply to subsequent nonperiodic distributions by the pension payer.

A pension payer must notify each recipient of the right to elect not to have taxes withheld under this section. The notice must comply with the requirements of section 3405 of the Code and any additional requirements prescribed by the Secretary.

A recipient's election not to have taxes withheld under this section is void if the recipient fails to furnish the recipient's tax identification number to the pension payer, or the Secretary has notified the pension payer that the tax identification number furnished by the recipient is incorrect.

(e) Exemptions. — This section does not apply to the following pension payments:

(1) A pension payment that is wages under this Article.

(2) Any portion of a pension payment that meets both of the following conditions:

   a. It is not a distribution or payment from an individual retirement plan as defined in section 7701 of the Code.

   b. The pension payer reasonably believes it is not taxable to the recipient under Article 4 of this Chapter.

(3) A distribution described in section 404(k)(2) of the Code, relating to dividends on corporate securities.

(4) A pension payment that consists only of securities of the recipient's employer corporation plus cash not in excess of two hundred dollars ($200.00) in lieu of securities of the employer corporation. (1999-414, s. 3; 2000-126, s. 3.)

Editor's Note. — Session Laws 1999-414, s. 4, made this section effective January 1, 2001.

§ 105-163.2B. North Carolina State Lottery Commission must withhold taxes.

The North Carolina State Lottery Commission, established by Chapter 18C of the General Statutes, must deduct and withhold State income taxes from the payment of winnings in an amount of six hundred dollars ($600.00) or more. The amount of taxes to be withheld is seven percent (7%) of the winnings. The Commission must file a return, pay the withheld taxes, and report the amount withheld in the time and manner required under G.S. 105-163.6 as if the winnings were wages. The taxes the Commission withholds are held in trust for the Secretary. (2005-276, s. 31.1(bb); 2005-344, s. 10.2(a); 2006-259, s. 8(f); 2006-264, s. 91(b).)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2005-344, s. 10.2(a), as added by Session Laws 2005-276, s. 31.1(bb), made this section effective for taxable years beginning on or after January 1, 2005.

Session Laws 2006-264, s. 91(b), which substituted "in an amount of six hundred dollars ($600.00) or more" for "that are reportable to the Internal Revenue Service under section 3406 of the Code" in the first sentence and added "and report the amount withheld" at the end of the third sentence, was repealed by Session Laws 2006-264, s. 91(e). Session Laws 2006-264, s. 91(e) provided that if Senate Bill 1523, 2005 Regular Session (S.L. 2006-259) becomes law, subsections (b) and (c) of this section are repealed.

Effect of Amendments. — Session Laws 2006-259, s. 8(f), effective August 23, 2006, substituted "in an amount of six hundred dollars ($600.00) or more" for "that are reportable to the Internal Revenue Service under section 3406 of the Code" at the end of the first sentence and substituted "return, pay the withheld taxes, and report the amount withheld" for "return and pay the withheld taxes" in the middle of the second sentence.

§ 105-163.3. Certain payers must withhold taxes.

(a) Requirement. — Every payer who pays a contractor more than one thousand five hundred dollars ($1,500) during a calendar year shall deduct and withhold from compensation paid to the contractor the State income taxes payable by the contractor on the compensation as provided in this section. The amount of taxes to be withheld is four percent (4%) of the compensation paid to the contractor. The taxes a payer withholds are held in trust for the Secretary.

(b) Exemptions. — The withholding requirement does not apply to the following:

(1) Compensation that is subject to the withholding requirement of G.S. 105-163.2.

(2) Compensation paid to an ordained or licensed member of the clergy.

(3) Compensation paid to an entity exempt from tax under G.S. 105-130.11.

(c) Returns; Due Date. — A payer shall file a return with the Secretary on a form prepared by the Secretary and shall provide any information required by the Secretary. The return is due and the withheld taxes are payable by the last day of the first month after the end of each calendar quarter during which the payer pays compensation to a contractor. The Secretary may extend the time for filing the return or paying the tax as provided in G.S. 105-263.

(d) Annual Statement; Report to Secretary. — A payer required to deduct and withhold from a contractor's compensation under this section shall furnish to the contractor duplicate copies of a written statement showing the following:

(1) The payer's name, address, and taxpayer identification number.
(2) The contractor's name, address, and taxpayer identification number.
(3) The total amount of compensation paid during the calendar year.
(4) The total amount deducted and withheld under this section during the calendar year.

This statement is due by January 31 following the calendar year. If the personal services for which the payer is paying are completed before the end of the calendar year and the contractor requests the statement, the statement is due within 45 days after the payer's last payment of compensation to the contractor. The Secretary may require the payer to include additional information on the statement.

Each payer shall file with the Secretary an annual report that compiles the information contained in each of the payer's statements to contractors and any other information required by the Secretary. This report is due on the date prescribed by the Secretary and is in lieu of the information report required by G.S. 105-154.

(e) Records. — If a payer does not withhold from payments to a nonresident entity because the entity is exempt from tax under G.S. 105-130.11, the payer shall obtain from the entity documentation proving its exemption from tax. If a payer does not withhold from payments to a nonresident corporation or a nonresident limited liability company because the entity has obtained a certificate of authority from the Secretary of State, the payer shall obtain from the entity its corporate identification number issued by the Secretary of State. If a payer does not withhold from payments to an individual because the individual is a resident, the payer shall obtain the individual's address and social security number. If a payer does not withhold from a partnership because the partnership has a permanent place of business in this State, the payer shall obtain the partnership's address and taxpayer identification number. The payer shall retain this information with its records.

(f) Payer May Repay Amounts Withheld Improperly. — A payer may refund to a person any amount the payer withheld improperly from the person under this section, if the refund is made before the end of the calendar year and before the payer furnishes the person the annual statement required by subsection (d) of this section. An amount is withheld improperly if it is withheld from a payment to a person who is not a contractor, if it is withheld from a payment that is not compensation, or if it is in excess of the amount required to be withheld under this section. A payer who makes a refund under this section must:

(1) Not report the amount refunded on the annual statement required by subsection (d); and
(2) Either not pay to the Secretary the amount refunded or, if the amount refunded has already been paid to the Secretary, reduce by the amount refunded the next payments to the Secretary of taxes withheld from the person. (1959, c. 1259, s. 1; 1973, c. 476, s. 193; 1989, c. 728, s. 1.42; 1989 (Reg. Sess., 1990), c. 945, s. 8; 1997-109, s. 2; 1998-98, ss. 11-13; 1998-162, s. 3.)

§ 105-163.4. Withholding does not create nexus.

A nonresident withholding agent's act in compliance with this Article does not in itself constitute evidence that the nonresident is doing business in this State. (1959, c. 1259, s. 1; 1989 (Reg. Sess., 1990), c. 945, s. 9; 1997-109, s. 2.)

§ 105-163.5. Employee exemptions allowable; certificates.

(a) An employee receiving wages is entitled to the exemptions for which the employee qualifies under Article 4 of this Chapter.

(b) Every employee shall, at the time of commencing employment, furnish his or her employer with a signed withholding exemption certificate informing the employer of the exemptions the employee claims, which in no event shall exceed the amount of exemptions to which the employee is entitled under the Code. If the employee fails to file the exemption certificate the employer, in computing amounts to be withheld from the employee's wages, shall allow the employee the exemption accorded a single person with no dependents.

(c) Withholding exemption certificates shall take effect as of the beginning of the first payroll period that ends on or after the date on which the certificate is furnished, or if payment of wages is made without regard to a payroll period, then the certificate shall take effect as of the beginning of the miscellaneous payroll period for which the first payment of wages is made on or after the date on which the certificate is furnished.

(d) If, on any day during the calendar year, the amount of withholding exemptions to which the employee is entitled is less than the amount of withholding exemptions claimed by the employee on the withholding exemption certificate then in effect with respect to the employee, the employee shall, within 10 days thereafter, furnish the employer with a new withholding exemption certificate stating the amount of withholding exemptions which the employee then claims, which shall in no event exceed the amount to which the employee is entitled on that day. If, on any day during the calendar year, the amount of withholding exemptions to which the employee is entitled is greater than the amount of withholding exemptions claimed, the employee may furnish the employer with a new withholding exemption certificate stating the amount of withholding exemptions which the employee then claims, which shall in no event exceed the amount to which the employee is entitled on that day.

(e) Withholding exemption certificates must be in the form and contain the information required by the Secretary. As far as practicable, the Secretary shall cause the form of the certificates to be substantially similar to federal exemption certificates.

(f) In addition to any criminal penalty provided by law, if an individual furnishes his or her employer an exemption certificate that contains information which has no reasonable basis and that results in a lesser amount of tax being withheld under this Article than would have been withheld if the individual had furnished reasonable information, the individual is subject to a penalty of fifty percent (50%) of the amount not properly withheld. (1959, c. 1259, s. 1; 1973, c. 476, s. 193; 1981 (Reg. Sess., 1982), c. 1277; 1989, c. 728, s. 1.43; 1997-109, s. 2.)

§ 105-163.6. When employer must file returns and pay withheld taxes.

(a) General. — A return is due quarterly or monthly as specified in this section. A return shall be filed with the Secretary on a form prepared by the Secretary, shall report any payments of withheld taxes made during the period covered by the return, and shall contain any other information required by the Secretary.

Withheld taxes are payable quarterly, monthly, or semiweekly, as specified in this section. If the Secretary finds that collection of the amount of taxes this Article requires an employer to withhold is in jeopardy, the Secretary may require the employer to file a return or pay withheld taxes at a time other than that specified in this section.

G.S. 105-163.6A is set out twice. See notes.

(b) Quarterly. — An employer who withholds an average of less than two hundred fifty dollars ($250.00) of State income taxes from wages each month must file a return and pay the withheld taxes on a quarterly basis. A quarterly return covers a calendar quarter and is due by the last day of the month following the end of the quarter.

(c) Monthly. — An employer who withholds an average of at least two hundred fifty dollars ($250.00) but less than two thousand dollars ($2,000) from wages each month must file a return and pay the withheld taxes on a monthly basis. A return for the months of January through November is due by the 15th day of the month following the end of the month covered by the return. A return for the month of December is due the following January 31.

(d) Semiweekly. — An employer who withholds an average of at least two thousand dollars ($2,000) of State income taxes from wages each month shall file a return by the date set under the Code for filing a return for federal employment taxes attributable to the same wages and shall pay the withheld State taxes by the date set under the Code for depositing or paying federal employment taxes attributable to the same wages. The date set by the Code for depositing or paying federal employment taxes shall be determined without regard to § 6302(g) of the Code.

An extension of time granted to file a return for federal employment taxes attributable to wages is an automatic extension of time for filing a return for State income taxes withheld from the same wages, and an extension of time granted to pay federal employment taxes attributable to wages is an automatic extension of time for paying State income taxes withheld from the same wages. An employer who pays withheld State income taxes under this subsection is not subject to interest on or penalties for a shortfall in the amount due if the employer would not be subject to a failure-to-deposit penalty had the shortfall occurred in a deposit of federal employment taxes attributable to the same wages and the employer pays the shortfall by the date the employer would have to deposit a shortfall in the federal employment taxes.

(e) Category. — The Secretary shall monitor the amount of taxes withheld by an employer or estimate the amount of taxes to be withheld by a new employer and shall direct each employer to pay withheld taxes in accordance with the appropriate schedule. An employer shall file a return and pay withheld taxes in accordance with the Secretary's direction until notified in writing to file and pay under a different schedule. (1959, c. 1259, s. 1; 1973, c. 476, s. 193; c. 1287, s. 7; 1975, 2nd Sess., c. 979, s. 1; 1977, c. 488; 1987, c. 622, s. 9; c. 813, s. 24; 1989 (Reg. Sess., 1990), c. 945, s. 10; 1993, c. 450, s. 6; 1993 (Reg. Sess., 1994), c. 661, s. 1; 1997-109, s. 2; 2001-427, s. 5(a), (b).)

§ 105-163.6A. (Effective for taxable years beginning before January 1, 2007) Federal corrections.

If the amount of taxes an employer is required to withhold and pay under the Code is corrected or otherwise determined by the federal government, the employer must, within two years after being notified of the correction or final determination by the federal government, file a return with the Secretary reflecting the corrected or determined amount. The Secretary shall determine from all available evidence the correct amount the employer should have paid under this Article for the period covered by the federal determination. As used in this section, the term "all available evidence" means evidence of any kind that becomes available to the Secretary from any source, whether or not the evidence was considered in the federal correction or determination.

The Secretary shall assess and collect any additional tax due from the employer as provided in Article 9 of this Chapter. If there has been an overpayment of the tax, the Secretary shall either refund the overpayment to the employer in accordance with G.S. 105-163.9 or credit the amount of the overpayment to the individual in accordance with G.S. 105-163.10. An employer who fails to comply with this section is subject to the penalties in G.S. 105-236 and forfeits the right to any refund due by reason of the determination. Failure of an employer to comply with this section does not, however, affect an individual's right to a credit under G.S. 105-163.10. (1993 (Reg. Sess., 1994), c. 582, s. 4.)

Section Set Out Twice. — The section above is effective for taxable years beginning before January 1, 2007. For the section as effective for taxable years beginning on or after January 1, 2007, see the following section, also numbered G.S. 105-163.6A.

§ 105-163.6A. (Effective for taxable years beginning on or after January 1, 2007) Federal corrections.

If the amount of taxes an employer is required to withhold and pay under the Code is corrected or otherwise determined by the federal government, the employer must, within six months after being notified of the correction or final determination by the federal government, file a return with the Secretary reflecting the corrected or determined amount. The Secretary must propose an assessment for any additional tax due from the employer as provided in Article 9 of this Chapter. If there has been an overpayment of the tax, the Secretary must either refund the overpayment to the employer in accordance with G.S. 105-163.9 or credit the amount of the overpayment to the individual in accordance with G.S. 105-163.10. An employer who fails to comply with this section is subject to the penalties in G.S. 105-236 and forfeits the right to any refund due by reason of the determination. Failure of an employer to comply with this section does not, however, affect an individual's right to a credit under G.S. 105-163.10. (1993 (Reg. Sess., 1994), c. 582, s. 4; 2007-491, s. 17.)

Section Set Out Twice. — The section above is effective for taxable years beginning on or after January 1, 2007. For the section effective for taxable years beginning before January 1, 2007, see the preceding section, also numbered G.S. 105-163.6A.

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 17, effective for taxable years beginning on or after January 1, 2007, substituted "six months" for "two years" in the first sentence, rewrote the second and third sentences of the former first paragraph and the first sentence of the former second paragraph as the present second sentence; and substituted "the Secretary must either refund" for "the Secretary shall either refund" near the beginning of the present third sentence. For applicability, see Editor's note.

G.S. 105-163.9 is set out twice. See notes.

§ 105-163.7. Statement to employees; information to Secretary.

(a) Every employer required to deduct and withhold from an employee's wages under G.S. 105-163.2 shall furnish to the employee in respect to the remuneration paid by the employer to such employee during the calendar year, on or before January 31 of the succeeding year, or, if the employment is terminated before the close of the calendar year, within 30 days after the date on which the last payment of remuneration is made, duplicate copies of a written statement showing the following:

(1) The employer's name, address, and taxpayer identification number.
(2) The employee's name and social security number.
(3) The total amount of wages.
(4) The total amount deducted and withheld under G.S. 105-163.2.

(b) The Secretary may require an employer to include information not listed in subsection (a) on the employer's written statement to an employee and to file the statement at a time not required by subsection (a). Every employer shall file an annual report with the Secretary that contains the information given on each of the employer's written statements to an employee and other information required by the Secretary. The annual report is due on the same date the employer's federal information return of federal income taxes withheld from wages is due under the Code. The report required by this subsection is in lieu of the report required by G.S. 105-154.

(c) Repealed by Session Laws 2002-72, s. 16, effective August 12, 2002. (1959, c. 1259, s. 1; 1973, c. 476, s. 193; 1989 (Reg. Sess., 1990), c. 945, s. 11; 1993 (Reg. Sess., 1994), c. 679, s. 8.3; 1997-109, s. 2; 2002-72, s. 16.)

§ 105-163.8. Liability of withholding agents.

(a) A withholding agent who withholds the proper amount of income taxes under this Article and pays the withheld amount to the Secretary is not liable to any person for the amount paid. A withholding agent who fails to withhold the proper amount of income taxes or pay the amount withheld to the Secretary is liable for the amount of tax not withheld or not paid. A withholding agent who fails to withhold the amount of income taxes required by this Article or who fails to pay withheld taxes by the due date for paying the taxes is subject to the penalties provided in Article 9 of this Chapter.

(b) Repealed by Session Laws 1998-212, s. 29A.14(g), effective January 1, 1999. (1959, c. 1259, s. 1; 1973, c. 476, s. 193; 1989 (Reg. Sess., 1990), c. 945, s. 12; 1997-109, s. 2; 1998-212, s. 29A.14(g).)

CASE NOTES

Allocation of Penalty Monies Collected. — Monetary payments for a taxpayer's noncompliance with a mandate of Chapter 105 are penalties and, therefore, subject to N.C. Const. art. IX, § 7; thus, monies collected by the North Carolina Department of Revenue for late filings, underpayments, and for failing to comply with statutory or regulatory tax provisions are payable to public schools. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

§ 105-163.9. (Effective until January 1, 2008) Refund of overpayment to withholding agent.

A withholding agent who pays the Secretary more under this Article than the Article requires the agent to pay may obtain a refund of the overpayment by filing an application for a refund with the Secretary. No refund is allowed,

G.S. 105-163.9 is set out twice. See notes.

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however, if the withholding agent withheld the amount of the overpayment from the wages or compensation of the agent's employees or contractors. A withholding agent must file an application for a refund within the time period set in G.S. 105-266. Interest accrues on a refund as provided in G.S. 105-266. (1959, c. 1259, s. 1; 1973, c. 476, s. 193; 1975, c. 74, s. 1; 1981 (Reg. Sess., 1982), c. 1223, s. 3; 1989 (Reg. Sess., 1990), c. 945, s. 13; 1997-109, s. 2.)

Section Set Out Twice. — The section above is effective until January 1, 2008. For the section as effective January 1, 2008, see the following section, also numbered G.S. 105-163.9.

§ 105-163.9. (Effective January 1, 2008) Refund of overpayment to withholding agent.

A withholding agent who pays the Secretary more under this Article than the Article requires the agent to pay may obtain a refund of the overpayment by filing a request for a refund with the Secretary. No refund is allowed, however, if the withholding agent withheld the amount of the overpayment from the wages or compensation of the agent's employees or contractors. A withholding agent must file a request for a refund within the time period set in G.S. G.S. 105-241.6. Interest accrues on a refund as provided in G.S. 105-241.21. (1959, c. 1259, s. 1; 1973, c. 476, s. 193; 1975, c. 74, s. 1; 1981 (Reg. Sess., 1982), c. 1223, s. 3; 1989 (Reg. Sess., 1990), c. 945, s. 13; 1997-109, s. 2; 2007-491, s. 18.)

Section Set Out Twice. — The section above is effective January 1, 2008. For the section as effective until January 1, 2008, see the preceding section, also numbered G.S. 105-163.9.

Editor's Note. — Session Laws 2007-491, s. 18, amended this section in the coded bill drafting format provided by G.S. 120-20.1. In the third sentence, the act struck through "105-266" but failed to strike through the "G.S." that immediately preceded it. The third sentence has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 18, effective January 1, 2008, substituted "a request" for "an application" in the first and third sentences, and substituted "G.S. 105-241.6" for "105-266" and "G.S. 105-241.21" for "G.S. 105-266" in the third and last sentences, respectively. For applicability, see Editor's note.

§ 105-163.10. Withheld amounts credited to taxpayer for calendar year.

The amount deducted and withheld under this Article during any calendar year from the wages or compensation of an individual shall be allowed as a credit to that individual against the tax imposed by Article 4 of this Chapter for taxable years beginning in that calendar year. The amount deducted and withheld under this Article during any calendar year from the compensation of a nonresident entity shall be allowed as a credit to that entity against the tax imposed by Article 4 of this Chapter for taxable years beginning in that calendar year. If the nonresident entity is a pass-through entity, the entity shall pass through and allocate to each owner the owner's share of the credit.

If more than one taxable year begins in the calendar year during which the withholding occurred, the amount shall be allowed as a credit against the tax for the last taxable year so beginning. To obtain the credit allowed in this section, the individual or nonresident entity must file with the Secretary one copy of the withholding statement required by G.S. 105-163.3 or G.S. 105-163.7 and any other information the Secretary requires. (1959, c. 1259, s. 1; 1967, c. 1110, s. 4; 1973, c. 476, s. 193; 1989, c. 728, s. 1.44; 1991 (Reg. Sess., 1992), c. 930, s. 9; 1997-109, s. 2.)

§§ 105-163.11 through 105-163.14: Repealed by Session Laws 1985, c. 443, s. 1.

§ 105-163.15. Failure by individual to pay estimated income tax; interest.

(a) In the case of any underpayment of the estimated tax by an individual, the Secretary shall assess interest in an amount determined by applying the applicable annual rate established under G.S. 105-241.21 to the amount of the underpayment for the period of the underpayment.

(b) For purposes of subsection (a), the amount of the underpayment shall be the excess of the required installment, over the amount, if any, of the installment paid on or before the due date for the installment. The period of the underpayment shall run from the due date for the installment to whichever of the following dates is the earlier: (i) the fifteenth day of the fourth month following the close of the taxable year, or (ii) with respect to any portion of the underpayment, the date on which such portion is paid. A payment of estimated tax shall be credited against unpaid required installments in the order in which such installments are required to be paid.

(c) For purposes of this section there shall be four required installments for each taxable year with the time for payment of the installments as follows:

(1) First installment — April 15 of taxable year;
(2) Second installment — June 15 of taxable year;
(3) Third installment — September 15 of taxable year; and
(4) Fourth installment — January 15 of following taxable year.

(d) Except as provided in subsection (e), the amount of any required installment shall be twenty-five percent (25%) of the required annual payment. The term "required annual payment" means the lesser of:

(1) Ninety percent (90%) of the tax shown on the return for the taxable year, or, if no return is filed, ninety percent (90%) of the tax for that year; or
(2) One hundred percent (100%) of the tax shown on the return of the individual for the preceding taxable year, if the preceding taxable year was a taxable year of 12 months and the individual filed a return for that year.

(e) In the case of any required installment, if the individual establishes that the annualized income installment is less than the amount determined under subsection (d), the amount of the required installment shall be the annualized income installment, and any reduction in a required installment resulting from the application of this subsection shall be recaptured by increasing the amount of the next required installment determined under subsection (d) by the amount of the reduction and by increasing subsequent required installments to the extent that the reduction has not previously been recaptured.

In the case of any required installment, the annualized income installment is the excess, if any, of (i) an amount equal to the applicable percentage of the tax for the taxable year computed by placing on an annualized basis the taxable income for months in the taxable year ending before the due date for the installment, over (ii) the aggregate amount of any prior required installments for the taxable year. The taxable income shall be placed on an annualized basis under rules prescribed by the Secretary. The applicable percentages for the required installments are as follows:

(1) First installment — twenty-two and one-half percent (22.5%);
(2) Second installment — forty-five percent (45%);
(3) Third installment — sixty-seven and one-half percent (67.5%); and
(4) Fourth installment — ninety percent (90%).

(f) No interest shall be imposed under subsection (a) if the tax shown on the return for the taxable year reduced by the tax withheld under this Article is less than the amount set in section 6654(e) of the Code or if the individual did not have any liability for tax under Part 2 of Article 4 for the preceding taxable year.

(g) For purposes of this section, the term "tax" means the tax imposed by Part 2 of Article 4 minus the credits against the tax allowed by this Chapter other than the credit allowed by this Article. The amount of the credit allowed under this Article for withheld income tax for the taxable year is considered a payment of estimated tax, and an equal part of that amount is considered to have been paid on each due date of the taxable year, unless the taxpayer establishes the dates on which all amounts were actually withheld, in which case the amounts so withheld are considered payments of estimated tax on the dates on which the amounts were actually withheld.

(h) If, on or before January 31 of the following taxable year, the taxpayer files a return for the taxable year and pays in full the amount computed on the return as payable, no interest shall be imposed under subsection (a) with respect to any underpayment of the fourth required installment for the taxable year.

(i) Notwithstanding subsections (c), (d), (e), and (h) of this section, an individual who is a farmer or fisherman for a taxable year is subject to the provisions of this subsection.

(1) One installment. — The individual is required to make only one installment payment of tax for that taxable year. This installment is due on or before January 15 of the following taxable year. The amount of the installment payment must be the lesser of:
    a. Sixty-six and two-thirds percent (66 ⅔%) of the tax shown on the return for the taxable year, or, if no return is filed, sixty-six and two-thirds percent (66 ⅔%) of the tax for that year; or
    b. One hundred percent (100%) of the tax shown on the return of the individual for the preceding taxable year, if the preceding taxable year was a taxable year of 12 months and the individual filed a return for that year.
(2) Exception. — If, on or before March 1 of the following taxable year, the taxpayer files a return for the taxable year and pays in full the amount computed on the return as payable, no interest is imposed under subsection (a) of this section with respect to any underpayment of the required installment for the taxable year.
(3) Eligibility. — An individual is a farmer or fisherman for any taxable year if the individual's gross income from farming or fishing, including oyster farming, for the taxable year is at least sixty-six and two-thirds percent (66 ⅔%) of the total gross income from all sources for the

taxable year, or the individual's gross income from farming or fishing, including oyster farming, shown on the return of the individual for the preceding taxable year is at least sixty-six and two-thirds percent (66 ⅔%) of the total gross income from all sources shown on the return.

(j) In applying this section to a taxable year beginning on any date other than January 1, there shall be substituted, for the months specified in this section, the months that correspond thereto. This section shall be applied to taxable years of less than 12 months in accordance with rules prescribed by the Secretary.

(k) This section shall not apply to any estate or trust. (1959, c. 1259, s. 1; 1963, c. 785, ss. 3, 4; 1973, c. 476, s. 193; c. 1287, s. 7; 1977, c. 657, s. 5; c. 1114, s. 8; 1985, c. 443, s. 2; 1989, c. 692, s. 7.1; 1991 (Reg. Sess., 1992), c. 950, s. 1; 1997-109, s. 2; 1998-98, s. 71; 1998-212, s. 29A.14(h); 2000-126, s. 4; 2005-276, s. 6.37(l); 2007-491, s. 44(1)a.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 6.37(w), provides: "The Office of State Budget and Management shall develop a methodology for computing the actual costs of collection of civil penalties by State departments and agencies. This methodology shall apply to all State departments and agencies, effective July 1, 2006."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2005-276, s. 6.37(l), effective July 1, 2005, in subsection (a), substituted "interest" for "a penalty"; in subsection (f), substituted "interest" for "addition to the tax"; and in subsection (h) and subdivision (i)(2), substituted "interest" for "addition to tax."

Session Laws 2007-491, s. 44(1)a., effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in subsection (a). For applicability, see Editor's note.

CASE NOTES

Allocation of Penalty Monies Collected. — Monetary payments for a taxpayer's noncompliance with a mandate of Chapter 105 are penalties and, therefore, subject to N.C. Const. art. IX, § 7; thus, monies collected by the North Carolina Department of Revenue for late filings, underpayments, and for failing to comply with statutory or regulatory tax provisions are payable to public schools. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

§ 105-163.16. Overpayment refunded.

If the amount of wages or compensation withheld at the source under this Article exceeds the tax imposed by Article 4 of this Chapter against which the withheld tax is credited under G.S. 105-163.10, the excess is considered an overpayment by the employee or contractor. If the amount of estimated tax paid under G.S. 105-163.15 exceeds the taxes imposed by Article 4 of this Chapter against which the estimated tax is credited under the provisions of this Article, the excess is considered an overpayment by the taxpayer. An overpayment shall be refunded as provided in Article 9 of this Chapter. (1959, c. 1259, s. 1; 1967, c. 702, s. 2; 1973, c. 476, s. 193; c. 903, s. 3; 1975, c. 74, s. 2; 1979, c. 801, s. 71; 1981 (Reg. Sess., 1982), c. 1223, s. 1; 1983, c. 663, s. 2; c. 865, s. 1; 1985, c. 443, s. 3; 1987 (Reg. Sess., 1988), c. 1063, s. 2; 1989, c. 728, s. 1.45; 1989 (Reg. Sess., 1990), c. 814, s. 23; 1991, c. 45, s. 22; 1993, c. 315, s. 2; 1997-109, s. 2.)

§§ **105-163.17, 105-163.18:** Repealed by Session Laws 1997, c. 109, s. 2, effective January 1, 1998.

§§ **105-163.19 through 105-163.21:** Repealed by Session Laws 1967, c. 1110, s. 4.

§ 105-163.22. Reciprocity.

The Secretary may, with the approval of the Attorney General, enter into agreements with the taxing authorities of states having income tax withholding statutes with such agreements to govern the amounts to be withheld from the wages and salaries of residents of such other state or states under the provisions of this Article when such other state or states grant similar treatment to the residents of this State. Such agreements may provide for recognition of the anticipated tax credits allowed under the provisions of G.S. 105-151 in determining the amounts to be withheld. (1959, c. 1259, s. 1; 1973, c. 476, s. 193; 1997-109, s. 2.)

§ 105-163.23. Withholding from federal employees.

The Secretary is designated as the proper official to make request for and enter into agreements with the Secretary of the Treasury of the United States to provide for the compliance with this Article by the head of each department or agency of the United States in withholding of State income taxes from wages of federal employees and paying the same to this State. The Secretary is authorized, empowered, and directed to request and enter into these agreements. (1959, c. 1259, s. 1; 1973, c. 476, s. 193; 1997-109, s. 2.)

§ 105-163.24. Construction of Article.

This Article shall be liberally construed in pari materia with Article 4 of this Chapter to the end that taxes levied by Article 4 shall be collected with respect to wages and compensation by withholding agents' withholding of the appropriate amounts and by individuals' payments in installments of income tax with respect to income not subject to withholding. (1959, c. 1259, s. 1; 1997-109, s. 2.)

CASE NOTES

Cited in Coley v. State, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

Article 4B.

Filing of Declarations of Estimated Income Tax and Installment Payments of Estimated Income Tax by Corporations.

§§ 105-163.25 through 105-163.37: Recodified as §§ 105-163.38 through 105-163.44.

Editor's Note. — This Article was rewritten by Session Laws 1983, c. 713, s. 86, and has been recodified as Article 4C of Chapter 105.

Article 4C.

Filing of Declarations of Estimated Income Tax and Installment Payments of Estimated Income Tax by Corporations.

§ 105-163.38. Definitions.

The following definitions apply in this Article, unless the context requires otherwise:

(1) Code. — Defined in G.S. 105-228.90.
(1a) Corporation. — Defined in section 7701 of the Code.
(2) Estimated tax. — The amount of income tax the corporation estimates as the amount imposed by Article 4 for the taxable year.
(3) Fiscal year. — An accounting period of 12 months ending on the last day of any month other than December.
(4) Secretary. — The Secretary of Revenue.
(5) Taxable year. — The calendar year or fiscal year used as a basis to determine net income under Article 4. If no fiscal year has been established, "fiscal year" means the calendar year. In the case of a return made for a fractional part of the year under Article 4, or under rules prescribed by the Secretary, "taxable year" means the period for which the return is made. (1959, c. 1259, s. 1A; 1973, c. 476, s. 193; 1983, c. 713, s. 86; 1989 (Reg. Sess., 1990), c. 984, s. 15; 1991 (Reg. Sess., 1992), c. 922, s. 8; 1993, c. 12, s. 10.)

Editor's Note. — This Article is Article 4B, as rewritten by Session Laws 1983, c. 713, s. 86, and recodified. Where appropriate, the historical citations to the sections in the former Article have been added to corresponding sections in the Article as rewritten and recodified.

§ 105-163.39. Declarations of estimated income tax required.

(a) Declaration Required. — Every corporation subject to taxation under Article 4 shall submit a declaration of estimated tax to the Secretary. This declaration is due at the time established in G.S. 105-163.40, and payment of the estimated tax is due at the time and in the manner prescribed in that section.

(b) Content. — In the declaration of estimated tax, the corporation shall state its estimated total net income from all sources for the taxable year, the proportion of its total net income allocable to this State, its estimated tax, and any other information required by the Secretary.

(c) Amendments to Declaration. — Under rules prescribed by the Secretary, a corporation may amend a declaration of estimated tax. (1959, c. 1259, s. 1A; 1973, c. 476, s. 193; 1983, c. 713, s. 86.)

§ 105-163.40. Time for submitting declaration; time and method for paying estimated tax; form of payment.

(a) Due Dates of Declarations. — Declarations of estimated tax are due at the same time as the corporation's first installment payment. Installment payments are due as follows:

(1) If, before the 1st day of the 4th month of the taxable year, the corporation's estimated tax equals or exceeds five hundred dollars ($500.00), the corporation shall pay the estimated tax in four equal installments on or before the 15th day of the 4th, 6th, 9th and 12th months of the taxable year.

(2) If, after the last day of the 3rd month and before the 1st day of the 6th month of the taxable year, the corporation's estimated tax equals or exceeds five hundred dollars ($500.00), the corporation shall pay the estimated tax in three equal installments on or before the 15th day of the 6th, 9th and 12th months of the taxable year.

(3) If, after the last day of the 5th month and before the 1st day of the 9th month of the taxable year, the corporation's estimated tax equals or exceeds five hundred dollars ($500.00), the corporation shall pay the estimated tax in two equal installments on or before the 15th day of the 9th and 12th months.

(4) If, after the last day of the 8th month and before the 1st day of the 12th month of the taxable year, the corporation's estimated tax equals or exceeds five hundred dollars ($500.00), the corporation shall pay the estimated tax on or before the 15th day of the 12th month of the taxable year.

(b) Payment of Estimated Tax When Declaration Amended. — When a corporation submits an amended declaration after making one or more installment payments on its estimated tax, the amount of each remaining installment shall be the amount that would have been payable if the estimate in the amended declaration was the original estimate, increased or decreased as appropriate by the amount computed by dividing:

(1) The absolute value of the difference between:
   a. The amount paid and
   b. The amount that would have been paid if the estimate in the amended declaration was the original estimate by
(2) The number of remaining installments.

(c) Short Taxable Year. — Payment of estimated tax for taxable years of less than 12 months shall be made in accordance with rules promulgated by the Secretary.

(d) Form of Payment. — A corporation that is required under the Code to pay its federal-estimated corporate income tax by electronic funds transfer must pay its State-estimated tax by electronic funds transfer. (1959, c. 1259, s. 1A; 1973, c. 476, s. 193; 1983, c. 713, s. 86; 1989 (Reg. Sess., 1990), c. 984, s. 16; 1999-389, s. 7.)

§ 105-163.41. Underpayment.

(a) Except as provided in subsection (d), if the amount of estimated tax paid by a corporation during the taxable year is less than the amount of tax imposed upon the corporation under Article 4 of this Chapter for the taxable year, the corporation must be assessed interest in an amount determined by multiplying the amount of the underpayment as determined under subsection (b), for the period of the underpayment as determined under subsection (c), by the percentage established as the rate of interest on assessments under G.S. 105-241.21 that is in effect for the period of the underpayment. For the purpose of this section, the amount of tax imposed under Article 4 of this Chapter is the net amount after subtracting the credits against the tax allowed by this Chapter other than the credit allowed by this Article.

(b) The amount of the underpayment shall be the difference between:

(1) The amount of the installment the corporation would have been required to pay if the corporation's estimated tax equalled ninety percent (90%) of the tax imposed under Article 4 for the taxable year, assuming the same schedule of installments, or ninety percent (90%) of the tax imposed for the taxable year if the corporation made no installment payments; and

(2) The amount, if any, of the corresponding installment timely paid by the corporation.

(c) The period of the underpayment shall run from the date the installment was required to be paid to the earlier of:

(1) The 15th day of the 3rd month following the close of the taxable year, or

(2) With respect to any portion of the underpayment, the date on which the portion is paid. An installment payment of estimated tax shall be considered a payment of any previous underpayment only to the extent the payment exceeds the amount of the installment determined under subdivision (1) of subsection (b) for that installment date.

(d) Except as provided in subdivision (5) of this subsection, the interest for underpayment imposed by this section shall not be imposed if the total amount of all payments of estimated tax made on or before the last date prescribed for the payment of the installments equals or exceeds the amount that would have been required to be paid on or before that date if the estimated tax was equal to the least of:

(1) The tax shown on the return of the corporation for the preceding taxable year, if the corporation filed a return for the preceding taxable year and the preceding year was a taxable year of 12 months;

(2) An amount equal to the tax computed at the rates applicable to the taxable year but otherwise on the basis of the facts shown on the return of the corporation for, and the law applicable to, the preceding taxable year; or

(3) An amount equal to ninety percent (90%) of the tax for the taxable year computed by placing on an annualized basis the taxable income:

  a. For the first three months of the taxable year, in the case of the installment required to be paid in the 4th month;

  b. For the first three months or for the first five months of the taxable year, in the case of the installment required to be paid in the 6th month;

  c. For the first six months or for the first eight months of the taxable year, in the case of the installment required to be paid in the 9th month; and

  d. For the first nine months or for the first 11 months of the taxable year, in the case of the installment required to be paid in the 12th month of the taxable year.

(4) For purposes of this subdivision, the taxable income shall be placed on an annualized basis by multiplying by 12 the taxable income referred to in the preceding sentence, and dividing the resulting amount by the

number of months in the taxable year (3, 5, 6, 8, 9, or 11 as the case may be) referred to in that sentence.

(5) In the case of a large corporation, as defined in section 6655 of the Code, subdivisions (1) and (2) of this subsection shall not apply. (1959, c. 1259, s. 1A; 1973, c. 476, s. 193; 1977, c. 1114, s. 9; 1983, c. 713, s. 86; 1987 (Reg. Sess., 1988), c. 994, ss. 2, 3; 2001-414, s. 13; 2005-276, s. 6.37(m); 2007-491, s. 44(1)a.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 6.37(w), provides: "The Office of State Budget and Management shall develop a methodology for computing the actual costs of collection of civil penalties by State departments and agencies. This methodology shall apply to all State departments and agencies, effective July 1, 2006."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2005-276, s. 6.37(m), effective July 1, 2005, deleted "Penalty for" from the section heading; in subsection (a), substituted "interest" for "an additional tax as a penalty"; and in subsection (d), in the introductory paragraph, substituted "interest" for "penalty" and added "imposed by this section."

Session Laws 2007-491, s. 44(1)a., effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in subsection (a). For applicability, see Editor's note.

CASE NOTES

Allocation of Penalty Monies Collected. — Monetary payments for a taxpayer's noncompliance with a mandate of Chapter 105 are penalties and, therefore, subject to N.C. Const. art. IX, § 7; thus, monies collected by the North Carolina Department of Revenue for late filings, underpayments, and for failing to comply with statutory or regulatory tax provisions are payable to public schools. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

§ 105-163.42: Repealed by Session Laws 1985 (Regular Session, 1986), c. 820.

§ 105-163.43. Overpayment refunded.

If the amount of estimated tax paid under this Article exceeds the taxes against which the estimated tax is credited pursuant to this Article, the excess is considered an overpayment by the taxpayer and shall be refunded as provided in Article 9 of this Chapter. (1959, c. 1259, s. 1A; 1967, c. 1110, s. 5; 1973, c. 476, s. 193; 1983, c. 713, s. 86; 1993, c. 315, s. 1.)

§ 105-163.44: Repealed by Session Laws 2000-140, s. 66, effective July 21, 2000.

ARTICLE 5.

Sales and Use Tax.

§ 105-164: Repealed by Session Laws 1957, c. 1340, s. 5.

Part 1. Title, Purpose and Definitions.

§ 105-164.1. Short title.

This Article shall be known as the "North Carolina Sales and Use Tax Act." (1957, c. 1340, s. 5; 1998-98, s. 47.)

Editor's Note. — Session Laws 1998-98, s. 47, effective August 14, 1998, redesignated Division I as Part 1.

Session Laws 2001-424, s. 32.15, provides: "For the 2001-2002 and 2002-2003 fiscal years, the Secretary of Revenue shall transfer at the end of each quarter from the State sales and use tax net collections received by the Department of Revenue under Article 5 of Chapter 105 of the General Statutes to the State Treasurer for the Wildlife Resources Fund to fund the cost of any legislative salary increase for employees of the Wildlife Resources Commission."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

Legal Periodicals. — For case law survey on sales tax, see 41 N.C.L. Rev. 508 (1963).

CASE NOTES

Constitutionality. — The sales tax cannot constitutionally be imposed upon interstate sales since it would then be a tax upon the privilege of doing interstate business, and would constitute a burden upon interstate commerce in violation of the commerce clause of the United States Constitution. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

The North Carolina Sales and Use Tax Act does not violate the equal protection clause of U.S. Const., Amend. XIV, and the principle of equitable taxation found in N.C. Const., Art. V, § 2. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

A state has the power to enact statutes which impose taxes on all businesses, including the press, in order to generate revenue so long as those statutes operate evenhandedly upon all similarly situated. The Sales and Use Tax Act imposes a uniform tax on all. Absent a discriminatory tax burden an appellant cannot be heard to complain that it, like all other businesses in the State, must bear its portion of the State's revenue needs. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

The purpose of the Sales and Use Tax Act is to impose a use tax, credited with any sales tax previously paid, upon the user of any tangible personal property in this State. Oscar Miller Contractor v. North Carolina Tax Rev. Bd., 61 N.C. App. 725, 301 S.E.2d 511, cert. denied, 308 N.C. 677, 304 S.E.2d 756 (1983).

The purpose of North Carolina's sales and use tax is two-fold. The primary purpose is, of course, to generate revenue for the State. The sales tax is, in effect, a tax imposed upon the retail merchant as a privilege tax for the right to engage in that business. The tax is, however, designed to be passed on to the consumer. The second purpose of the sales and use tax scheme is to equalize the tax burden on all State residents. This is achieved through imposition of the use tax in certain situations where the sales tax is not applicable. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

The chief function of the Sales and Use Tax Act is to prevent the evasion of a sales tax by persons purchasing tangible personal property outside of North Carolina for storage, use or consumption within the State. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

Imposing a tax upon the retail sale of goods within the State without imposing a complementing tax on the in-state use of goods purchased outside the State might encourage North Carolina residents to shop in other states to avoid paying North Carolina sales tax. Therefore, the Sales and Use Tax Act imposes a use tax on items purchased outside the State and thus not subject to sales tax, which are brought into the State for storage, use or consumption in this State. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

Power of Legislature. — The power of the legislature to levy taxes of the character provided in this Article has long been settled. Duke v. State, 247 N.C. 236, 100 S.E.2d 506 (1957).

The sales tax and the use tax may often bring about the same result but they are different in conception. They are assessments upon different transactions and are bottomed on distinguishable taxable events. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

Distinction Between Sales Tax and Use Tax. — A sales tax is assessed on the purchase price of property and is imposed at the time of sale; a use tax is assessed on the storage, use or consumption of property and takes effect only after such use begins. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Unlike a sales tax imposed on interstate sales, the use tax does not impermissibly burden interstate commerce since it is a tax imposed on the enjoyment of goods after the sale has already spent its interstate character. It is designed to complement the sales tax and to reach transactions which cannot constitutionally be subject to a sales tax. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

The use tax removes, insofar as possible, the discrimination against local merchants resulting from the imposition of a sales tax and equalizes the burden of the tax on property sold locally and that purchased without the State. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

Sales Tax Is a Privilege or License Tax. — The legislature intended that the sales tax be primarily a privilege or license tax on retailers. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

The sales tax statute levies a tax upon the sale of tangible personal property in this State by a "retail" merchant as a privilege tax for engaging or continuing in the business of a retail merchant. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Imposed on All Retailers, as a Class. — The North Carolina law imposes the sales tax on all retailers, as a class, and applies it alike in its exactions and exemptions to all persons belonging to the prescribed class. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Perfect equality in the collection of the tax by retailers from consumers is, as a practical matter, impossible as between almost any two or more retailers by reason of the differences in types of merchandise sold and selling methods. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

If property is used to produce something which will add to the taxpayer's profit, but the thing produced will not be sold subject to the sales tax, the sale of the property is not a sale to a manufacturer within the meaning of the Sales and Use Tax Act. Such a sale is subject to the Use Tax at the rate of 4 percent (3 percent for the State and 1 percent for the county). Oscar Miller Contractor v. North Carolina Tax Rev. Bd., 61 N.C. App. 725, 301 S.E.2d 511, cert. denied, 308 N.C. 677, 304 S.E.2d 756 (1983).

Construction of Former Provisions of Article. — As to the incidence of the sales tax where it is imposed upon a general class, as for instance retail merchants, the law is construed more strictly against the agency imposing the tax, and in favor of the taxpayer. Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948).

For other decisions under former laws, see Powell v. Maxwell, 210 N.C. 211, 186 S.E. 326 (1936); McCanless Motor Co. v. Maxwell, 210 N.C. 725, 188 S.E. 389 (1936); Leonard v. Maxwell, 216 N.C. 89, 3 S.E.2d 316, appeal dismissed, 308 U.S. 516, 60 S. Ct. 175, 84 L. Ed. 439 (1939).

§ 105-164.2. Purpose.

The taxes herein imposed shall be in addition to all other license, privilege or excise taxes and the taxes levied by this Article are to provide revenue for the support of the public school system of this State and for other necessary uses and purposes of the government and State of North Carolina. (1957, c. 1340, s. 5.)

CASE NOTES

The purpose of North Carolina's sales and use tax is two-fold. The primary purpose is, of course, to generate revenue for the State. The sales tax is, in effect, a tax imposed upon the retail merchant as a privilege tax for the right to engage in that business. The tax is, however, designed to be passed on to the consumer. The second purpose of the sales and use tax scheme is to equalize the tax burden on all State residents. This is achieved through imposition of the use tax in certain situations where the sales tax is not applicable. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

The chief function of the Sales and Use Tax Act is to prevent the evasion of a sales tax by persons purchasing tangible personal property outside of North Carolina for storage, use or consumption within the State. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

The use tax removes, insofar as possible, the discrimination against local merchants resulting from the imposition of a sales tax and equalizes the burden of the tax on property sold locally and that purchased without the State. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

Cited in Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962); Rent-A-Car Co. v. Lynch, 298 N.C. 559, 259 S.E.2d 564 (1979); Stam v. State, 47 N.C. App. 209, 267 S.E.2d 335 (1980).

§ 105-164.3. Definitions.

The following definitions apply in this Article:

(1) Analytical services. — Testing laboratories that are included in national industry 541380 of NAICS or medical laboratories that are included in national industry 621511 of NAICS.

(1a) Ancillary service. — A service associated with or incidental to the provision of a telecommunications service. The term includes detailed communications billing, directory assistance, vertical service, and voice mail service. A vertical service is a service, such as call forwarding, caller ID, three-way calling, and conference bridging, that allows a customer to identify a caller or manage multiple calls and call connections.

(1b) Bundled transaction. — A retail sale of two or more distinct and identifiable products, at least one of which is taxable and one of which is exempt, for one nonitemized price. Products are not sold for one nonitemized price if an invoice or another sales document made available to the purchaser separately identifies the price of each product. A bundled transaction does not include the retail sale of any of the following:

- a. A product and any packaging item that accompanies the product and is exempt under G.S. 105-164.13(23).
- b. A sale of two or more products whose combined price varies, or is negotiable, depending on the products the purchaser selects.
- c. A sale of a product accompanied by a transfer of another product with no additional consideration.d. A product and the delivery or installation of the product.
- e. A product and any service necessary to complete the sale.

(1d) Business. — Includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, profit, benefit or advantage, either direct or indirect. The term "business" shall not be construed in this Article to include occasional and isolated sales or transactions by a person who does not hold himself out as engaged in business.

(1f) Cable service. — The one-way transmission to subscribers of video programming or other programming service and any subscriber interaction required to select or use the service.

(2) Candy. — A preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces that do not require refrigeration. The term does not include any preparation that contains flour.

(3) Clothing. — All human wearing apparel suitable for general use including coats, jackets, hats, hosiery, scarves, and shoes.

(4) Clothing accessories or equipment. — Incidental items worn on the person or in conjunction with clothing including jewelry, cosmetics, eyewear, wallets, and watches.

(4a) Combined general rate. — The State's general rate of tax set in G.S. 105-164.4(a) plus the sum of the rates of the local sales and use taxes authorized by Subchapter VIII of this Chapter for every county in this State.

(4b) Computer. — An electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.

(4c) Computer software. — A set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task.

(4d) Computer supply. — An item that is considered a "school computer supply" under the Streamlined Agreement.

(5) Consumer. — Means and includes every person storing, using or otherwise consuming in this State tangible personal property purchased or received from a retailer either within or without this State.

(5a), (5b) Reserved for future codification purposes.

(5c) Custom computer software. — Computer software that is not prewritten computer software. The term includes a user manual or other documentation that accompanies the sale of the software.

(5d) Delivered electronically. — Delivered to the purchaser by means other than tangible storage media.

(6) Delivery charges. — Charges imposed by the retailer for preparation and delivery of personal property or services to a location designated by the consumer.

(7) Dietary supplement. — A product that is intended to supplement the diet of humans and is required to be labeled as a dietary supplement under federal law, identifiable by the "Supplement Facts" box found on the label.

(7a) Direct mail. — Printed material delivered or distributed by the United States Postal Service or other delivery service to a mass audience or to addresses on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items is not billed directly to the recipients. The term includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in the package containing the printed material. The term does not include multiple items of printed material delivered to a single address.

(8) Direct-to-home satellite service. — Programming transmitted or broadcast by satellite directly to the subscribers' premises without the

use of ground equipment or distribution equipment, except equipment at the subscribers' premises or the uplink process to the satellite.

(8a) Drug. — A compound, substance, or preparation or a component of one of these that meets any of the following descriptions and is not food, a dietary supplement, or an alcoholic beverage:
  a. Is recognized in the United States Pharmacopoeia, Homeopathic Pharmacopoeia of the United States, or National Formulary.
  b. Is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease.
  c. Is intended to affect the structure or function of the body.

(8b) Durable medical equipment. — Equipment that meets all of the conditions of this subdivision. The term includes repair and replacement parts for the equipment. The term does not include mobility enhancing equipment.
  a. Can withstand repeated use.
  b. Primarily and customarily used to serve a medical purpose.
  c. Generally not useful to a person in the absence of an illness or injury.
  d. Not worn in or on the body.

(8c) Durable medical supplies. — Supplies related to use with durable medical equipment that are eligible to be covered under the Medicare or Medicaid program.

(8d) Electronic. — Relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(8e) Eligible Internet data center. — A facility that satisfies each of the following conditions:
  a. The facility is used primarily or is to be used primarily by a business engaged in "Internet service providers and Web search portals" industry 51811, as defined by NAICS.
  b. The facility is comprised of a structure or series of structures located or to be located on a single parcel of land or on contiguous parcels of land that are commonly owned or owned by affiliation with the operator of that facility.
  c. The facility is located or to be located in a county that was designated, at the time of application for the written determination required under sub-subdivision d. of this subdivision, either an enterprise tier one, two, or three area or a development tier one or two area pursuant to G.S. 105-129.3 or G.S. 143B-437.08, regardless of any subsequent change in county enterprise or development tier status.
  d. The Secretary of Commerce has made a written determination that at least two hundred fifty million dollars ($250,000,000) in private funds has been or will be invested in real property or eligible business property, or a combination of both, at the facility within five years after the commencement of construction of the facility.

(8f) Eligible railroad intermodal facility. — Defined in G.S. 105-129.95.

(9) Engaged in business. — Maintaining, occupying or using permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business, for the selling or delivering of tangible personal property for storage, use or consumption in this State, or permanently or temporarily, directly or through a subsidiary, having any representative, agent, salesman, canvasser or solicitor operating in this State in such selling or delivering, and the fact that any corporate retailer, agent or

subsidiary engaged in business in this State may not be legally domesticated or qualified to do business in this State is immaterial. It also means maintaining in this State, either permanently or temporarily, directly or through a subsidiary, tangible personal property for the purpose of lease or rental. It also means making a mail order sale, as defined in this section, if one of the conditions listed in G.S. 105-164.8(b) is met. It also means the direct shipment of wine to a purchaser in this State by a wine shipper permittee under G.S. 18B-1001.1.

(10) Food. — Substances that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. The substances may be in liquid, concentrated, solid, frozen, dried, or dehydrated form. The term does not include an alcoholic beverage, as defined in G.S. 105-113.68, or a tobacco product, as defined in G.S. 105-113.4.

(11) Food sold through a vending machine. — Food dispensed from a machine or another mechanical device that accepts payment.

(12) Gross sales. — The sum total of the sales price of all retail sales of tangible personal property and services.

(13) Hub. — Either of the following:

  a. An interstate air courier's hub is the interstate air courier's principal airport within the State for sorting and distributing letters and packages and from which the interstate air courier has, or expects to have upon completion of construction, no less than 150 departures a month under normal operating conditions.

  b. An interstate passenger air carrier's hub is the airport in this State that meets both of the following conditions:

    1. The air carrier has allocated to the airport under G.S. 105-338 more than sixty percent (60%) of its aircraft value apportioned to this State.

    2. The majority of the air carrier's passengers boarding at the airport are connecting from other airports rather than originating at that airport.

(14) In this (the) State. — Within the exterior limits of the State of North Carolina and includes all territory within such limits owned by or ceded to the United States of America.

(14c) Interstate air business. — An interstate air courier, an interstate freight air carrier, or an interstate passenger air carrier.

(15) Interstate air courier. — A person whose primary business is the furnishing of air delivery of individually addressed letters and packages for compensation, in interstate commerce, except by the United States Postal Service.

(15b) Interstate freight air carrier. — A person whose primary business is scheduled freight air transportation, as defined in the North American Industry Classification System adopted by the United States Office of Management and Budget, in interstate commerce.

(16) Interstate passenger air carrier. — A person whose primary business is scheduled passenger air transportation, as defined in the North American Industry Classification System adopted by the United States Office of Management and Budget, in interstate commerce.

(17) Lease or rental. — A transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration. The term does not include any of the following:

  a. A transfer of possession or control of property under a security agreement or deferred payment plan that requires the transfer of title upon completion of the required payments.

  b. A transfer of possession or control of property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price that does not exceed the greater of one hundred dollars ($100.00) or one percent (1%) of the total required payments.

c. The providing of tangible personal property along with an operator for a fixed or indeterminate period of time if the operator is necessary for the equipment to perform as designed. For the purpose of this sub-subdivision, an operator must do more than maintain, inspect, or set up the tangible personal property.

(17a) Load and leave. — Delivery to the purchaser by use of a tangible storage media where the tangible storage media is not physically transferred to the purchaser.

(18) Mail order sale. — A sale of tangible personal property, ordered by mail, telephone, computer link, or other similar method, to a purchaser who is in this State at the time the order is remitted, from a retailer who receives the order in another state and transports the property or causes it to be transported to a person in this State. It is presumed that a resident of this State who remits an order was in this State at the time the order was remitted.

(19) Major recycling facility. — Defined in G.S. 105-129.25.

(20) Manufactured home. — A structure that is designed to be used as a dwelling and is manufactured in accordance with the specifications for manufactured homes issued by the United States Department of Housing and Urban Development.

a., b. Repealed by Session Laws 2003-400, s. 13, effective January 1, 2004, and applicable to sales of modular homes on and after that date.

(21) Mobile telecommunications service. — A radio communication service carried on between mobile stations or receivers and land stations and by mobile stations communicating among themselves and includes all of the following:

a. Both one-way and two-way radio communication services.

b. A mobile service that provides a regularly interacting group of base, mobile, portable, and associated control and relay stations for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation.

c. Any service for which a federal license is required in a personal communications service.

(21a) Mobility enhancing equipment. — Equipment that meets all of the conditions of this subdivision. The term includes repair and replacement parts for the equipment. The term does not include durable medical equipment.

a. Primarily and customarily used to provide or increase the ability of an individual to move from one place to another.

b. Appropriate for use either in a home or motor vehicle.

c. Not generally used by a person with normal mobility.

d. Not normally provided on a motor vehicle by a motor vehicle manufacturer.

(21b) Modular home. — A factory-built structure that is designed to be used as a dwelling, is manufactured in accordance with the specifications for modular homes under the North Carolina State Residential Building Code, and bears a seal or label issued by the Department of Insurance pursuant to G.S. 143-139.1.

(21c) Modular homebuilder. — A person who furnishes for consideration a modular home to a purchaser that will occupy the modular home. The purchaser can be a person that will lease or rent the unit as real property.

(22) Moped. — A vehicle that has two or three wheels, no external shifting device, and a motor that does not exceed 50 cubic centimeters piston

displacement and cannot propel the vehicle at a speed greater than 30 miles per hour on a level surface.

(23) Motor vehicle. — A vehicle that is designed primarily for use upon the highways and is either self-propelled or propelled by a self-propelled vehicle, but does not include:

a. A moped.

b. Special mobile equipment.

c. A tow dolly that is exempt from motor vehicle title and registration requirements under G.S. 20-51(10) or (11).

d. A farm tractor or other implement of husbandry.

e. A manufactured home, a mobile office, or a mobile classroom.

f. Road construction or road maintenance machinery or equipment.

(23a) NAICS. — Defined in G.S. 105-129.81.

(24) Net taxable sales. — Means and includes the gross retail sales of the business of the retailer taxed under this Article after deducting exempt sales and nontaxable sales.

(25) Nonresident retail or wholesale merchant. — A person who does not have a place of business in this State, is engaged in the business of acquiring, by purchase, consignment, or otherwise, tangible personal property and selling the property outside the State, and is registered for sales and use tax purposes in a taxing jurisdiction outside the State.

(25a) Over-the-counter drug. — A drug that can be dispensed under federal law without a prescription and is required by 21 C.F.R. § 210.66 to have a label containing a "Drug Facts" panel and a statement of its active ingredients.

(26) Person. — The same meaning as in G.S. 105-228.90.

(26a) Place of primary use. — The street address representative of where the use of a customer's telecommunications service primarily occurs. The street address must be the customer's residential street address or primary business street address. For mobile telecommunications service, the street address must be within the licensed service area of the service provider. If the customer who contracted with the telecommunications provider for the telecommunications service is not the end user of the service, the end user is considered the customer for the purpose of determining the place of primary use.

(27) Prepaid telephone calling service. — Prepaid wireline calling service or prepaid wireless calling service.

(27a) Prepaid wireless calling service. — A right that meets all of the following requirements:

a. Authorizes the purchase of mobile telecommunications service, either exclusively or in conjunction with other services.

b. Must be paid for in advance.

c. Is sold in units or dollars whose number or dollar value declines with use and is known on a continuous basis.

(27b) Prepaid wireline calling service. — A right that meets all of the following requirements:

a. Authorizes the exclusive purchase of wireline telecommunications service.

b. Must be paid for in advance.

c. Enables the origination of calls by means of an access number, authorization code, or another similar means, regardless of whether the access number or authorization code is manually or electronically dialed.

d. Is sold in units or dollars whose number or dollar value declines with use and is known on a continuous basis.

(28) Prepared food. — Food that meets at least one of the conditions of this subdivision. Prepared food does not include food the retailer sliced, repackaged, or pasteurized but did not heat, mix, or sell with eating utensils.
  a. It is sold in a heated state or it is heated by the retailer.
  b. It consists of two or more foods mixed or combined by the retailer for sale as a single item. This sub-subdivision does not include foods containing raw eggs, fish, meat, or poultry that require cooking by the consumer as recommended by the Food and Drug Administration to prevent food borne illnesses.
  c. It is sold with eating utensils provided by the retailer, such as plates, knives, forks, spoons, glasses, cups, napkins, and straws.

(29) Prescription. — An order, formula, or recipe issued orally, in writing, electronically, or by another means of transmission by a physician, dentist, veterinarian, or another person licensed to prescribe drugs.

(29a) Prewritten computer software. — Computer software, including prewritten upgrades, that is not designed and developed by the author or another creator to the specifications of a specific purchaser. The term includes software designed and developed by the author or another creator to the specifications of a specific purchaser when it is sold to a person other than the specific purchaser.

(30) Production company. — A person engaged in the business of making original motion picture, television, or radio images for theatrical, commercial, advertising, or educational purposes.

(30a) Professional motorsports racing team. — A racing team that satisfies all of the following conditions:
  a. The team is operated for profit.
  b. A majority of the revenues of the team is derived from sponsorship of the racing team and prize money.
  c. The team competes in at least sixty-six percent (66%) of the races sponsored in a single season by a motorsports sanctioning body.

(30b) Prosthetic device. — A replacement, corrective, or supporting device worn on or in the body that meets one of the conditions of this subdivision. The term includes repair and replacement parts for the device.
  a. Artificially replaces a missing portion of the body.
  b. Prevents or corrects a physical deformity or malfunction.
  c. Supports a weak or deformed portion of the body.

(31) Protective equipment. — Items for human wear and designed as protection of the wearer against injury or disease or as protection against damage or injury of other persons or property but not suitable for general use including breathing masks, face shields, hard hats, and tool belts.

(32) Purchase. — Acquired for a consideration whether
  a. The acquisition was effected by a transfer of title or possession, or both, or a license to use or consume;
  b. The transfer was absolute or conditional regardless of the means by which it was effected; and
  c. The consideration is a price or rental in money or by way of exchange or barter.

It shall also include the procuring of a retailer to erect, install or apply tangible personal property for use in this State.

(33) Purchase price. — The term has the same meaning as the term "sales price" when applied to an item subject to use tax.

(34) Retail sale or sale at retail. — The sale, lease, or rental for any purpose other than for resale, sublease, or subrent.

(35) Retailer. — Means and includes every person engaged in the business of making sales of tangible personal property at retail, either within or without this State, or peddling the same or soliciting or taking orders for sales, whether for immediate or future delivery, for storage, use or consumption in this State and every manufacturer, producer or contractor engaged in business in this State and selling, delivering, erecting, installing or applying tangible personal property for use in this State notwithstanding that said property may be permanently affixed to a building or realty or other tangible personal property. "Retailer" also means a person who makes a mail order sale, as defined in this section, if one of the conditions listed in G.S. 105-164.8(b) is met. Provided, however, that when in the opinion of the Secretary it is necessary for the efficient administration of this Article to regard any salesmen, solicitors, representatives, consignees, peddlers, truckers or canvassers as agents of the dealers, distributors, consignors, supervisors, employers or persons under whom they operate or from whom they obtain the tangible personal property sold by them regardless of whether they are making sales on their own behalf or on behalf of such dealers, distributors, consignors, supervisors, employers or persons, the Secretary may so regard them and may regard the dealers, distributors, consignors, supervisors, employers or persons as "retailers" for the purpose of this Article.

(36) Sale or selling. — The transfer of title or possession of tangible personal property, conditional or otherwise, in any manner or by any means whatsoever, for a consideration paid or to be paid.

The term includes the fabrication of tangible personal property for consumers by persons engaged in business who furnish either directly or indirectly the materials used in the fabrication work. The term also includes the furnishing or preparing for a consideration of any tangible personal property consumed on the premises of the person furnishing or preparing the property or consumed at the place at which the property is furnished or prepared. The term also includes a transaction in which the possession of the property is transferred but the seller retains title or security for the payment of the consideration.

If a retailer engaged in the business of selling prepared food and drink for immediate or on-premises consumption also gives prepared food or drink to its patrons or employees free of charge, for the purposes of this Article the property given away is considered sold along with the property sold. If a retailer gives an item of inventory to a customer free of charge on the condition that the customer purchase similar or related property, the item given away is considered sold along with the item sold. In all other cases, property given away or used by any retailer or wholesale merchant is not considered sold, whether or not the retailer or wholesale merchant recovers its cost of the property from sales of other property.

(37) Sales price. — The total amount or consideration for which tangible personal property or services are sold, leased, or rented. The consideration may be in the form of cash, credit, property, or services. The sales price must be valued in money, regardless of whether it is received in money.

a. The term includes all of the following:
   1. The retailer's cost of the property sold.
   2. The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the retailer, all taxes imposed on the retailer, and any other expense of the retailer.
   3. Charges by the retailer for any services necessary to complete the sale.

4. Delivery charges.
5. Installation charges.
6. Repealed by Session Laws 2007-244, s. 1, effective October 1, 2007.
7. Credit for trade-in.
8. Discounts that are reimbursable by a third party and can be determined at the time of sale through any of the following:
   I. Presentation by the consumer of a coupon or other documentation.
   II. Identification of the consumer as a member of a group eligible for a discount.
   III. The invoice the retailer gives the consumer.

b. The term does not include any of the following:
   1. Discounts that are not reimbursable by a third party, are allowed by the retailer, and are taken by a consumer on a sale.
   2. Interest, financing, and carrying charges from credit extended on the sale, if the amount is separately stated on the invoice, bill of sale, or a similar document given to the consumer.
   3. Any taxes imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the consumer.

(37a) Satellite digital audio radio service. — A radio communication service in which audio programming is digitally transmitted by satellite to an earth-based receiver, whether directly or via a repeater station.

(37b) School instructional material. — Defined in the Streamlined Agreement.

(37d) School supply. — An item that is commonly used by a student in the course of study and is considered a “school supply” or “school art supply” under the Streamlined Agreement.

(38) Secretary. — The Secretary of the North Carolina Department of Revenue.

(39) Repealed by Session Laws 2002-16, s. 3, effective August 1, 2002, and applicable to taxable services reflected on bills dated after August 1, 2002.

(40) Soft drink. — A nonalcoholic beverage that contains natural or artificial sweeteners. The term does not include beverages that contain one or more of the following:
a. Milk or milk products.
b. Soy, rice, or similar milk substitutes.
c. More than fifty percent (50%) vegetable or fruit juice.

(41) Special mobile equipment. — Any of the following:
a. A vehicle that has a permanently attached crane, mill, well-boring apparatus, ditch-digging apparatus, air compressor, electric welder, feed mixer, grinder, or other similar apparatus is driven on the highway only to get to and from a nonhighway job and is not designed or used primarily for the transportation of persons or property.
b. A vehicle that has permanently attached special equipment and is used only for parade purposes.
c. A vehicle that is privately owned, has permanently attached fire-fighting equipment, and is used only for fire-fighting purposes.
d. A vehicle that has permanently attached playground equipment and is used only for playground purposes.

(42) Sport or recreational equipment. — Items designed for human use and worn in conjunction with an athletic or recreational activity that are not suitable for general use including ballet shoes, cleated athletic shoes, shin guards, and ski boots.

(43) State agency. — A unit of the executive, legislative, or judicial branch of State government, such as a department, a commission, a board, a council, or The University of North Carolina. The term does not include a local board of education.

(44) Storage. — Means and includes any keeping or retention in this State for any purpose by the purchaser thereof, except sale in the regular course of business, of tangible personal property purchased from a retailer.

(45) Storage and Use; Exclusion. — "Storage" and "use" do not include the keeping, retaining or exercising of any right or power over tangible personal property by the purchaser thereof for the original purpose of subsequently transporting it outside the State for use by said purchaser thereafter solely outside the State and which purpose is consummated, or for the purpose of being processed, fabricated or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the State and thereafter used by the purchaser thereof solely outside the State.

(45a) Streamlined Agreement. — The Streamlined Sales and Use Tax Agreement as amended as of June 23, 2007.

(46) Tangible personal property. — Personal property that may be seen, weighed, measured, felt, or touched or is in any other manner perceptible to the senses. The term includes electricity, water, gas, steam, and prewritten computer software.

(47) Taxpayer. — Any person liable for taxes under this Article.

(48) Telecommunications service. — The electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. The term includes any transmission, conveyance, or routing in which a computer processing application is used to act on the form, code, or protocol of the content for purposes of the transmission, conveyance, or routing, regardless of whether it is referred to as voice-over Internet protocol or the Federal Communications Commission classifies it as enhanced or value added. The term does not include the following:

a. Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a customer whose primary purpose for using the service is to obtain the processed data or information.

b. The sale, installation, maintenance, or repair of tangible personal property.

c. Directory advertising and other advertising.

d. Billing and collection services provided to a third party.

e. Internet access service.

f. Radio and television audio and video programming service, regardless of the medium of delivery, and the transmission, conveyance, or routing of the service by the programming service provider. The term includes cable service and audio and video programming service provided by a mobile telecommunications service provider.

g. Ancillary service.

h. A digital product delivered electronically, including software, music, a ring tone, video, and reading material.

(49) Use. — The exercise of any right, power, or dominion whatsoever over tangible personal property or a service by the purchaser of the property or service. The term includes withdrawal from storage, distribution, installation, affixation to real or personal property, and exhaustion or consumption of the tangible personal property or service by the owner or purchaser. The term does not include the sale of tangible personal property or a service in the regular course of business.

(50) Use tax. — The tax imposed by Part 2 of this Article.

(50c) Video programming. — Programming provided by, or generally considered comparable to programming provided by, a television broadcast station, regardless of the method of delivery.

(51) Wholesale merchant. — Every person who engages in the business of buying or manufacturing any tangible personal property and selling same to registered retailers, wholesalers and nonresident retail or wholesale merchants for resale. It shall also include persons making sales of tangible personal property which are defined herein as wholesale sales. For the purposes of this Article any person, firm, corporation, estate or trust engaged in the business of manufacturing, producing, processing or blending any articles of commerce and maintaining a store or stores, warehouse or warehouses, or any other place or places, separate and apart from the place of manufacture or production, for the sale or distribution of its products (other than bakery products) to other manufacturers or producers, wholesale or retail merchants, for the purpose of resale shall be deemed a "wholesale merchant."

(52) Wholesale sale. — A sale of tangible personal property by a wholesale merchant to a manufacturer, or registered jobber or dealer, or registered wholesale or retail merchant, for the purpose of resale but does not include a sale to users or consumers not for resale. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 1213, s. 1; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; c. 1287, s. 8; 1975, c. 104; c. 275, s. 6; 1979, c. 48, s. 2; c. 71; c. 801, s. 72; 1983, c. 713, ss. 87, 88; 1983 (Reg. Sess., 1984), c. 1097, ss. 4, 5; 1985, c. 23; 1987, c. 27; c. 557, s. 3.1; c. 854, ss. 2, 3; 1987 (Reg. Sess., 1988), c. 1044, s. 3; c. 1096, ss. 1-3; 1989, c. 692, s. 3.2; 1989 (Reg. Sess., 1990), c. 813, s. 13; 1991, c. 45, s. 15; c. 79, ss. 1, 3; c. 689, s. 190.1(a); 1991 (Reg. Sess., 1992), c. 949, s. 3; 1993, c. 354, s. 16; c. 484, s. 1; c. 507, s. 1; 1995 (Reg. Sess., 1996), c. 649, s. 2; 1996, 2nd Ex. Sess., c. 14, ss. 13, 14; 1997-6, s. 7; 1997-370, s. 1; 1997-426, s. 4; 1998-22, s. 4; 1998-55, ss. 7, 13; 1998-98, ss. 13.1(a), 106; 1999-337, s. 28(a), (b); 1999-360, s. 6(a)-(c); 1999-438, s. 4; 2000-153, s. 4; 2000-173, s. 9; 2001-347, ss. 2.1-2.7; 2001-414, s. 14; 2001-424, s. 34.17(b); 2001-430, ss. 1, 2; 2001-476, s. 18(a); 2001-489, s. 3(a); 2002-16, ss. 1, 2, 3; 2002-170, s. 6; 2003-284, s. 45.2; 2003-400, ss. 13, 14; 2003-402, s. 12; 2004-124, s. 32B.3; 2004-170, ss. 18, 19; 2005-276, ss. 33.2, 33.3; 2006-33, s. 1; 2006-66, ss. 24.10(a), 24.17(a); 2006-151, s. 2; 2006-162, s. 5(a); 2006-168, ss. 4.1, 4.3; 2006-252, ss. 2.25(a), (a1), (c), 2.26; 2007-244, s. 1; 2007-323, ss. 31.14(a), 31.20(a), 31.23(b).)

Editor's Note. — Session Laws 1987 (Reg. Sess., 1988), c. 1096, s. 6 provides: "It is the intent of the General Assembly that the Department of Revenue shall collect all of the sales and use taxes due to the State and local governments. Notwithstanding the provisions of G.S. 105-268.1, the Secretary of Revenue may, without seeking prior approval of the Governor and the Council of State, enter into agreements with any other state to coordinate and promote collection of sales and use taxes by retailers making mail order sales, as defined in this act."

Session Laws 2001-476, s. 18(c), provides: "This section becomes effective January 1, 2002, and applies to sales made on or after that late. The Codifier is authorized to modify G.S. 05-164.3 to change the format of the existing lefinitions to match the format of the new lefinitions enacted during 2001, but not to hange the format of the new definitions encted in 2001 to match the format of the existng definitions. The Codifier is authorized to enumber these definitions as necessary to naintain their alphabetical order." The definiions have been renumbered as above at the lirection of the Revisor of Statutes.

Session Laws 2002-146, s. 9, provides: "It is he intent of the General Assembly that the rovisions of this act not be expanded. If a court f competent jurisdiction holds any provision of his act invalid, the section containing that rovision is repealed. The repeal of a section of his act under this section does not affect other rovisions of this act that may be given affect vithout the invalid provision."

Session Laws 2003-284, s. 45.1, provides: The Streamlined Sales and Use Tax Agreenent is an historic multistate agreement deigned to simplify and modernize sales and use ax collection and administration. The states nd businesses involved in the Streamlined ales Tax Project recognize that a simplified nd uniform system saves businesses complince and audit costs, while also saving states dministrative costs and improving voluntary ompliance, which should increase state collecions. To participate in the Agreement, North arolina must amend or modify some of its ales and use tax law to conform to the simpliications and uniformity in the Agreement. This art [Part XLV of Session Laws 2003-284] nakes those necessary changes."

Session Laws 2003-284, s. 48.1, provides: Parts 32 through 47 of this act do not affect the ights or liabilities of the State, a taxpayer, or nother person arising under a statute mended or repealed by those parts before the ffective date of its amendment or repeal; nor lo they affect the right to any refund or credit of tax that accrued under the amended or reealed statute before the effective date of its mendment or repeal."

Session Laws 2003-284, s. 1.2, provides: This act shall be known as the 'Current Operations and Capital Improvements Appropriaions Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: Except for statutory changes or other proviions that clearly indicate an intention to have ffects beyond the 2003-2005 fiscal biennium, he textual provisions of this act apply only to unds appropriated for, and activities occurring luring, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severabilty clause.

Subdivisions (21a) and (21b), as enacted by ession Laws 2003-400, s. 14, have been redesignated as (21b) and (21c) at the direction of the Revisor of Statutes.

Subdivision (1) was added by Session Laws 2006-33, s. 1, as subdivision (01) and was redesignated at the direction of the Revisor of Statutes. Subdivisions (1) and (1a) were redesignated as subdivisions (1a) and (1b) respectively, and subdivisions (27a) and (27b) were redesignated as subdivisions (27b) and (27a), respectively, at the direction of the Revisor of Statutes.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 24.17(c), as amended by Session Laws 2006-168, s. 4.3, and Session Laws 2006-252, s. 2.25(c), provides: "Subsection (b) of this section becomes effective October 1, 2006, and applies to sales made on or after that date. The remainder of this section is effective when it becomes law [July 10, 2006]."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-151, s. 20 is a severability clause.

Session Laws 2006-252, s. 2.25(a), which made amendments similar to Session Laws 2006-168, did not take effect because House Bill 2744, 2005 General Assembly (2006-168) became law.

Session Laws 2007-323, s. 31.20(a), added a subdivision (33a). That subdivision has been renumbered as subdivision (1), and the previously existing subdivision (1) has been renumbered as subdivision (1a), to maintain the definitions in alphabetical order at the direction of the Revisor of Statutes.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, ss. 33.2 and 33.3, effective October 1, 2005, recodfied subdivisions (4a) and (4b) as subdivisions (4b) and (4c), respectively; added subdivisions (1a), (4a), (4d), (37a), (37b) and (45a); and in subdivision (10), inserted "an alcoholic beverage, as defined in G.S. 105-113.68, or a" and made a related stylistic change.

Session Laws 2006-33, s. 1, effective January 1, 2007, added subdivision (1); rewrote subdivision (27); added present subdivision (27a) and redesignated former subdivisions (27)a through

(27)d as present subdivisions (27b)a through (27b)d; added subdivision (27a); and rewrote subdivisions (45a) and (48).

Session Laws 2006-66, s. 24.10(a), effective July 1, 2007, and applicable to purchases made on or after that date, added present subsection (30a) and redesignated former subsection (30a) as present subsection (30b).

Session Laws 2006-66, s. 24.17(a), effective July 10, 2006, as amended by Session Laws 2006-168, s. 4.3, added new subdivisions (8e) and (23a). For effective date and applicability, see editor's note.

Session Laws 2006-151, s. 2, effective January 1, 2007, added subdivision (50c).

Session Laws 2006-162, s. 5(a), effective July 24, 2006, rewrote subdivision (49).

Session Laws 2006-168, s. 4.1, effective July 27, 2006, inserted the quotation marks around "Internet service providers and Web search portals" in subdivision (8e).

Session Laws 2006-252, s. 2.25(a1), effective January 1, 2007, inserted "or a development tier one or two area," "or G.S. 143B-437.08," and "or development" in subdivision (8e)c.

Session Laws 2006-252, s. 2.26, effective January 1, 2007, rewrote subdivision (23a).

Session Laws 2007-244, s. 1, effective October 1, 2007, added subdivision (1b); redesignated former subdivisions (1a) and (1b) as subdivisions (1d) and (1f), respectively; rewrote subdivision (12); deleted former sub-subdivision (37)(a)6. which read: "The value of exempt personal property given to the consumer when taxable and exempt personal property are bundled together and sold by the retailer as a single product or piece of merchandise."; added sub-subdivision (37)(a)8.; substituted "Discounts that are not reimbursable" for "Discounts, including cash, term, or coupons, that are not reimbursed" in sub-subdivision (37)(b)1.; and substituted "as of June 23, 2007" for "in November 2005" in subdivision (45a).

Session Laws 2007-323, s. 31.14(a), effective October 1, 2007, and applicable to sales made on or after October 1, 2007, added subdivision (37b); redesignated former subdivision (37b) as subdivision (37d); and substituted "'school supply' or 'school art supply'" for "'school supply' a 'school art supply', or 'school instruction material'" in subdivision (37d).

Session Laws 2007-323, s. 31.20(a), effective July 31, 2007, added the subdivision designated herein as subdivision (1).

Session Laws 2007-323, s. 31.23.(b), effective January 1, 2007, and applicable to sales made on or after January 1, 2007, added subdivision (8f).

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 481.

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former G.S. 105-89.1.*

"Cash Discount". — The size of a discount is irrelevant if it is given in consideration for payment within a prescribed time, in which case it is a "cash discount" within the meaning of subdivision (6). Walls & Marshall Fuel Co. v. North Carolina Dep't of Revenue, 95 N.C. App. 151, 381 S.E.2d 815 (1989).

Where taxpayer who sold fuel oil offered an 8 cents per gallon discount to its customers if the bill was paid within three days from delivery, the price reduction option fell within the recognized meaning of "cash discount," because it was a deduction from the billed price which the seller allowed for payment within a certain time. Walls & Marshall Fuel Co. v. North Carolina Dep't of Revenue, 95 N.C. App. 151, 381 S.E.2d 815 (1989).

Bank as Automobile Dealer. — Where a dealer in automobiles has sold to the bank, to which he was indebted, his automobiles on hand, for the purpose of securing the debt, under further provisions that he was to sell and collect and hold the proceeds in trust for the purpose stated and has thereafter left the State and the bank has assumed to continue the sales and make collection therefor, the bank may not avoid payment of the tax upon the ground that it was not a dealer, etc., in contemplation of the statute, and thus evade the practical efficiency of the statute and reduce it to a nullity. American Exch. Nat'l Bank v. Lacy, 188 N.C. 25, 123 S.E. 475 (1924).

"Storage". — Subdivision (17) [now (44)] limits "storage" to the keeping or retention of personal property purchased from a retailer, thus excluding from the tax the storage of personal property not so acquired. The commas inserted by the 1973 amendment make this clear as to "storage" thereafter. In re Clayton-Marcus Co., 286 N.C. 215, 210 S.E.2d 199 (1974).

"Use". — Under this section as it stood before the 1975 amendment to subdivision (19) [now (45)], it was held that a taxable "use" did not include a processing of material into a different product, which resulting product was, itself, to be transported outside the State and used outside the State exclusively, regardless of who the user there might be. In re Clayton-Marcus Co., 286 N.C. 215, 210 S.E.2d 199 (1974).

There is no limitation upon the definition of "use" contained in subdivision (18) [now (49)]. In re Clayton-Marcus Co., 286 N.C. 215, 210 S.E.2d 199 (1974).

Subdivision (18) [now (49)] does not stand alone. Subdivision (19) [now (45)] is part of the definition of "use." In re Clayton-Marcus Co., 286 N.C. 215, 210 S.E.2d 199 (1974).

The terms "storage" and "use," as used in § 105-164.6, must be given the meaning stated in the definitions under subdivisions (17), (18) and (19) [now (44), (49), and (45), respectively] of this section. In re Clayton-Marcus Co., 286 N.C. 215, 210 S.E.2d 199 (1974).

"Nonresident retailor wholesale merchant." — Where plaintiff, a wholesale candy merchant, sold its products to purchasers outside of North Carolina who resold the products and plaintiff shipped the products directly to their customers, some of whom were located in North Carolina, the purchasers met the definition of 'nonresident retail or wholesale merchants' under G.S. 105-164.3(10) [now (25)], and plaintiff was incorrectly assessed wholesale taxes under (former) G.S. 105-164.5(2). VSA, Inc. v. Faulkner, 126 N.C. App. 421, 485 S.E.2d 348 (1997).

Use of Fabric by Furniture Manufacturer in Producing Swatch Books. — Under this section as it stood before the 1975 amendment to subdivision (19) [now (45)], it was held that the use, in North Carolina, by a furniture manufacturer of fabric in the production of swatch books for distribution, without charge, to its potential customers, in or out of this State, was not a "use" within the definition of that word contained in subdivisions (18) and (19) [now (44) and (45)] of this section, and no tax thereon was imposed by G.S. 105-164.6. In re Clayton-Marcus Co., 286 N.C. 215, 210 S.E.2d 199 (1974).

Raw Materials As Tangible Personal Property. — Raw materials, purchased out-of-state and incorporated out-of-state into building components, which were then used in the construction of buildings in North Carolina, were tangible personal property that was subject to the use tax found in G.S. 105-164.6(b). Morton Bldgs., Inc. v. Tolson, 172 N.C. App. 119, 615 S.E.2d 906, 2005 N.C. App. LEXIS 1579 (2005).

Burden on Lessor to Show That Leasing Transactions Constituted Sale for Resale. — A lessor of television sets who had not procured resale certificates from any of its customers had the burden to show that its leasing transactions constituted a sale for resale, entitling the lessor to an exemption from the sales tax. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

Leasing of Television Set to Motel or Hotel Owner Not Sale for Resale. — Leasing of a television set to a motel or hotel owner for use in a room rented to transients is not a sale for resale as contemplated by the North Carolina Sales and Use Tax Act. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

Temporary Custody of Tapes for Purpose of Rebroadcast Was Not a "Sale". — The word "sale" under a former statute did not embrace a transaction whereby a radio broadcasting station was given temporary custody of transcription tapes or records in order to rebroadcast the programs contained thereon. Watson Indus. v. Shaw, 235 N.C. 203, 69 S.E.2d 505 (1952).

"Motor Vehicles". — Auto trucks were held to come within the designation of "automobiles" as used in a former statute taxing the manufacturers of automobiles. State v. Evans, 205 N.C. 434, 171 S.E. 640 (1933), rev'd on other grounds, 256 U.S. 421, 41 S. Ct. 571, 65 L. Ed. 1029 (1921).

Applied in Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969); Young Roofing Co. v. North Carolina Dep't of Revenue, 42 N.C. App. 248, 256 S.E.2d 306 (1979).

Cited in Rent-A-Car Co. v. Lynch, 298 N.C. 559, 259 S.E.2d 564 (1979); In re Proposed Assmt. of Additional Sales & Use Tax, 46 N.C. App. 631, 265 S.E.2d 461 (1980); In re Assessment of Additional Sales & Use Tax Against Strawbridge Studios, Inc., 94 N.C. App. 300, 380 S.E.2d 142 (1989); In re Rock-Ola Cafe, 111 N.C. App. 683, 433 S.E.2d 236 (1993).

Part 2. Taxes Levied.

§ 105-164.4. Tax imposed on retailers.

(a) **(Effective until October 1, 2008 — see notes)** A privilege tax is imposed on a retailer at the following percentage rates of the retailer's net taxable sales or gross receipts, as appropriate. The general rate of tax is four percent (4.25%).

(a) **(Effective October 1, 2008 until October 1, 2009 — see notes)** A privilege tax is imposed on a retailer at the following percentage rates of the retailer's net taxable sales or gross receipts, as appropriate. The general rate of tax is four and one-half percent (4.5%).

(a) **(Effective October 1, 2009 — see notes)** A privilege tax is imposed on a retailer at the following percentage rates of the retailer's net taxable sales or gross receipts, as appropriate. The general rate of tax is four and three-quarters percent (4.75%).

(1) The general rate of tax applies to the sales price of each item or article of tangible personal property that is sold at retail and is not subject to tax under another subdivision in this section.

(1a) The rate of two percent (2%) applies to the sales price of each manufactured home sold at retail, including all accessories attached to the manufactured home when it is delivered to the purchaser. The maximum tax is three hundred dollars ($300.00) per article. Each section of a manufactured home that is transported separately to the site where it is to be erected is a separate article.

(1b) The rate of three percent (3%) applies to the sales price of each aircraft or boat sold at retail, including all accessories attached to the item when it is delivered to the purchaser. The maximum tax is one thousand five hundred dollars ($1,500) per article.

(1c), (1d) and (1e) Repealed by Session Laws 2005-276, s. 33.4(b), effective January 1, 2006.

(1f) The rate of two and eighty-three-hundredths percent (2.83%) applies to the sales price of electricity that is measured by a separate meter or another separate device and sold to a commercial laundry or to a pressing and dry-cleaning establishment for use in machinery used in the direct performance of the laundering or the pressing and cleaning service.

a. Repealed by Session Laws 2007-397, s. 10(b), effective October 1, 2007, and applicable to sales occurring on or after that date.

b. Repealed by Session Laws 2006-66, s. 24.19(a), effective July 1, 2007, and applicable to sales made on or after that date.

c. Repealed by Session Laws 2007-397, s. 10(b), effective October 1, 2007, and applicable to sales occurring on or after that date.

(1g) Repealed by Session Laws 2004-110, s. 6.1, effective October 1, 2004, and applicable to sales of electricity made on or after that date.

(1h) **(Expires for sales made on or after October 1, 2007)** The rate of seventeen-hundredths percent (0.17%) applies to the sales price of electricity sold to an aluminum smelting facility for use in connection with the operation of that facility and measured by a separate meter or measuring device.

(1i) Repealed by Session Laws 2007-397, s. 10(a), effective October 1, 2007, and applicable to sales occurring on or after that date.

(1j) **(Effective until July 1, 2008 — see notes)** The rate of one and eight-tenths percent (1.8%) applies to the sales price of electricity described in this subdivision and measured by a separate meter or another separate device:

a. Sales of electricity to manufacturing industries and manufacturing plants for use in connection with the operation of the industries and plants.

b. Sales of electricity to farmers to be used by them for any farming purposes other than preparing food, heating dwellings, and other household purposes.

(1j) **(Effective July 1, 2008 until July 1, 2009 — see notes)** The rate of one and four-tenths percent (1.4%) applies to the sales price of electricity described in this subdivision and measured by a separate meter or another separate device:

a. Sales of electricity to manufacturing industries and manufacturing plants for use in connection with the operation of the industries and plants.

b. Sales of electricity to farmers to be used by them for any farming purposes other than preparing food, heating dwellings, and other household purposes.

(1j) **(Effective July 1, 2009 until July 1, 2010 — see notes)** The rate of eight-tenths percent (.8%) applies to the sales price of electricity described in this subdivision and measured by a separate meter or another separate device:

a. Sales of electricity to manufacturing industries and manufacturing plants for use in connection with the operation of the industries and plants.

b. Sales of electricity to farmers to be used by them for any farming purposes other than preparing food, heating dwellings, and other household purposes.

(2) The applicable percentage rate applies to the gross receipts derived from the lease or rental of tangible personal property by a person who is engaged in the business of leasing or renting tangible personal property, or is a retailer and leases or rents property of the type sold by the retailer. The applicable percentage rate is the rate and the maximum tax, if any, that applies to a sale of the property that is leased or rented. A person who leases or rents property shall also collect the tax imposed by this section on the separate retail sale of the property.

(3) Operators of hotels, motels, tourist homes, tourist camps, and similar type businesses and persons who rent private residences and cottages to transients are considered retailers under this Article. A tax at the general rate of tax is levied on the gross receipts derived by these retailers from the rental of any rooms, lodgings, or accommodations furnished to transients for a consideration. This tax does not apply to any private residence or cottage that is rented for less than 15 days in a calendar year or to any room, lodging, or accommodation supplied to the same person for a period of 90 or more continuous days.

As used in this subdivision, the term "persons who rent to transients" means (i) owners of private residences and cottages who rent to transients and (ii) rental agents, including "real estate brokers" as defined in G.S. 93A-2, who rent private residences and cottages to transients on behalf of the owners. If a rental agent is liable for the tax imposed by this subdivision, the owner is not liable.

(4) Every person engaged in the business of operating a dry cleaning, pressing, or hat-blocking establishment, a laundry, or any similar business, engaged in the business of renting clean linen or towels or wearing apparel, or any similar business, or engaged in the business of soliciting cleaning, pressing, hat blocking, laundering or linen rental business for any of these businesses, is considered a retailer under this Article. A tax at the general rate of tax is levied on the gross receipts derived by these retailers from services rendered in engaging in any of the occupations or businesses named in this subdivision. The tax imposed by this subdivision does not apply to receipts derived from coin, token, or card-operated washing machines, extractors, and dryers. The tax imposed by this subdivision does not apply to gross receipts derived from services performed for resale by a retailer that pays the tax on the total gross receipts derived from the services.

(4a) The rate of three percent (3%) applies to the gross receipts derived from sales of electricity, other than sales of electricity subject to tax under another subdivision in this section. A person who sells electricity is considered a retailer under this Article.

(4b) A person who sells tangible personal property at a specialty market, other than the person's own household personal property, is considered a retailer under this Article. A tax at the general rate of tax is levied on the sales price of each article sold by the retailer at the specialty market. The term "specialty market" has the same meaning as defined in G.S. 66-250.

(4c) The combined general rate applies to the gross receipts derived from providing telecommunications service and ancillary service. A person who provides telecommunications service or ancillary service is considered a retailer under this Article. These services are taxed in accordance with G.S. 105-164.4C.

(4d) The sale or recharge of prepaid telephone calling service is taxable at the general rate of tax. The tax applies regardless of whether tangible personal property, such as a card or a telephone, is transferred. The tax applies to a service that is sold in conjunction with prepaid wireless calling service. Prepaid telephone calling service is taxable at the point of sale instead of at the point of use and is sourced in accordance with G.S. 105-164.4B. Prepaid telephone calling service taxed under this subdivision is not subject to tax as a telecommunications service.

(5) Repealed by Session Laws 1998-212, s. 29A.1(a), effective May 1, 1999.

(6) The combined general rate applies to the gross receipts derived from providing video programming to a subscriber in this State. A cable service provider, a direct-to-home satellite service provider, and any other person engaged in the business of providing video programming is considered a retailer under this Article.

(6a) The general rate applies to the gross receipts derived from providing satellite digital audio radio service. For services received by a mobile or portable station, the service is sourced to the subscriber's business or home address. A person engaged in the business of providing satellite digital audio radio service is a retailer under this Article.

(7) The combined general rate applies to the sales price of spirituous liquor other than mixed beverages. As used in this subdivision, the terms "spirituous liquor" and "mixed beverage" have the meanings provided in G.S. 18B-101.

(8) The rate of two and one-half percent (2.5%) applies to the sales price of each modular home sold at retail, including all accessories attached to the modular home when it is delivered to the purchaser. The sale of a modular home to a modular homebuilder is considered a retail sale. A person who sells a modular home at retail is allowed a credit against the tax imposed by this subdivision for sales or use tax paid to another state on tangible personal property incorporated in the modular home. The retail sale of a modular home occurs when a modular home manufacturer sells a modular home to a modular homebuilder or directly to the end user of the modular home.

(b) The tax levied in this section shall be collected from the retailer and paid by him at the time and in the manner as hereinafter provided. Provided, however, that any person engaging or continuing in business as a retailer shall pay the tax required on the net taxable sales of such business at the rates specified when proper books are kept showing separately the gross proceeds of taxable and nontaxable sales of tangible personal property in such form as may be accurately and conveniently checked by the Secretary or his duly authorized agent. If such records are not kept separately the tax shall be paid as a retailer on the gross sales of business and the exemptions and exclusions provided by this Article shall not be allowed. The tax levied in this section is in addition to all other taxes whether levied in the form of excise, license or privilege or other taxes.

(c) Certificate of Registration. — Before a person may engage in business as a retailer or a wholesale merchant, the person must obtain a certificate of registration from the Department in accordance with G.S. 105-164.29. (1957, c.

1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2; 1963, c. 1169, ss. 3, 11; 1967, c. 1110, s. 6; c. 1116; 1969, c. 1075, s. 5; 1971, c. 887, s. 1; 1973, c. 476, s. 193; c. 1287, s. 8; 1975, c. 752; 1977, c. 903; 1977, 2nd Sess., c. 1218; 1979, c. 17, s. 1; c. 22; c. 48, s. 1; c. 527, s. 1; c. 801, s. 73; 1981, c. 984, ss. 1, 2; 1981 (Reg. Sess., 1982), cc. 1207, 1273; 1983, c. 510; c. 713, ss. 89, 93; c. 805, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1065, ss. 1, 2, 4; c. 1097, ss. 6, 13; 1985, c. 704; 1985 (Reg. Sess., 1986), c. 925; c. 1005; 1987, c. 557, ss. 4, 5; c. 800, ss. 2, 3; c. 854, s. 1; 1987 (Reg. Sess., 1988), c. 1044, s. 4; 1989, c. 692, ss. 3.1, 3.3, 8.4(8); c. 770, s. 74.4; 1989 (Reg. Sess., 1990), c. 813, ss. 14, 15; 1991, c. 598, s. 5; c. 689, s. 311; c. 690, s. 1; 1993, c. 372, s. 1; c. 484, s. 2; 1995, c. 17, s. 6; c. 477, s. 1; 1996, 2nd Ex. Sess., c. 13, ss. 1.1, 9.1, 9.2; 1997-475, s. 1.1; 1998-22, s. 5; 1998-55, ss. 8, 14; 1998-98, ss. 13.2, 48(a), (b); 1998-121, ss. 3, 5; 1998-197, s. 1; 1998-212, s. 29A.1(a); 1999-337, ss. 29, 30; 1999-360, s. 3(a), (b); 1999-438, s. 1; 2000-140, s. 67(a); 2001-424, ss. 34.13(a), 34.17(a), 34.23(b), 34.25(a); 2001-430, ss. 3, 4, 5; 2001-476, ss. 17(b)-(d), (f); 2001-487, ss. 67(b), 122(a)-(c); 2002-16, s. 4; 2003-284, s. 38.1; 2003-400, s. 15; 2004-110, ss. 6.1, 6.2, 6.3; 2005-144, s. 9.1; 2005-276, ss. 33.1, 33.4(a), 33.4(b); 2006-33, ss. 2, 11; 2006-66, ss. 24.1(a), (b), (c), 24.19(a), (b); 2006-151, s. 3; 2007-145, s. 9(a); 2007-323, ss. 31.2(a), (b), 31.16.3(h), 31.16.4(g); 2007-397, ss. 10(a)-(f).)

Introductory Language of Subsection (a) Set Out Three Times. — The first version of the introductory language of subsection (a) set out above is effective until October 1, 2008. The second version of the introductory language of subsection (a) set out above is effective October 1, 2008 until October 1, 2009. The third version of the introductory language of subsection (a) set out above is effective October 1, 2009.

Subdivision (a)(1j) Set Out Three Times. — The first version of subdivision (a)(1j) set out above is effective until July 1, 2008. The second version of subdivision (a)(1j) set out above is effective July 1, 2008 until July 1, 2009. The third version of subdivision (a)(1j) set out above is effective July 1, 2009. Subdivision (a)(1j) is repealed effective July 1, 2010.

Editor's Note. — Session Laws 1998-121, s. 2, effective August 27, 1998, and applicable to taxes payable on or after July 1, 1998, repealed "Part 2 of Division II of Article 5 of Chapter 105." This act probably intended to repeal G.S. 105-164.5, which was the only section in Part 2 of Division II of Article 5. Effective August 14, 1998, Session Laws 1998-98, ss. 48(a) and (b) to 54, merged G.S. 105-164.4 to 105-164.12B into Division II, redesignated the Divisions of Article 5 as Part 1 to 8 with former Division II as Part 2 (G.S. 105-164.4 to 105-164.12B). Subsequently 1998-217, s. 59, effective October 31, 1998, rewrote 1998-121, s. 2 to refer only to G.S. 105-164.5.

Session Laws 2001-424, ss. 34.17(a) and 34.23(b) both added a subdivision (a)(6) to this section. The subdivision added by s. 34.23(b) has been renumbered (a)(7) at the direction of the Revisor of Statutes.

Session Laws 2001-424, s. 34.13(a), effective October 16, 2001, and applicable to sales made on or after that date, substituted "four and one-half percent (4 ½%)" for "four percent" in the introductory language of subsection (a).

Session Laws 2001-424, s. 34.13(b), provides: "The provisions of this section [s. 34.13 of Session Laws 2001-424] increasing the general rate of State sales tax do not apply to construction materials purchased to fulfill a lump-sum or unit-price contract entered into or awarded before the effective date of the increase or entered into or awarded pursuant to a bid made before the effective date of the increase when the construction materials would otherwise be subject to the increased rate of tax provided under this section [s. 34.13 of Session Laws 2001-424]."

Session Laws 2001-424, s. 34.13(c), which amended the introductory language in subsection (a), as amended by Session Laws 2003-284, s. 38.1, as amended by Session Laws 2005-144, s. 9.1, as amended by Session Laws 2005-276, s. 33.1, as amended by 2006-66, s. 24.1(a), provides: "This section [s. 34.13 of Session Laws 2001-424] becomes effective October 16, 2001, and applies to sales made on or after that date. This section does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this section before the effective date of its amendment or repeal; nor does it affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal." Session Laws 2006-66, s. 24.1(a), deleted the second sentence, which read: "This section is repealed effective for sales made on or after July 1, 2007."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium.”

Session Laws 2001-424, s. 36.5 is a severability clause.

Session Laws 2001-476, s. 17(f), as amended by Session Laws 2001-487, s. 122(b) and (c), effective July 1, 2005, and applicable to sales made on or after that date, rewrote the table in subdivision (a)(1g)b.

Session Laws 2001-476, s. 17(g), as amended by Session Laws 2001-487, s. 122(c), provides: “Subsections (b) and (c) of this section become effective January 1, 2002, and apply to sales made on or after that date. Subsection (f) of this section becomes effective July 1, 2005, and applies to sales made on or after that date. The remainder of this section is effective when it becomes law.”

Session Laws 2003-284, s. 48.1, provides: “Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal.”

Session Laws 2003-284, s. 1.2, provides: “This act shall be known as the “Current Operations and Capital Improvements Appropriations Act of 2003.”

Session Laws 2003-284, s. 49.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium.”

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2004-110, s. 6.4, provided for the expiration of subdivision (a)(1h) for sales made on or after October 1, 2007.

Session Laws 2004-110, s. 8.1, provides: “This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before the effective date of its amendment or repeal; nor does this act affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal.”

Session Laws 2004-110, s. 6.2, reenacted subdivision (a)(1f)b, which had been repealed by Session Laws 2001-476, s. 17(b), effective January 1, 2002, and applicable to sales made on or after that date.

Session Laws 2005-276, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2005’.”

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006’.”

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-151, s. 20 is a severability clause.

Session Laws 2007-145, s. 9(b), provides : “A retailer is not liable for an over-collection or under-collection of sales tax if the retailer has made a good faith effort to comply with the law and collect the proper amount of tax and has, due to the change under this section in the rate of tax imposed under G.S. 105-164.4(a), over-collected or under-collected the amount of sales tax that is due. This subsection applies only to the period beginning July 1, 2007, and ending August 1, 2007.”

Session Laws 2007-323, s. 31.2(d), as added by Session Laws 2007-345, s. 14.9(a) provides: “A retailer is not liable for an over-collection or under-collection of sales tax if the retailer has made a good faith effort to comply with the law and collect the proper amount of tax and has, due to the change in the rate of tax imposed under this section, over-collected or under-collected the amount of sales tax that is due. This subsection applies only to the period beginning August 1, 2007, and ending September 1, 2007.”

Session Laws 2007-323, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2007’.”

Session Laws 2007-323, s. 32.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium.”

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2007-368, s. 3, amended Session Laws 1967, c. 1096, s. 4, to address the applicability of sales tax to bread sold at bakery thrift stores.

Session Laws 2007-397, s. 15, contains a severability clause.

Effect of Amendments. — Session Laws 2004-110, ss. 6.1, 6.2 and 6.3, effective October 1, 2004, and applicable to sales of electricity made on or after that date, repealed subdivision (a)(1g); reenacted subdivision (a)(1f)b; and added subdivision (1h). See Editor's note for expiration of subdivision (a)(1h).

Session Laws 2005-276, s. 33.4(a), effective October 1, 2005, and s. 33.4(b), effective January 1, 2006, in subdivision (a)(1b), substituted "aircraft or boat" for "aircraft, boat, railway car, or locomotive"; deleted subdivisions (a)(1c) through (a)(1e); in subdivision (a)(4c) and (a)(7), substituted "combined general rate" for "rate of six percent (6%)"; and rewrote subdivision (a)(6); and added subdivision (a)(6a).

Session Laws 2006-33, s. 2, effective January 1, 2007, in subdivision (a)(4c), inserted "service and ancillary" preceding "service" in the first sentence, and "or ancillary service" in the second sentence and rewrote the last sentence; and added the third sentence in subdivision (a)(4d).

Session Laws 2006-33, s. 11, effective July 1, 2006, and applicable to purchases made on or after that date, rewrote subdivision (a)(8).

Session Laws 2006-66, s. 24.1(b), effective December 1, 2006, and applies to sales made on or after that date, substituted "four and one-quarter percent (4.25%)" for "four and one half percent (4 1/2%)" in the introductory language of subsection (a).

Session Laws 2006-66, s. 24.1(c), as amended by Session Laws 2007-145, s. 9(a), effective July 1, 2007, and applicable to sales made on or after that date, substituted "four percent (4%)" for "four and one quarter percent (4.25%)" in the introductory language of subsection (a). The amendment to subsection (a) made by Session Laws 2006-66, s. 24.1(c), was repealed by Session Laws 2007-323, s. 31.2(a), (b), effective July 31, 2007.

Session Laws 2006-66, s. 24.19(a), effective July 1, 2007, and applicable to sales made on or after that date, repealed subdivision (a)(1f)b.

Session Laws 2006-66, s. 24.19(b), effective July 1, 2007, and applicable to sales made on or after that date, added new subdivision (a)(1i).

Session Laws 2006-151, s. 3, effective January 1, 2007, in subdivision (a)(6), substituted "video programming" for "any of the following broadcast services" in the first sentence, and rewrote the second sentence, which read: "A person engaged in the business of providing any of these services is considered a retailer under this Article: a. Direct-to-home satellite service. b. Cable service."

Session Laws 2007-323, s. 31.16.3(h), effective October 1, 2008, and applicable to sales occurring on or after October 1, 2008, substituted "four and one-half percent (4.5%)" for "four and one quarter percent (4.25%)" at the end of the introductory language of subsection (a).

Session Laws 2007-323, s. 31.16.4(g), effective October 1, 2009, and applicable to sales occurring on or after October 1, 2009, substituted "four and three-quarters percent (4.75%)" for "four and one half percent (4.5%)" at the end of the introductory language of subsection (a).

Session Laws 2007-397, s. 10(a)-(c), effective October 1, 2007, and applicable to sales occurring on or after that date, repealed subdivision (a)(1i); rewrote subdivision (a)(1f); and added subdivision (a)(1j).

Session Laws 2007-397, s. 10(d), effective July 1, 2008, and applicable to sales occurring on or after that date, substituted "one and four-tenths percent (1.4%)" for "one and eight-tenths percent (1.8%)" in subdivision (a)(1j).

Session Laws 2007-397, s. 10(e), effective July 1, 2009, and applicable to sales occurring on or after that date, substituted "eight-tenths percent (0.8%)" for "one and four-tenths percent (1.4%)" in subdivision (a)(1j).

Session Laws 2007-397, s. 10(f), effective July 1, 2010, and applicable to sales occurring on or after that date, repealed subdivision (a)(1j).

Legal Periodicals. — For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

See legislative survey, 21 Campbell L. Rev. 323 (1999).

CASE NOTES

I. General Consideration.
II Manufacturing.
III Fuels.
IV. Machinery Used in Agriculture.
V. Leases and Rentals.
VI. Cleaning and Laundering Facilities.

I. GENERAL CONSIDERATION.

The purpose of North Carolina's sales and use tax scheme is two-fold. The primary purpose is, of course, to generate revenue for the State. The sales tax is, in effect, a tax imposed upon the retail merchant as a privilege tax for the right to engage in that business. The tax is, however, designed to be passed on to the consumer. The second purpose of the sales and use tax scheme is to equalize the tax burden on all State residents. This is achieved through imposition of the use tax in certain situations where the sales tax is not applicable. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

The chief function of the Sales and Use Tax Act is to prevent the evasion of a sales tax by persons purchasing tangible personal property outside of North Carolina for storage, use or consumption within the State. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

Constitutionality. — G.S. 105-164.4(a)(6), which imposes a sales tax on direct-to-home satellite service, but not on cable television service, does not discriminate against satellite providers in favor of cable companies on its face and in its practical effect because the differential tax results solely from differences between the nature of the provision of satellite and cable services, and not from the geographical location of the businesses. DirecTV, Inc. v. State, 178 N.C. App. 659, 632 S.E.2d 543, 2006 N.C. App. LEXIS 1651 (2006).

Distinctions Between Sales and Use Taxes and Property Taxes. — See Sykes v. Clayton, 274 N.C. 398, 163 S.E.2d 775 (1968).

Sales and Use Taxes Differ in Conception. — While a sales tax and a use tax in many instances may bring about the same result, they are different in conception. They are assessments upon different transactions and are bottomed on distinguishable taxable events. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966); In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

The purpose of the use tax as indicated by the legislative histories of use and sales taxes is to impose the same burdens on out-of-state purchases as the sales tax imposes on purchases within the State. Rent-A-Car Co. v. Lynch, 39 N.C. App. 709, 251 S.E.2d 917, rev'd on other grounds, 298 N.C. 559, 259 S.E.2d 564 (1979).

A sales tax is a tax on the freedom of purchase. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

Hence, It Burdens Interstate Commerce. — A sales tax, when applied to interstate transactions, is a tax on the privilege of doing interstate business, creates a burden on interstate commerce, and runs counter to the Commerce Clause of the federal Constitution. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

And the sales tax cannot constitutionally be imposed upon interstate sales since it would then be a tax upon the privilege o doing interstate business, and would constitute a burden upon interstate commerce in violation of the commerce clause of the United States Constitution. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C 211, 322 S.E.2d 155 (1984), appeal dismissed 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

But Use Tax Is Tax on Enjoyment After Sale Has Spent Interstate Character. — A use tax is a tax on the enjoyment of that which was purchased after a sale has spent its interstate character. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

The use tax does not impermissibly burden interstate commerce since it is a tax imposed on the enjoyment of goods after the sale has already spent its interstate character. It is designed to complement the sales tax and to reach transactions which cannot constitutionally be subject to a sales tax. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984) appeal dismissed, 472 U.S. 1001, 105 S. Ct 2693, 86 L. Ed. 2d 710 (1985).

Merchants are statutory agents for the collection of the tax on sales, which is definitely imposed upon the consumer, and their responsibility arises on the assumption that they must so collect. Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948).

The sales tax is a tax on the retailer. In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

This section imposes the sales tax on all retailers, as a class, and applies it alike in its exactions and exemptions to all persons belonging to the prescribed class. Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

And Is a Privilege Tax. — Taxes under this section are not imposed upon the consumer, but are rather a privilege tax for engaging in business. Telerent Leasing Corp. v. High, 8 N.C App. 179, 174 S.E.2d 11 (1970).

This section imposes a privilege or license tax upon retailers and not a tax on purchasers or consumers. Fisher v. Jones, 15 N.C. App. 737 190 S.E.2d 663 (1972).

The sales tax is primarily a privilege or license tax on retailers, and not a tax on consumers. Rent-A-Car Co. v. Lynch, 39 N.C. App 709, 251 S.E.2d 917, rev'd on other grounds 298 N.C. 559, 259 S.E.2d 564 (1979).

But Sales Tax Intended to Be Passed on to Consumer. — Even though the sales tax is primarily a license or privilege tax on retailers the intent of the law is that the sales tax be passed on to the consumer. Rent-A-Car Co. v Lynch, 39 N.C. App. 709, 251 S.E.2d 917, rev'd on other grounds, 298 N.C. 559, 259 S.E.2d 564 (1979).

No Double Taxation. — The sales/use tax is, by its terms, levied upon the "retailer." There is, perforce, no double levy on any one object of taxation, where the two different sections of the sales/use tax impose two separate taxes on two separate people for two separate transactions. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

Perfect Equality in Collection of Tax Is Impossible. — Perfect equality in the collection of the tax by retailers from consumers is, as a practical matter, impossible as between almost any two or more retailers by reason of the differences in types of merchandise sold and selling methods. If the accidents of trade lead to inequality or hardships, the consequences must be accepted as inherent in government by law instead of government by edict. Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

Taxable event for assessment of the sales tax occurs at the time of sale and purchase within the State. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

The language in the exemption under subdivision (1) of this section, "the tax levied under this subdivision," refers to the sales or use tax imposed under this section. Rent-A-Car Co. v. Lynch, 39 N.C. App. 709, 251 S.E.2d 917, rev'd on other grounds, 298 N.C. 559, 259 S.E.2d 564 (1979).

Provisos Create Class of Transactions Taxed at Lower Rate. — Provisos incorporated into this section create a class of transactions as to which the tax is computed at a smaller percentage of the sale price, coupled in some instances with a limitation of the maximum tax to be imposed on account of the sale of any single article within the category. Hatteras Yacht Co. v. High, 265 N.C. 653, 144 S.E.2d 821 (1965) decided prior to the second 1967 amendment.

And Are Strictly Construed. — A proviso in a statute taxing certain transactions at a lower rate than that made applicable in general, or providing that as to certain transactions the total tax shall not exceed a specified amount, there being no such limitation generally, is a partial exemption and is, therefore, to be strictly construed against the claim of such special or preferred treatment. Hatteras Yacht Co. v. High, 265 N.C. 653, 144 S.E.2d 821 (1965).

The expression "total net taxable sales" and expressions of similar purport, as used in this Article, means the total of all retail sales, except those excluded in whole or in part by Part 1 of Division II, which imposes and levies the tax, and except those which are exempt under G.S. 105-164.13. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Retail merchants may themselves make retail purchases. Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

And when they do, they must like any other purchaser, pay the retail sales tax. Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

Retailer as Actual User and Ultimate Consumer. — Petitioner's sale of propane gas tanks to retailers, who brought them for the purpose of placing them on the premises of their retail gas customers, constituted retail sales upon which petitioner should have collected the sales tax from the retailers, who were not purchasing the particular property for resale or rental, but were the actual users and ultimate consumers of the tanks in question. Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

Lessor Has Burden to Show That Leasing Transactions Constituted Sale for Resale. — A lessor of television sets who had not procured resale certificates from any of its customers had the burden to show that its leasing transactions constituted a sale for resale, entitling the lessor to an exemption from the sales tax. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

Erroneous Advice of Agent of Department of Revenue. — The State is not estopped to collect the retail sales tax levied by this section by the action of an agent of the Department of Revenue in erroneously advising the merchant that certain sales were not subject to the tax, notwithstanding that the merchant was thereby deprived of the opportunity to collect the tax from his customers. Gregory Poole Equip. Co. v. Coble, 38 N.C. App. 483, 248 S.E.2d 378 (1978).

Exemption from State Sales Tax Does Not Preclude Local Sales Taxation. — The limitation, in G.S. 105-467(1), of local sales tax to sales "subject to" the State sales tax refers not to those transactions for which a state sales tax is actually assessed, but to any transaction described in subdivision (1) of this section without regard to whether the transaction might be exempted or excluded from taxation by the operation of G.S. 105-164.13. Thus, exemption from state sales tax does not preclude the assessment of a local sales tax. Gregory Poole Equip. Co. v. Coble, 38 N.C. App. 483, 248 S.E.2d 378 (1978), aff'd, 297 N.C. 19, 252 S.E.2d 729 (1979); 297 N.C. 19, 252 S.E.2d 729 (1979).

Taxpayer Has Burden of Showing Lower Tax Rate Applies. — When a taxing statute provides a lower tax rate than is generally applied, a partial exemption is created; the taxpayer claiming an exemption has the burden of showing that he comes within that exception. Deep River Farms, Ltd. v. Lynch, 58 N.C. App. 165, 292 S.E.2d 752 (1982).

Building Materials. — For decisions under the former statute relating to tax on building materials, see Watson Indus. v. Shaw, 235 N.C. 203, 69 S.E.2d 505 (1952); Robinson & Hale, Inc. v. Shaw, 242 N.C. 486, 87 S.E.2d 909 (1955).

A sales tax on retailers who sell merchandise through vending machines (including items sold for less than ten cents where it is impossible to recoup the tax from the purchaser) does not violate constitutional provisions relating to due process and equal protection. Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

Applied in Young Roofing Co. v. North Carolina Dep't of Revenue, 42 N.C. App. 248, 256 S.E.2d 306 (1979); Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

Cited in Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971); Gregory Poole Equip. Co. v. Coble, 297 N.C. 19, 252 S.E.2d 729 (1979); Rent-A-Car Co. v. Lynch, 298 N.C. 559, 259 S.E.2d 564 (1979); Oscar Miller Contractor, Inc. v. North Carolina Tax Rev. Bd., 61 N.C. App. 725, 301 S.E.2d 511 (1983); Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990); In re Rock-Ola Cafe, 111 N.C. App. 683, 433 S.E.2d 236 (1993).

II MANUFACTURING.

Term "Manufacturing" Not Definable with Complete Precision. — The term "manufacturing" as used in tax statutes is not susceptible of an exact and all-embracing definition, for it has many applications and meanings. Master Hatcheries, Inc. v. Coble, 286 N.C. 518, 212 S.E.2d 150 (1975).

A commercial hatchery is a manufacturing industry or plant within the meaning of paragraph (1)h (now (1d)b.). Master Hatcheries, Inc. v. Coble, 286 N.C. 518, 212 S.E.2d 150 (1975).

A restaurant is not a manufacturer as that term is used in subdivision (1)(h) (now (1d)b) of this section. Hed, Inc. v. Powers, 84 N.C. App. 292, 352 S.E.2d 265, cert. denied, 319 N.C. 458, 356 S.E.2d 4 (1987).

III FUELS.

When Fuel Exempted from Sales and Use Taxes. — When fuel is the product of a mine and sold by the producer in its original unmanufactured state, it is exempt from sales and use taxes. Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968).

IV. MACHINERY USED IN AGRICULTURE.

Hydroponic Growing Systems Are Not "Machines". — The definition of "machines" in paragraph g of subdivision (1) (now (1d)a.) of this section does not include a greenhouse-like structure used for hydroponic growing of tomatoes, as the hydroponic growing systems required substantial human activity within the system in order for the tomatoes to be cultivated and harvested. Deep River Farms, Ltd. v. Lynch, 58 N.C. App. 165, 292 S.E.2d 752 (1982).

V. LEASES AND RENTALS.

The language in subdivision (2) clearly contemplates a rental paid periodically in cash or in commodities or services having a monetary value. Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

Taxing of Both Rental of Room and Leasing of Television Located Therein. — The imposition of a sales/use tax on the gross rental of a motel or hotel room as well as on the gross proceeds from the leasing of a television set located in that room does not constitute double taxation. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

Monthly Equipment and Maintenance Charges. — Where a corporation that designed, manufactured, leased and sold computers and other business machines and equipment, in leasing such machines and equipment, required lessees to agree to pay both a "monthly equipment charge" and a "base monthly maintenance charge," both charges were part of the gross proceeds derived from the renting of machines and equipment within the contemplation of this section., cert. denied, Sperry Corp. v. Lynch, 76 N.C. App. 327, 332 S.E.2d 757; 314 N.C. 669, 336 S.E.2d 401 (1985).

VI. CLEANING AND LAUNDERING FACILITIES.

Cleaning and Laundering Facilities. — A coin-operated laundry, which is a commercial establishment in which automatic washing machines, dryers and dry-cleaning machines are installed for the use and convenience of the general public, is a "launderette" or "launderall" as those terms are used in subdivision (4) of this section and is subject to the tax levied upon laundries in that subdivision. Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

Apartment Owners Must Pay Sales Tax on Laundry Machine Receipts. — The General Assembly did not intend by the 1975 amendment to G.S. 105-85, exempting apartment owners from the privilege license tax on laundries, to exclude the payment of sales tax by apartment owners on the gross receipts from coin-operated washers and dryers. Master Hatcheries, Inc. v. Coble, 286 N.C. 518, 212 S.E.2d 150 (1975).

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Sales tax is applicable to gross receipts from rug cleaning services. — conducted on the business premises of a rug cleaner but is not applicable to gross receipts from rug cleaning services conducted on the premises of the rug cleaner's customer. See opinion of Attorney General to Mr. Eric L. Gooch, Sales and Use Tax Division, N.C. Department of Revenue, 42 N.C.A.G. 35 (1972).

§ 105-164.4A: Repealed by Session Laws 2005-276, s. 33.5, effective January 1, 2006.

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

§ 105-164.4B. Sourcing principles.

(a) General Principles. — The following principles apply in determining where to source the sale of a product. These principles apply regardless of the nature of the product.

(1) Over-the-counter. — When a purchaser receives a product at a business location of the seller, the sale is sourced to that business location.

(2) Delivery to specified address. — When a purchaser receives a product at a location specified by the purchaser and the location is not a business location of the seller, the sale is sourced to the location where the purchaser receives the product.

(3) Delivery address unknown. — When a seller of a product does not know the address where a product is received, the sale is sourced to the first address or location listed in this subdivision that is known to the seller:

a. The business or home address of the purchaser.

b. The billing address of the purchaser or, if the product is prepaid wireless calling service, the location associated with the mobile telephone number.

c. The address from which tangible personal property was shipped or from which a service was provided.

(b) Periodic Rental Payments. — When a lease or rental agreement requires recurring periodic payments, the payments are sourced as follows:

(1) For leased or rented property, the first payment is sourced in accordance with the principles set out in subsection (a) of this section and each subsequent payment is sourced to the primary location of the leased or rented property for the period covered by the payment. This subdivision applies to all property except a motor vehicle, an aircraft, transportation equipment, and a utility company railway car.

(2) For leased or rented property that is a motor vehicle or an aircraft but is not transportation equipment, all payments are sourced to the primary location of the leased or rented property for the period covered by the payment.

(3) For leased or rented property that is transportation equipment, all payments are sourced in accordance with the principles set out in subsection (a) of this section.

(4) For a railway car that is leased or rented by a utility company and would be transportation equipment if it were used in interstate commerce, all payments are sourced in accordance with the principles set out in subsection (a) of this section.

(c) Transportation Equipment Defined. — As used in the section, the term "transportation equipment" means any of the following used to carry persons or property in interstate commerce: a locomotive, a railway car, a commercial motor vehicle as defined in G.S. 20-4.01, or an aircraft. The term includes a container designed for use on the equipment and a component part of the equipment.

(d) Exceptions. — This section does not apply to the following:

(1) Telecommunications services. — Telecommunications services are sourced in accordance with G.S. 105-164.4C.

(2) Direct mail. — Direct mail that meets one of the conditions of this subdivision is sourced to the location where the property is delivered. In all other cases, direct mail is sourced in accordance with the principles set out in subsection (a) of this section.

a. Direct mail purchased pursuant to a direct pay permit.

b. When the purchaser provides the seller with information to show the jurisdictions to which the direct mail is to be delivered. (2001-347, s. 2.9; 2002-16, s. 5; 2003-284, s. 45.3; 2004-170, s. 20; 2006-33, s. 3; 2006-66, s. 24.13(a).)

Editor's Note. — Session Laws 2001-347, s. 3.2, made this section effective January 1, 2002.

Session Laws 2001-347, s. 2.16, amended Session Laws 1967, c. 1096, s. 4, which authorized a sales tax for Mecklenburg County, by deleting the final sentence of the third paragraph, and adding the following sentence immediately following the second sentence in the third paragraph: "The sourcing principles in G.S. 105-164.4B apply in determining whether the local sales tax applies to a transaction."

A new G.S. 105-164.4B, relating to tax on telecommunications, was enacted by Session Laws 2001-430, s. 6, effective January 1, 2002, and recodified as G.S. 105-164.4C by Session Laws 2001-487, s. 67(a), also effective January 1, 2002.

Session Laws 2003-284, s. 45.1, provides: "The Streamlined Sales and Use Tax Agreement is an historic multistate agreement designed to simplify and modernize sales and use tax collection and administration. The states and businesses involved in the Streamlined Sales Tax Project recognize that a simplified and uniform system saves businesses compliance and audit costs, while also saving states administrative costs and improving voluntary compliance, which should increase state collections. To participate in the Agreement, North Carolina must amend or modify some of its sales and use tax law to conform to the simplifications and uniformity in the Agreement. This part [Part XLV of Session Laws 2003-284] makes those necessary changes."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-368, s. 3, amended Session Laws 1967, c. 1096, s. 4, to address the applicability of sales tax to bread sold at bakery thrift stores.

Effect of Amendments. — Session Laws 2006-33, s. 3, effective January 1, 2007, in subdivision (a)(3)b, substituted "wireless calling" for "telephone calling service that authorizes the purchase of mobile telecommunications."

Session Laws 2006-66, s. 24.13(a), effective July 1, 2006, and applicable to lease or rental payments made on or after that date, substituted "equipment, and a utility company railway car" for "equipment" at the end of subdivision (b)(1); added subdivision (b)(4) and made a minor stylistic change.

§ 105-164.4C. Telecommunications service and ancillary service.

(a) General. — The gross receipts derived from providing telecommunications service or ancillary service in this State are taxed at the rate set in G.S. 105-164.4(a)(4c). Telecommunications service is provided in this State if the service is sourced to this State under the sourcing principles set out in subsections (a1) and (a2) of this section. Ancillary service is provided in this State if the telecommunications service to which it is ancillary is provided in this State. The definitions and provisions of the federal Mobile Telecommunications Sourcing Act apply to the sourcing and taxation of mobile telecommunications services.

(a1) General Sourcing Principles. — The following general sourcing principles apply to telecommunications services. If a service falls within one of the exceptions set out in subsection (a2) of this section, the service is sourced in accordance with the exception instead of the general principle.

(1) Flat rate. — A telecommunications service that is not sold on a call-by-call basis is sourced to this State if the place of primary use is in this State.

(2) General call-by-call. — A telecommunications service that is sold on a call-by-call basis and is not a postpaid calling service is sourced to this State in the following circumstances:

a. The call both originates and terminates in this State.

b. The call either originates or terminates in this State and the telecommunications equipment from which the call originates or terminates and to which the call is charged is located in this State. This applies regardless of where the call is billed or paid.

(3) Postpaid. — A postpaid calling service is sourced to the origination point of the telecommunications signal as first identified by either the seller's telecommunications system or, if the system used to transport the signal is not the seller's system, by information the seller receives from its service provider.

(a2) Sourcing Exceptions. — The following telecommunications services and products are sourced in accordance with the principles set out in this subsection:

(1) Mobile. — Mobile telecommunications service is sourced to the place of primary use, unless the service is prepaid wireless calling service or is air-to-ground radiotelephone service. Air-to-ground radiotelephone service is a postpaid calling service that is offered by an aircraft common carrier to passengers on its aircraft and enables a telephone call to be made from the aircraft. The sourcing principle in this subdivision applies to a service provided as an adjunct to mobile telecommunications service if the charge for the service is included within the term "charges for mobile telecommunications services" under the federal Mobile Telecommunications Sourcing Act.

(2) Prepaid. — Prepaid telephone calling service is sourced in accordance with G.S. 105-164.4B.

(3) Private. — Private telecommunications service is sourced in accordance with subsection (e) of this section.

(b) Repealed by Session Laws 2006-33, s. 4, effective January 1, 2007.

(c)(1)-(10) Repealed by Session Laws 2006-33, s. 4, effective January 1, 2007.

(11) Repealed by Session Laws 2005-276, s. 33.7, effective October 1, 2005.

(12)-(16) Repealed by Session Laws 2006-33, s. 4, effective January 1, 2007.

(d) Recodified as G.S. 105-164.4D by Session Laws 2006-151, s. 4, effective January 1, 2007.

(e) Private Line. — The gross receipts derived from private telecommunications service are sourced as follows:

(1) If all the customer's channel termination points are located in this State, the service is sourced to this State.

(2) If all the customer's channel termination points are not located in this State and the service is billed on the basis of channel termination points, the charge for each channel termination point located in this State is sourced to this State.

(3) If all the customer's channel termination points are not located in this State and the service is billed on the basis of channel mileage, the following applies:

a. A charge for a channel segment between two channel termination points located in this State is sourced to this State.

b. Fifty percent (50%) of a charge for a channel segment between a channel termination point located in this State and a channel termination point located in another state is sourced to this State.

(4) If all the customer's channel termination points are not located in this State and the service is not billed on the basis of channel termination points or channel mileage, a percentage of the charge for the service is sourced to this State. The percentage is determined by dividing the number of channel termination points in this State by the total number of channel termination points.

(f) Call Center Cap. The gross receipts tax on telecommunications service that originates outside this State, terminates in this State, and is provided to a call center that has a direct pay permit issued by the Department under G.S. 105-164.27A may not exceed fifty thousand dollars ($50,000) a calendar year. This cap applies separately to each legal entity.

(g) Credit. — A taxpayer who pays a tax legally imposed by another state on a telecommunications service taxable under this section is allowed a credit against the tax imposed in this section.

(h) Definitions. — The following definitions apply in this section:

(1) Ancillary service. — Defined in G.S. 105-164.3.

(1a) Call-by-call basis. — A method of charging for a telecommunications service whereby the price of the service is measured by individual calls.

(2) Call center. — Defined in G.S. 105-164.27A.

(3) Mobile telecommunications service. — Defined in G.S. 105-164.3.

(4) Place of primary use. — Defined in G.S. 105-164.3.

(5) Postpaid calling service. — A telecommunications service that is charged on a call-by-call basis and is obtained by making payment at the time of the call either through the use of a credit or payment mechanism, such as a bank card, travel card, credit card, or debit card, or by charging the call to a telephone number that is not associated with the origination or termination of the telecommunications service. A postpaid calling service includes a service that meets all the requirements of a prepaid wireline telephone calling service, except the exclusive use requirement.

(6) Prepaid telephone calling service. — Defined in G.S. 105-164.3.

(7) Private telecommunications service. — Telecommunications service that entitles a subscriber of the service to exclusive or priority use of a communications channel or group of channels.

(8) Telecommunications service. — Defined in G.S. 105-164.3. (2001-430, s. 6; 2001-487, ss. 67(a), (c), 69(b); 2002-16, s 10; 2002-16, ss. 6, 7, 8, 9, 11, 14; 2003-416, s. 16(a); 2005-276, ss. 33.6, 33.7; 2006-33, s. 4; 2006-151, s. 4.)

Editor's Note. — Session Laws 2001-430, s. 20, makes this section effective January 1, 2002, and applicable to taxable services reflected on bills dated on or after January 1, 2002.

Session Laws 2001-430, s. 15, provides: "The Department of Revenue must report to the Revenue Laws Study Committee by October 1, 2003, on the amounts collected under this act and on the distributions made to local governments, including the amounts received by them from the sales and use tax on prepaid calling arrangements. On or before October 1, 2007, the Department must report to the Revenue Laws Study Committee any recommendations it has, if any, to adjust the distributions made to local governments. The Department must consult with the North Carolina League of Municipalities in developing its recommendations."

This section was formerly G.S. 105-164.4B. It was recodified by Session Laws 2001-487, s. 67(a), effective January 1, 2002.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

G.S. 105-164.4C(d) was recodified as G.S. 105-164.4D by Session Laws 2006-151, s. 4, effective January 1, 2007.

Subdivision (h)(1) was added by Session Laws 2006-33, s. 4, as subdivision (h)(01), and was redesignated at the direction of the Revisor of Statutes. Subdivision (h)(1) was redesignated as (h)(1a) to preserve alphabetical order at the direction of the Revisor of Statutes.

Session Laws 2006-151, s. 20, is a severability clause.

Effect of Amendments. — Session Laws 2005-276, ss. 33.6 and 33.7, effective October 1, 2005, in subdivision (b)(2), inserted "voice mail,"; and repealed subdivision (c)(11).

Session Laws 2006-33, s. 4, effective January 1, 2007, rewrote the section catchline; in subsection (a), added "or ancillary service" following "providing telecommunications service" in the first sentence, and added the third sentence; in subdivision (a2)(1), deleted "authorized by a" preceding "prepaid" and substituted "wireless" for "telephone" thereafter; deleted former subsections (b) and (c); added subdivision (h)(01); and added "wireline" preceding "telephone calling service" in the last sentence of subdivision (h)(5).

§ 105-164.4D. Bundled transactions.

(a) Tax Application. — Tax applies to the sales price of a bundled transaction unless one of the following applies:

(1) Fifty percent (50%) test. — All of the products in the bundle are tangible personal property, the bundle includes one or more of the exempt products listed in this subdivision, and the price of the taxable products in the bundle does not exceed fifty percent (50%) of the price of the bundle:

a. Food exempt under G.S. 105-164.13B.

b. A drug exempt under G.S. 105-164.13(13).

c. Medical devices, equipment, or supplies exempt under G.S. 105-164.13(12).

(2) Allocation. — The bundle includes a service, and the retailer determines an allocated price for each product in the bundle based on a reasonable allocation of revenue that is supported by the retailer's business records kept in the ordinary course of business. In this circumstance, tax applies to the allocated price of each taxable product in the bundle.

(3) Ten percent (10%) test. — The price of the taxable products in the bundle does not exceed ten percent (10%) of the price of the bundle, and no other subdivision in this subsection applies.

(b) Determining Threshold. — A retailer of a bundled transaction subject to this section may use either the retailer's cost price or the retailer's sales price to determine if the transaction meets the fifty percent (50%) test or the ten percent (10%) test set out in subdivisions (a)(1) and (a)(3) of this section. A retailer may not use a combination of cost price and sales price to make this determination. If a bundled transaction subject to subdivision (a)(3) of this section includes a service contract, the retailer must use the full term of the contract in determining whether the transaction meets the threshold set in the subdivision. (2006-151, ss. 4, 5; 2007-244, s. 2.)

Editor's Note. — This section was subsection (d) of G.S. 105-164.4C. It has been recodified and rewritten as G.S. 105-164.4D by Session Laws 2006-151, ss. 4 and 5, effective January 1, 2007.

Session Laws 2006-151, s. 20 is a severability clause.

Session Laws 2007-244, s. 7, amends Session Laws 1967, c. 1096, s. 4, by adding a new subdivision (5a), which provides: "The sales price of a bundled transaction that includes food subject to tax under subdivision (5) of this section, if the price of the food exceeds ten percent (10%) of the price of the bundle. A retailer must determine the price of food in a bundled transaction in accordance with G.S. 105-164.4D."

Effect of Amendments. — Session Laws 2006-151, s. 5, effective January 1, 2007, deleted "telecommunications" following "When a taxable" in the introductory paragraph of the section.

Session Laws 2007-244, s. 2, effective October 1, 2007, substituted "transactions" for "services" in the section heading; and rewrote the section.

§ 105-164.5: Repealed by Session Laws 1998-121, s. 2, as amended by Session Laws 1998-217, s. 59, and applicable to taxes payable on or after July 1, 1998.

§ 105-164.5A: Repealed by Session Laws 1961, c. 1213, s. 3.

§ 105-164.6. Complementary use tax.

(a) Tax. — An excise tax at the applicable rate set in G.S. 105-164.4 is imposed on the products listed below. The applicable rate is the rate and maximum tax, if any, that would apply to the sale of the product. A product is subject to tax under this section only if it is subject to tax under G.S. 105-164.4.

(1) Tangible personal property purchased inside or outside this State for storage, use, or consumption in this State. This subdivision includes property that becomes part of a building or another structure.

(2) Tangible personal property leased or rented inside or outside this State for storage, use, or consumption in this State.

(3) Services sourced to this State.

(b) Liability. — The tax imposed by this section is payable by the person who purchases, leases, or rents tangible personal property or who purchases a service. If the property purchased becomes a part of a building or other structure in the State and the purchaser is a contractor or subcontractor, the contractor, the subcontractor, and the owner of the building are jointly and severally liable for the tax. The liability of a contractor, a subcontractor, or an owner who did not purchase the property is satisfied by receipt of an affidavit from the purchaser certifying that the tax has been paid.

(c) Credit. — A credit is allowed against the tax imposed by this section for the following:

(1) The amount of sales or use tax paid on the item to this State. Payment of sales or use tax to this State on an item by a retailer extinguishes the liability of a purchaser for the tax imposed under this section.

(2) The amount of sales or use tax paid on the item to another state. If the amount of tax paid to the other state is less than the amount of tax imposed by this section, the difference is payable to this State. The credit allowed by this subdivision does not apply to tax paid to a state that does not grant a similar credit for sales or use taxes paid in North Carolina.

(d), (e) Repealed by Session Laws 2005-276, s. 33.8, effective October 1, 2005.

(f) Registration. — Before a person may engage in business in this State selling or delivering tangible personal property for storage, use, or consumption in this State, the person must obtain a certificate of registration from the

Department. To obtain a certificate of registration, a person must register with the Department.

The holder of the certificate of registration must pay the tax levied under this Article. A certificate of registration is valid unless it is revoked for failure to comply with the provisions of this Article or becomes void. A certificate issued to a retailer becomes void if, for a period of 18 months, the retailer files no returns or files returns showing no sales.

(g) Repealed by Session Laws 1995, c. 7, s. 1. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; 1979, c. 17, s. 2; c. 48, ss. 3, 4; c. 179, s. 3; c. 527, s. 2; 1979, 2nd Sess., c. 1100, s. 1; c. 1175; 1981, cc. 18, 65; 1983, c. 713, s. 90; 1983 (Reg. Sess., 1984), c. 1065, s. 3; 1989, c. 692, s. 3.4; 1991, c. 689, s. 312; c. 690, s. 3; 1995, c. 7, s. 1; c. 17, s. 7; 1998-121, s. 4; 1999-438, s. 1.1; 2001-414, s. 15; 2003-416, ss. 17, 24(a); 2005-276, s. 33.8; 2006-162, s. 6.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 33.8, effective October 1, 2005, rewrote the section.

Session Laws 2006-162, s. 6, effective July 24, 2006, inserted "or use" in the middle of the first sentence of subdivision (c)(2).

Legal Periodicals. — For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former statutes relating to the levy of compensating use taxes.*

Constitutionality. — The constitutionality of a use tax has long been established. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

The purpose of North Carolina's sales and use tax scheme is two-fold. The primary purpose is, of course, to generate revenue for the State. The sales tax is, in effect, a tax imposed upon the retail merchant as a privilege tax for the right to engage in that business. The tax is, however, designed to be passed on to the consumer. The second purpose of the sales and use tax scheme is to equalize the tax burden on all State residents. This is achieved through imposition of the use tax in certain situations where the sales tax is not applicable. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

Sales Tax and Use Tax Are Complementary. — The use tax and the sales tax law, taken and applied together, provide a uniform tax upon either the sale or use of all tangible personal property irrespective of where it may be purchased. That is, the sales tax and the use tax are complementary and functional parts of one system of taxation. Johnston v. Gill, 224 N.C. 638, 32 S.E.2d 30 (1944).

The use tax is designed to complement the sales tax and to reach transactions which cannot be subject to a sales tax by reason of its burden on interstate commerce. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

But Differ from Each Other in Conception. — While a sales tax and a use tax in many instances may bring about the same result, they are different in conception. They are assessments upon different transactions and are bottomed on distinguishable taxable events. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966); In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

Distinctions Between Sales and Use Taxes and Property Taxes. — See Sykes v. Clayton, 274 N.C. 398, 163 S.E.2d 775 (1968).

The purpose of the use tax is to remove, insofar as possible, the discrimination against local merchants resulting from the imposition of a sales tax, and to equalize the burden of the tax on property sold locally and that purchased without the State. Watson Indus. v. Shaw, 235 N.C. 203, 69 S.E.2d 505 (1952).

The use tax is not a sales tax. Its chief function is to prevent the evasion of the sales tax by persons purchasing tangible personal property outside of North Carolina for storage, use, or consumption within the State. Thus it prevents unfair competition on the part of out-of-state merchants. Johnston v. Gill, 224 N.C. 638, 32 S.E.2d 30 (1944).

The purpose of the use tax is to impose the same burdens on out-of-state purchases as the sales tax imposes on purchases within the State. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Use tax does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the State, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relationship to interstate commerce arises from the fact that immediately preceding the transfer of possession to the purchaser within the State, which is the taxable event regardless of the time and place of passing of title, the merchandise had been transported in interstate commerce and brought to its journey's end. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

A sales tax is a tax on the freedom of purchase and, when applied to interstate transactions, it is a tax on the privilege of doing interstate business, creates a burden on interstate commerce and runs counter to the Commerce Clause of the federal Constitution. Conversely, a use tax is a tax on the enjoyment of that which was purchased after a sale has spent its interstate character. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

A use tax does not discriminate against interstate commerce since it is laid upon every purchaser, within the State, of goods for consumption, regardless of whether they have been transported in interstate commerce. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

The use tax does not impermissibly burden interstate commerce since it is a tax imposed on the enjoyment of goods after the sale has already spent its interstate character. It is designed to complement the sales tax and to reach transactions which cannot constitutionally be subject to a sales tax. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

Provisions of this statute cannot be extended beyond clear import of language used, or their operation enlarged so as to embrace matters not specifically pointed out. Watson Indus. v. Shaw, 235 N.C. 203, 69 S.E.2d 505 (1952).

The terms "storage" and "use," as used in this section, must be given the meaning stated in the definitions under subdivisions (17), (18) and (19) [now (44), (49), and (45), respectively] of G.S. 105-164.3. In re Clayton-Marcus Co., 286 N.C. 215, 210 S.E.2d 199 (1974).

Taxable Event for Assessment of Use Tax. — Regardless of the time and place of passing title, the taxable event for assessment of the use tax occurs when possession of the property is transferred to the purchaser within the taxing state for storage, use or consumption. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

If property is used to produce something which will add to the taxpayer's profit but the thing produced will not be sold subject to the sales tax, the sale of the property is not a sale to a manufacturer within the meaning of the Sales and Use Tax Act. Such a sale is subject to the Use Tax at the rate of four percent (three percent for the state and one percent for the county). Oscar Miller Contractor, Inc. v. North Carolina Tax Rev. Bd., 61 N.C. App. 725, 301 S.E.2d 511, cert. denied, 308 N.C. 677, 304 S.E.2d 756 (1983).

When Fuel Exempt from Sales and Use Taxes. — When fuel is the product of a mine and sold by the producer in its original unmanufactured state, it is exempt from sales and use taxes. Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968).

Soliciting Orders. — Where one is engaged within this State in a regular business of soliciting orders for tailor-made clothing on commission, part of which he collects at the time the order is taken, and the clothes are shipped by the maker, who collects the balance of the price directly from the purchaser, such transaction is subject to the use tax and the solicitor is a retailer and an agent for collecting the use tax, for which he is liable on his failure to do so. Johnston v. Gill, 224 N.C. 638, 32 S.E.2d 30 (1944).

Prerequisites to Assessment of Tax. — See Watson Indus. v. Shaw, 235 N.C. 203, 69 S.E.2d 505 (1952).

Dominion over, Possession of, or Title to Property Must Be Acquired by Purchaser. — See Watson Indus. v. Shaw, 235 N.C. 203, 69 S.E.2d 505 (1952).

Lease of Transcription Tape to Broadcasting Station. — The former statute could not be construed to impose a tax on a broadcasting station where it purchased the right to rebroadcast programs recorded on a transcription tape and was given temporary custody of the tape in order to make use of the purchase. Watson Indus. v. Shaw, 235 N.C. 203, 69 S.E.2d 505 (1952).

Food, such as peanuts, pretzels, and other "munchies" offered by respondent restaurants to customers purchasing beverages at their bars, meals offered without charge to restaurant managers, and matches provided free of charge to customers were not subject to use tax under subsection (a) because respondents included the cost of all the various items in their menu-item prices and collected sales taxes on those items. In re Rock-Ola Cafe, 111 N.C. App. 683, 433 S.E.2d 236 (1993), discretionary review improvidently granted, 336 N.C. 58, 441 S.E.2d 551 (1994).

Raw Materials As Tangible Personal

Property. — Raw materials, purchased out-of-state and incorporated out-of-state into building components, which were then used in the construction of buildings in North Carolina, were tangible personal property that was subject to the use tax found in G.S. 105-164.6(b). Morton Bldgs., Inc. v. Tolson, 172 N.C. App. 119, 615 S.E.2d 906, 2005 N.C. App. LEXIS 1579 (2005).

Statute of Limitations. — The collection of a use or excise tax being subject to the same statute of limitations, which applies to the collection of the sales tax, a use or excise tax which accrued in the year 1937 was held barred by the three-year statute of limitations when assessed in 1942. Standard Fertilizer Co. v. Gill, 225 N.C. 426, 35 S.E.2d 275 (1945).

Applied in Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962); In re Assessment of Additional N.C. & Orange County Use Taxes, 66 N.C. App. 423, 311 S.E.2d 366 (1984).

Cited in American Equitable Assurance Co. v. Gold, 249 N.C. 461, 106 S.E.2d 875 (1959); Master Hatcheries, Inc. v. Coble, 286 N.C. 518, 212 S.E.2d 150 (1975); Rent-A-Car Co. v. Lynch, 298 N.C. 559, 259 S.E.2d 564 (1979).

OPINIONS OF ATTORNEY GENERAL

Nonresident Servicemen Stationed in State Not Exempt from Use Tax on Motor Vehicles, etc., Purchased Outside State for Use in State. — See opinion of Attorney General to Mr. Eric L. Gooch, Director, Sales and Use Tax Division, N.C. Department of Revenue, 40 N.C.A.G. 887 (1969).

§ 105-164.6A. Voluntary collection of use tax by sellers.

(a) Voluntary Collection Agreements. — The Secretary may enter into agreements with sellers pursuant to which the seller agrees to collect and remit on behalf of its customers State and local use taxes due on items of tangible personal property the seller sells. For the purpose of this section, a seller is a person who is engaged in the business of selling tangible personal property for use in this State and who does not have sufficient nexus with this State to be required to collect use tax on the sales.

(b) Mandatory Provisions. — The agreements must contain the following provisions:

(1) The seller is not liable for use tax not paid to it by a customer.
(2) A customer's payment of a use tax to the seller relieves the customer of liability for the use tax.
(3) The seller must remit all use taxes it collects from customers on or before the due date specified in the agreement, which may not be later than 31 days after the end of a quarter or other collection period. The collection period cannot be more often than annually if the seller's State and local tax collections are less than one thousand dollars ($1,000) in a calendar year.
(4) A seller who fails to remit use taxes collected on behalf of its customers by the due date specified in the agreement is subject to the interest and penalties provided in Article 9 of this Chapter with respect to the taxes to the same extent as if the seller were a retailer and were required to collect use taxes under this Article.

(c) Optional Provisions. — The agreements may contain the following provisions:

(1) The seller will collect the use tax only on items that are subject to the general rate of tax.
(2) The seller will collect local use taxes only to the extent they are at the same rate in every unit of local government in the State.
(3) The seller will remit the tax and file reports in the form prescribed by the Secretary.
(4) Other provisions establishing the types of transactions on which the seller will collect tax and prescribing administrative procedures and requirements. (1996, 2nd Ex. Sess., c. 14, s. 11; 2000-120, s. 4; 2003-284, s. 45.4.)

Editor's Note. — Session Laws 2003-284, s. 45.1, provides: "The Streamlined Sales and Use Tax Agreement is an historic multistate agreement designed to simplify and modernize sales and use tax collection and administration. The states and businesses involved in the Streamlined Sales Tax Project recognize that a simplified and uniform system saves businesses compliance and audit costs, while also saving states administrative costs and improving voluntary compliance, which should increase state collections. To participate in the Agreement, North Carolina must amend or modify some of its sales and use tax law to conform to the simplifications and uniformity in the Agreement. This part [Part XLV of Session Laws 2003-284] makes those necessary changes."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

§ 105-164.7. Sales tax part of purchase price.

Every retailer subject to the tax levied in G.S. 105-164.4 shall at the time of selling or delivering or taking an order for the sale or delivery of taxable tangible personal property or a taxable service, or collecting the sales price, add to the sales price the amount of tax due. The tax constitutes a part of the purchase price, is a debt from the purchaser to the retailer until paid, and is recoverable at law in the same manner as other debts. The tax must be stated and charged separately from the sales price, shown separately on the retailer's sales records, and paid by the purchaser to the retailer as trustee for and on account of the State. The retailer is liable for the collection of the tax and for its payment to the Secretary. The retailer's failure to charge the tax to or to collect the tax from the purchaser does not affect this liability. It is the intent of this Article that the tax be added to the sales price of tangible personal property and services when sold at retail and be borne and passed on to the customer, instead of being borne by the retailer. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 2000-19, s. 1.3; 2006-162, s. 7.)

Effect of Amendments. — Session Laws 2006-162, s. 7, effective July 24, 2006, substituted "charge the tax to or to collect" for "charge to or collect" near the end of the next to the last sentence.

CASE NOTES

Editor's Note. — *The cases below were decided prior to the 2000 amendment to this section.*

Sales Tax Intended to Be Passed on to Consumer. — Even though the sales tax is primarily a license or privilege tax on retailers, the intent of the law is that the sales tax be passed on to the consumer. Rent-A-Car Co. v. Lynch, 39 N.C. App. 709, 251 S.E.2d 917, rev'd on other grounds, 298 N.C. 559, 259 S.E.2d 564 (1979).

But this section does not relieve the retailer of any tax liability; it provides him a ready legal means for recoupment. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Failure to Charge or Collect Tax Does Not Affect Retailer's Liability. — The tax must be added to the purchase price and constitutes a debt from purchaser to retailer until paid, but failure to charge or collect the tax from purchaser shall not affect retailer's liability. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

The retailer is not to be excused from liability merely because it is to his advantage to make use of a method of selling which will not permit him to keep a proper record of sales or to make the collections required by law. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962); Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

Failure to charge or collect the tax from purchaser does not relieve the retailer of any tax liability. Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

Notwithstanding that it is the intent of the law that the sales tax shall be passed on to the customer and that it not be borne by the retailer, the retailer is liable to the Secretary for the tax if he fails to collect it from his vendee or, in a proper case, from his lessee. Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

Effect of Failure to Add Tax at Proper Time. — In an action to determine who was liable to the Secretary of Revenue for the sales tax from a transaction, plaintiff retailer could not collect from defendant purchaser for sales taxes on materials sold by plaintiff to defendant where plaintiff failed to add sales taxes to the sales price of the material at the "time of selling or delivering or taking an order" as required by this section. Carolina-Atlantic Distribs., Inc. v. Teachey's Insulation, Inc., 51 N.C. App. 705, 277 S.E.2d 460 (1981).

In bankruptcy proceedings, both collected and uncollected sales taxes under this section will be accorded unlimited priority of payment pursuant to 11 U.S.C. § 507(a)-(7)(C), which accords priority status to taxes required to be collected by a party and held for the government. In re Taylor Tobacco Enters., Inc., 106 Bankr. 441 (E.D.N.C. 1989).

Cited in American Equitable Assurance Co. v. Gold, 249 N.C. 461, 106 S.E.2d 875 (1959); In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968); Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990).

§ 105-164.8. Retailer's obligation to collect tax; mail order sales subject to tax.

(a) Obligation. — Every retailer engaged in business in this State as defined in this Article shall collect said tax notwithstanding

(1) That the purchaser's order or the contract of sale is delivered, mailed or otherwise transmitted by the purchaser to the retailer at a point outside this State as a result of solicitation by the retailer through the medium of a catalogue or other written advertisement; or

(2) That the purchaser's order or the contract of sale is made or closed by acceptance or approval outside this State, or before said tangible personal property enters this State; or

(3) That the purchaser's order or the contract of sale provides that said property shall be or is in fact procured or manufactured at a point outside this State and shipped directly to the purchaser from the point of origin; or

(4) That said property is mailed to the purchaser in this State or a point outside this State or delivered to a carrier outside this State f.o.b. or otherwise and directed to the purchaser in this State regardless of whether the cost of transportation is paid by the retailer or by the purchaser; or

(5) That said property is delivered directly to the purchaser at a point outside this State; or

(6) Any combination in whole or in part of any two or more of the foregoing statements of fact, if it is intended that the tangible personal property purchased be brought to this State for storage, use or consumption in this State.

(b) Mail Order Sales. — A retailer who makes a mail order sale is engaged in business in this State and is subject to the tax levied under this Article if at least one of the following conditions is met:

(1) The retailer is a corporation engaged in business under the laws of this State or a person domiciled in, a resident of, or a citizen of, this State.

(2) The retailer maintains retail establishments or offices in this State, whether the mail order sales thus subject to taxation by this State result from or are related in any other way to the activities of such establishments or offices.

(3) The retailer has representatives in this State who solicit business or transact business on behalf of the retailer, whether the mail order

sales thus subject to taxation by this State result from or are related in any other way to such solicitation or transaction of business.

(4) Repealed by Session Laws 1991, c. 45, s. 16.

(5) The retailer, by purposefully or systematically exploiting the market provided by this State by any media-assisted, media-facilitated, or media-solicited means, including direct mail advertising, distribution of catalogs, computer-assisted shopping, television, radio or other electronic media, telephone solicitation, magazine or newspaper advertisements, or other media, creates nexus with this State.

(6) Through compact or reciprocity with another jurisdiction of the United States, that jurisdiction uses its taxing power and its jurisdiction over the retailer in support of this State's taxing power.

(7) The retailer consents, expressly or by implication, to the imposition of the tax imposed by this Article. For purposes of this subdivision, evidence that a retailer engaged in the activity described in subdivision (5) shall be prima facie evidence that the retailer consents to the imposition of the tax imposed by this Article.

(8) The retailer is a holder of a wine shipper permit issued by the ABC Commission pursuant to G.S. 18B-1001.1.

(c) Local Tax. — A retailer who is required to collect the tax imposed by this Article must collect a local use tax on a transaction if a local sales tax does not apply to the transaction. The sourcing principles in G.S. 105-164.4B determine whether a local sales tax or a local use tax applies to a transaction. A "local sales tax" is a tax imposed under Chapter 1096 of the 1967 Session Laws or by Subchapter VIII of this Chapter, and a local use tax is a use tax imposed under that act or Subchapter. (1957, c. 1340, s. 5; 1987 (Reg. Sess., 1988), c. 1096, s. 4; 1991, c. 45, s. 16; 2001-347, s. 2.10; 2003-402, s. 13; 2003-416, ss. 24(b), 24(c).)

Editor's Note. — Session Laws 1967, c. 1096, referred to in subsection (c) of this section, relates to sales and use tax for Mecklenburg County.

§ 105-164.9. Advertisement to absorb tax unlawful.

Any retailer who shall by any character or public advertisement offer to absorb the tax levied in this Article or in any manner directly or indirectly advertise that the tax herein imposed is not considered an element in the price to the purchaser shall be guilty of a Class 1 misdemeanor. Any violations of the provisions of this section reported to the Secretary shall be reported by him to the Attorney General of the State to the end that such violations may be brought to the attention of the solicitor of the court of the county or district whose duty it is to prosecute misdemeanors in the jurisdiction. It shall be the duty of such solicitor to investigate such alleged violations and if he finds that this section has been violated prosecute such violators in accordance with the law. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 1993, c. 539, s. 704; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Applied in Rent-A-Car Co. v. Lynch, 39 N.C. App. 709, 251 S.E.2d 917 (1979).

Cited in Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962); In re Taylor Tobacco Enters., Inc., 106 Bankr. 441 (E.D.N.C. 1989).

§ 105-164.10. Retail bracket system.

For the convenience of the retailer in collecting the tax due under this Article, the Secretary shall prescribe tables that compute the tax due on sales by rounding off the amount of tax due to the nearest whole cent. The Secretary shall issue a separate table for each rate of tax that may apply to a sale, including the general rate established in G.S. 105-164.4, preferential rates, and combined State and local rates. Use of the tables prescribed by the Secretary does not relieve a retailer of liability for the applicable rate of tax due on the gross receipts or net taxable sales of the retailer. (1957, c. 1340, s. 5; 1961, c. 826, s. 2; 1973, c. 476, s. 193; 1991, c. 689, s. 313.)

CASE NOTES

Constitutionality. — This section does not render the sales tax unconstitutional as violating the due process clause of the State Constitution or U.S. Const., Amend. XIV. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

The seller of goods through vending machines was in no position to attack the sales tax statute as discriminatory in that no tax is collected on sales of less than 10¢, where approximately 76% of the seller's receipts came from items priced at 10¢ or above, and thus assuming the average sale to be 20¢, the seller must have collected 5% on more than three fourths of its total receipts. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Bracket system is for the convenience of the retailer. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

The 1957 act made no material change in the effect of the bracket system, which had previously been in force pursuant to a regulation of the Secretary of Revenue, and made no change in the nature of the tax by reason of the inclusion of the bracket system in the act itself. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Retailer Not Relieved of Liability. — The legislature was careful to state, in all instances where administrative provisions might be construed to shift the burden of the tax from retailer to purchaser, that such provisions do not relieve the retailer from his privilege tax liability. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Goods Not Exempt Because of Smallness of Unit Price. — This Article in no particular exempts goods from the tax on retailers because of smallness of unit price. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Section Has Reference to Sales, Not Unit Price of Goods. — The bracket system provides that a retailer shall collect from a purchaser "no amount on sales of less than 10¢," and it has reference to sales, not unit price of goods. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

If a customer buys two or more items priced at less than ten cents each so that the sale amounts to ten cents or more, the retailer's failure to collect said tax from the purchaser shall not affect the retailer's liability to the State. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Applied in Rent-A-Car Co. v. Lynch, 39 N.C. App. 709, 251 S.E.2d 917 (1979).

§ 105-164.11. Excessive and erroneous collections.

(a) Remittance of Over-Collections to Secretary. — When the tax collected for any period is in excess of the total amount that should have been collected, the total amount collected must be paid over to the Secretary. When tax is collected for any period on exempt or nontaxable sales the tax erroneously collected shall be remitted to the Secretary and no refund shall be made to a taxpayer unless the purchaser has received credit for or has been refunded the amount of tax erroneously charged. This provision shall be construed with other provisions of this Article and given effect so as to result in the payment to the Secretary of the total amount collected as tax if it is in excess of the amount that should have been collected.

(b) Refund Procedures First Remedy. — The first course of remedy available to purchasers seeking a refund of over-collected sales or use taxes from the seller are the customer refund procedures provided in this Chapter or otherwise provided by administrative rule, bulletin, or directive on the law issued by the Secretary.

(c) Cause of Action Against Seller. — A cause of action against the seller for over-collected sales or uses taxes does not accrue until a purchaser has provided written notice to a seller and the seller has had 60 days to respond. The notice to the seller must contain the information necessary to determine the validity of the request.

(d) Presumption of Reasonable Business Practice. — In connection with a purchaser's request from the seller of over-collected sales or use taxes, a seller shall be presumed to have a reasonable business practice if, in the collection of sales and use taxes, the seller uses either a provider or a system, including a proprietary system, that is certified by the State and the seller has remitted to the State all taxes collected less any deductions, credits, or collection allowances. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2; 1973, c. 476, s. 193; 1991 (Reg. Sess., 1992), c. 1007, s. 4; 2004-22, s. 1.)

§ 105-164.12: Repealed by Session Laws 2001-347, s. 2.11, effective January 1, 2002.

§ 105-164.12A. Electric golf cart and battery charger considered a single article.

The sale of an electric golf cart and a battery charger that is not physically attached to the golf cart is considered the sale of a single article of tangible personal property in imposing tax under this Article if the battery charger is designed to recharge the golf cart and is sold to the purchaser of the golf cart when the golf cart is sold. (1985 (Reg. Sess., 1986), c. 901.)

§ 105-164.12B. Tangible personal property sold below cost with conditional service contract.

(a) Conditional Service Contract Defined. — A conditional service contract is a contract in which all of the following conditions are met:

(1) A seller transfers an item of tangible personal property to a consumer on the condition that the consumer enter into an agreement to purchase services on an ongoing basis for a minimum period of at least six months.

(2) The agreement requires the consumer to pay a cancellation fee to the seller if the consumer cancels the contract for services within the minimum period.

(3) For the item transferred, the seller charges the consumer a price that, after any price reduction the seller gives the consumer, is below the purchase price the seller paid for the item. The seller's purchase price is presumed to be no greater than the price the seller paid, as shown on the seller's purchase invoice, for the same item within 12 months before the seller entered into the conditional service contract.

(b) Tax. — If a seller transfers an item of tangible personal property as part of a conditional service contract, a sale has occurred. The sales price of the item is presumed to be the retail price at which the item would sell in the absence of the conditional service contract. Sales tax is due at the time of the transfer on the following:

(1) Any part of the presumed sales price the consumer pays at that time, if the service in the contract is taxable at the combined general rate.

(2) The presumed sales price, if the service in the contract is not taxable at the combined general rate.

(c)-(f). Repealed by Session Laws 2007-244, s. 3, effective October 1, 2007. (1996, 2nd Ex. Sess., c. 13, s. 5.1; 2001-414, ss. 16, 17; 2006-151, s. 6; 2007-244, s. 3.)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 13, s. 10.2(5), made this section effective on the earliest date practicable (November 1, 1996), and provides that the earliest date practicable is considered to be the first day of the third month following the ratification of the act (August 2, 1996). The act further provides that this section is applicable to sales made on or after the effective date.

Session Laws 1996, Second Extra Session, c. 13, s. 1, provides that this act shall be known as the William S. Lee Quality Jobs and Business Expansion Act.

Session Laws 1996, Second Extra Session, c. 13, s. 10.1, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before its amendment or repeal; nor does it affect the right to any refund or credit of a tax that would otherwise have been available under the amended or repealed statute before its amendment or repeal."

Session Laws 2006-151, s. 20, is a severability clause.

Effect of Amendments. — Session Laws 2006-151, s. 6, effective January 1, 2007, substituted "Tangible personal property bundled with service contract" for "Bundled transactions" in the section heading.

Session Laws 2007-244, s. 3, effective October 1, 2007, substituted "sold below cost with conditional" for "bundled with" in the section heading; in the introductory language of subsection (a), substituted "Conditional Service Contract" for "Bundled Transaction" in the subsection catchline, and substituted "conditional service contract is a contract" for "bundled transaction is a transaction"; substituted "seller" for "service provider" in subdivision (a)(2); rewrote subdivision (a)(3) and subsection (b); and deleted former subsections (c) through (f).

Part 3. Exemptions and Exclusions.

§ 105-164.13. Retail sales and use tax.

The sale at retail and the use, storage, or consumption in this State of the following tangible personal property and services are specifically exempted from the tax imposed by this Article:

Agricultural Group.

(1) Any of the following items sold to a farmer for use by the farmer in the planting, cultivating, harvesting, or curing of farm crops or in the production of dairy products, eggs, or animals. A "farmer" includes a dairy operator, a poultry farmer, an egg producer, a livestock farmer, a farmer of crops, and a farmer of an aquatic species, as defined in G.S. 106-758.
   a. Commercial fertilizer, lime, land plaster, plastic mulch, plant bed covers, potting soil, baler twine, and seeds.
   b. Farm machinery, attachment and repair parts for farm machinery, and lubricants applied to farm machinery. The term 'machinery' includes implements that have moving parts or are operated or drawn by an animal. The term does not include implements operated wholly by hand or motor vehicles required to be registered under Chapter 20 of the General Statutes.
   c. A horse or mule.
   d. **(Effective until July 1, 2010 — see notes)** Fuel other than electricity.
   d. **(Effective July 1, 2010 — see notes)** Fuel.

(1a) Sales of the following to a farmer, as defined in subdivision (1) of this section:

a. A container used for a purpose set out in subdivision (1) of this section or in packaging and transporting the farmer's product for sale.

b. A grain, feed, or soybean storage facility, and parts and accessories attached to the facility.

(1b) **(Effective July 1, 2010 — see notes)** Electricity sold to a farmer to be used for any farming purpose other than preparing food, heating dwellings, and other household purposes.

(2) Repealed by Session Laws 2001, c. 514, s. 1, effective February 1, 2002.

(2a) Any of the following substances when purchased for use on animals or plants, as appropriate, held or produced for commercial purposes. This exemption does not apply to any equipment or devices used to administer, release, apply, or otherwise dispense these substances:

a. Remedies, vaccines, medications, litter materials, and feeds for animals.

b. Rodenticides, insecticides, herbicides, fungicides, and pesticides.

c. Defoliants for use on cotton or other crops.

d. Plant growth inhibitors, regulators, or stimulators, including systemic and contact or other sucker control agents for tobacco and other crops.

e. Semen.

(3) Products of forests and mines in their original or unmanufactured state when such sales are made by the producer in the capacity of producer.

(4) Cotton, tobacco, peanuts or other farm products sold to manufacturers for further manufacturing or processing.

(4a) Baby chicks and poults sold for commercial poultry or egg production.

(4b) Products of a farm sold in their original state by the producer of the products if the producer is not primarily a retail merchant and ice used to preserve agriculture, aquaculture and commercial fishery products until the products are sold at retail.

(4c) Any of the following items concerning the housing, raising, or feeding of animals:

a. Commercially manufactured facilities to be used for commercial purposes for housing, raising, or feeding animals or for housing equipment necessary for these commercial activities.

b. Building materials, supplies, fixtures, and equipment that become a part of and are used in the construction, repair, or improvement of an enclosure or a structure specifically designed, constructed, and used for housing, raising, or feeding animals or for housing equipment necessary for one of these commercial activities.

c. Commercially manufactured equipment, and parts and accessories for the equipment, used in a facility that is exempt from tax under this subdivision or in an enclosure or a structure whose building materials are exempt from tax under this subdivision.

(4d) Any of the following tobacco items:

a. The lease or rental of tobacco sheets used in handling tobacco in the warehouse and transporting tobacco to and from the warehouse.

b. A metal flue sold for use in curing tobacco, whether the flue is attached to a handfired furnace or used in connection with a mechanical burner.

c. A bulk tobacco barn or rack, parts and accessories attached to the tobacco barn or rack, and any similar apparatus, part, or accessory used to cure or dry tobacco or another crop.

(4e) Repealed by Session Laws 2006-162, s. 8(b), effective July 24, 2006.

(4f) Sales of the following to a person who is engaged in the commercial logging business:
  a. Logging machinery. — Logging machinery is machinery used to harvest raw forest products for transport to first market.
  b. Attachments and repair parts for logging machinery.
  c. Lubricants applied to logging machinery.
  d. Fuel used to operate logging machinery.

Industrial Group.

(5) Manufactured products produced and sold by manufacturers or producers to other manufacturers, producers, or registered retailers or wholesale merchants, for the purpose of resale except as modified by G.S. 105-164.3(51). This exemption does not extend to or include retail sales to users or consumers not for resale.

(5a) Products that are subject to tax under Article 5F of this Chapter.

(5b) Sales to a telephone company regularly engaged in providing telephone service to subscribers on a commercial basis of central office equipment, switchboard equipment, private branch exchange equipment, terminal equipment other than public pay telephone terminal equipment, and parts and accessories attached to the equipment.

(5c) Sales of towers, broadcasting equipment, and parts and accessories attached to the equipment to a radio or television company licensed by the Federal Communications Commission.

(5d) Sales of broadcasting equipment and parts and accessories attached to the equipment to a cable service provider. For the purposes of this subdivision, "broadcasting equipment" does not include cable.

(6) Repealed by Session Laws 1989 (Regular Session, 1990), c. 1068, s. 1.

(7) Sales of products of waters in their original or unmanufactured state when such sales are made by the producer in the capacity of producer. Fish and seafoods are likewise exempt when sold by the fisherman in that capacity.

(8) Sales to a manufacturer of tangible personal property that enters into or becomes an ingredient or component part of tangible personal property that is manufactured. This exemption does not apply to sales of electricity.

(8a) Sales to a small power production facility, as defined in 16 U.S.C. § 796(17)(A), of fuel used by the facility to generate electricity.

(9) Boats, fuel oil, lubricating oils, machinery, equipment, nets, rigging, paints, parts, accessories, and supplies sold to any of the following:
  a. The holder of a standard commercial fishing license issued under G.S. 113-168.2 for principal use in commercial fishing operations.
  b. The holder of a shellfish license issued under G.S. 113-169.2 for principal use in commercial shellfishing operations.
  c. The operator of a for-hire boat, as defined in G.S. 113-174, for principal use in the commercial use of the boat.

(10) Sales of the following to commercial laundries or to pressing and dry cleaning establishments:
  a. Articles or materials used for the identification of garments being laundered or dry cleaned, wrapping paper, bags, hangers, starch, soaps, detergents, cleaning fluids and other compounds or chemicals applied directly to the garments in the direct performance of the laundering or the pressing and cleaning service.
  b. Laundry and dry-cleaning machinery, parts and accessories attached to the machinery, and lubricants applied to the machinery.
  c. Fuel, other than electricity, used in the direct performance of the laundering or the pressing and cleaning service.

Motor Fuels Group.

(10a) Sales of the following to a major recycling facility:
  a. Lubricants and other additives for motor vehicles or machinery and equipment used at the facility.
  b. Materials, supplies, parts, and accessories, other than machinery and equipment, that are not capitalized by the taxpayer and are used or consumed in the manufacturing and material handling processes at the facility.
  c. Electricity used at the facility.

(10b) Recodified as G.S. 105-164.13(10a)c. by Session Laws 2005-276, s. 33.9, effective January 1, 2006.

(11) Any of the following fuel:
  a. Motor fuel, as defined in G.S. 105-449.60, except motor fuel for which a refund of the per gallon excise tax is allowed under G.S. 105-449.105A or G.S. 105-449.107.
  b. Alternative fuel taxed under Article 36D of this Chapter, unless a refund of that tax is allowed under G.S. 105-449.107.

(11a) Sales of diesel fuel to railroad companies for use in rolling stock other than motor vehicles. The definitions in G.S. 105-333 apply in this subdivision.

Medical Group.

(12) Sales of any of the following items:
  a. Prosthetic devices.
  b. Mobility enhancing equipment sold on a prescription.
  c. Durable medical equipment sold on prescription.
  d. Durable medical supplies sold on prescription.

(13) All of the following drugs, including their packaging materials and any instructions or information about the drugs included in the package with them:
  a. Drugs required by federal law to be dispensed only on prescription.
  b. Over-the-counter drugs sold on prescription.
  c. Insulin.

(13a) Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 16.

(13b) Repealed by Session Laws 1999, c. 438, s. 7, effective October 1, 1999.

(13c) Nutritional supplements sold by a chiropractic physician at a chiropractic office to a patient as part of the patient's plan of treatment, as authorized by G.S. 90-151.1.

Printed Materials Group.

(14) Public school books on the adopted list, the selling price of which is fixed by State contract.

(14a) Recodified as subdivision (33a) by Session Laws 2000-120, s. 5, effective July 14, 2000.

Transactions Group.

(15) Accounts of purchasers, representing taxable sales, on which the tax imposed by this Article has been paid, that are found to be worthless and actually charged off for income tax purposes may,at corresponding periods, be deducted from gross sales. In the case of a municipality that sells electricity, the account maybe deducted if it meets all the

conditions for charge-off that would apply if the municipality were subject to income tax. Any accounts deducted pursuant to this subdivision must be added to gross sales if afterwards collected.

(16) Sales of an article repossessed by the vendor if tax was paid on the sales price of the article.

Exempt Status Group.

(17) Sales which a state would be without power to tax under the limitations of the Constitution or laws of the United States or under the Constitution of this State.

Unclassified Group.

(18) Repealed by Session Laws 2005-276, s. 33.9, effective January 1, 2006.

(19) Repealed by Session Laws 1991, c. 618, s. 1.

(20) Sales by blind merchants operating under supervision of the Department of Health and Human Services.

(21) The lease or rental of motion picture films used for exhibition purposes where the lease or rental of such property is an established business or part of an established business or the same is incidental or germane to said business of the lessee.

(22) The lease or rental of films, motion picture films, transcriptions and recordings to radio stations and television stations operating under a certificate from the Federal Communications Commission.

(22a) Sales of audiovisual masters made or used by a production company in making visual and audio images for first generation reproduction. For the purpose of this subdivision, an "audiovisual master" is an audio or video film, tape, or disk or another audio or video storage device from which all other copies are made.

(23) Sales of the following packaging items:

a. Wrapping paper, labels, wrapping twine, paper, cloth, plastic bags, cartons, packages and containers, cores, cones or spools, wooden boxes, baskets, coops and barrels, including paper cups, napkins and drinking straws and like articles sold to manufacturers, producers and retailers, when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail and when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer.

b. A container that is used as packaging by the owner of the container or another person to enclose tangible personal property for delivery to a purchaser of the property and is required to be returned to its owner for reuse.

(24) Sales of fuel and other items of tangible personal property for use or consumption by or on ocean-going vessels which ply the high seas in interstate or foreign commerce in the transport of freight and/or passengers for hire exclusively, when delivered to an officer or agent of such vessel for the use of such vessel; provided, however, that sales of fuel and other items of tangible personal property made to officers, agents, members of the crew or passengers of such vessels for their personal use shall not be exempted from payment of the sales tax.

(25) Sales by merchants on the Cherokee Indian Reservation when such merchants are authorized to do business on the Reservation and are paying the tribal gross receipts levy to the Tribal Council.

(26) Food sold not for profit by public or private school cafeterias within school buildings during the regular school day.

(26a) Food sold not for profit by a public school cafeteria to a child care center that participates in the Child and Adult Care Food Program of the Department of Public Instruction.

(27) Meals and food products served to students in dining rooms regularly operated by State or private educational institutions or student organizations thereof.

(27a) Bread, rolls, and buns sold at a bakery thrift store. A "bakery thrift store" is a retail outlet of a bakery that sells at wholesale over ninety percent (90%) of the items it makes and sells at the retail outlet day-old bread, rolls, and buns returned to it by retailers that acquired these items from the bakery.

(28) Sales of newspapers by newspaper street vendors, by newspaper carriers making door-to-door deliveries, and by means of vending machines and sales of magazines by magazine vendors making door-to-door sales.

(29) Repealed by Session Laws 2005-435, s. 30, effective September 27, 2005.

(29a) Repealed by Session Laws 1995 (Regular Session, 1996), c. 646, s. 5.

(30) Sales from vending machines when sold by the owner or lessee of said machines at a price of one cent (1¢) per sale.

(31) Sales of meals not for profit to elderly and incapacitated persons by charitable or religious organizations not operated for profit which are entitled to the refunds provided by G.S. 105-164.14(b), when such meals are delivered to the purchasers at their places of abode.

(31a) Food sold by a church or religious organization not operated for profit when the proceeds of the sales are actually used for religious activities.

(31b) Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 16.

(32) Sales of motor vehicles, the sale of a motor vehicle body to be mounted on a motor vehicle chassis when a certificate of title has not been issued for the chassis, and the sale of a motor vehicle body mounted on a motor vehicle chassis that temporarily enters the State so the manufacturer of the body can mount the body on the chassis.

(33) Tangible personal property purchased solely for the purpose of export to a foreign country for exclusive use or consumption in that or some other foreign country, either in the direct performance or rendition of professional or commercial services, or in the direct conduct or operation of a trade or business, all of which purposes are actually consummated, or purchased by the government of a foreign country for export which purpose is actually consummated. "Export" shall include the acts of possessing and marshalling such property, by either the seller or the purchaser, for transportation to a foreign country, but shall not include devoting such property to any other use in North Carolina or the United States. "Foreign country" shall not include any territory or possession of the United States.

In order to qualify for this exemption, an affidavit of export indicating compliance with the terms and conditions of this exemption, as prescribed by the Secretary of Revenue, must be submitted by the purchaser to the seller, and retained by the seller to evidence qualification for the exemption.

If the purposes qualifying the property for exemption are not consummated, the purchaser shall be liable for the tax which was avoided by the execution of the aforesaid affidavit as well as for applicable penalties and interest and the affidavit shall contain express provision that the purchaser has recognized and assumed such liability.

The principal purpose of this exemption is to encourage the flow of commerce through North Carolina ports that is now moving through out-of-state ports. However, it is not intended that property acquired for personal use or consumption by the purchaser, including gifts, shall be exempt hereunder.

(33a) Tangible personal property sold by a retailer to a purchaser within or without this State, when the property is delivered in this State to a common carrier or to the United States Postal Service for delivery to the purchaser or the purchaser's designees outside this State and the purchaser does not subsequently use the property in this State.

(34) Sales of items by a nonprofit civic, charitable, educational, scientific or literary organization when the net proceeds of the sales will be given or contributed to the State of North Carolina or to one or more of its agencies or instrumentalities, or to one or more nonprofit charitable organizations, one of whose purposes is to serve as a conduit through which such net proceeds will flow to the State or to one or more of its agencies or instrumentalities.

(35) Sales by a nonprofit civic, charitable, educational, scientific, literary, or fraternal organization when all of the following conditions are met:
  a. The sales are conducted only upon an annual basis for the purpose of raising funds for the organization's activities.
  b. The proceeds of the sale are actually used for the organization's activities.
  c. The products sold are delivered to the purchaser within 60 days after the first solicitation of any sale made during the organization's annual sales period.

(36) Advertising supplements and any other printed matter ultimately to be distributed with or as part of a newspaper.

(37) Repealed by Session Laws 2001-424, s. 34.23(a), effective December 1, 2001, and applicable to sales made on or after that date.

(38) Food and other items lawfully purchased under the Food Stamp Program, 7 U.S.C. § 2011, and supplemental foods lawfully purchased with a food instrument issued under the Special Supplemental Food Program, 42 U.S.C. § 1786, and supplemental foods purchased for direct distribution by the Special Supplemental Food Program.

(39) Sales of paper, ink, and other tangible personal property to commercial printers and commercial publishers for use as ingredients or component parts of free distribution periodicals and sales by printers of free distribution periodicals to the publishers of these periodicals. As used in this subdivision, the term "free distribution periodical" means a publication that is continuously published on a periodic basis monthly or more frequently, is provided without charge to the recipient, and is distributed in any manner other than by mail.

(40) Sales to the Department of Transportation.

(41) Sales of mobile classrooms to local boards of education or to local boards of trustees of community colleges.

(42) Tangible personal property that is purchased by a retailer for resale or is manufactured or purchased by a wholesale merchant for resale and then withdrawn from inventory and donated by the retailer or wholesale merchant to either a governmental entity or a nonprofit organization, contributions to which are deductible as charitable contributions for federal income tax purposes.

(43) Custom computer software. Custom computer software and the portion of prewritten computer software that is modified or enhanced

if the modification or enhancement is designed and developed to the specifications of a specific purchaser and the charges for the modification or enhancement are separately stated.

(43a) Computer software delivered electronically or delivered by load and leave.

(44) Piped natural gas. — This item is exempt because it is taxed under Article 5E of this Chapter.

(45) Sales of the following items to an interstate passenger air carrier for use at its hub:
   a. Aircraft lubricants, aircraft repair parts, and aircraft accessories.
   b. Aircraft simulators for flight crew training.

(45a) Sales to an interstate air business of tangible personal property that becomes a component part of or is dispensed as a lubricant into commercial aircraft during its maintenance, repair, or overhaul. For the purpose of this subdivision, commercial aircraft includes only aircraft that has a certified maximum take-off weight of more than 12,500 pounds and is regularly used to carry for compensation passengers, commercial freight, or individually addressed letters and packages.

(45b) Sales of the following items to an interstate air courier for use at its hub:
   a. Aircraft lubricants, aircraft repair parts, and aircraft accessories.
   b. Materials handling equipment, racking systems, and related parts and accessories for the storage or handling and movement of tangible personal property at an airport or in a warehouse or distribution facility.

(46) Sales of electricity by a municipality whose only wholesale supplier of electric power is a federal agency and who is required by a contract with that federal agency to make payments in lieu of taxes.

(47) An amount charged as a deposit on a beverage container that is returnable to the vendor for reuse when the amount is refundable or creditable to the vendee, whether or not the deposit is separately charged.

(48) An amount charged as a deposit on an aeronautic, automotive, industrial, marine, or farm replacement part that is returnable to the vendor for rebuilding or remanufacturing when the amount is refundable or creditable to the vendee, whether or not the deposit is separately charged. This exemption does not include tires or batteries.

(49) Installation charges when the charges are separately stated.

(49a) Delivery charges for delivery of direct mail if the charges are separately stated on an invoice or similar billing document given to the purchaser.

(50) Fifty percent (50%) of the sales price of tangible personal property sold through a coin-operated vending machine, other than tobacco.

(51) Water delivered by or through main lines or pipes for either commercial or domestic use or consumption.

(52) Items subject to sales and use tax under G.S. 105-164.4, other than electricity, telecommunications service, and ancillary service as defined in G.S. 105-164.4, if all of the following conditions are met:
   a. The items are purchased by a State agency for its own use and in accordance with G.S. 105-164.29A.
   b. The items are purchased pursuant to a valid purchase order issued by the State agency that contains the exemption number of the agency and a description of the property purchased, or the items purchased are paid for with a State-issued check, electronic deposit, credit card, procurement card, or credit account of the State agency.

c. For all purchases other than by an agency-issued purchase order,the agency must provide to or have on file with the retailer the agency's exemption number.

(53) Sales to a professional land surveyor of tangible personal property on which custom aerial survey data is stored in digital form or is depicted in graphic form. Data is custom if it was created to the specifications of the professional land surveyor purchasing the property. A professional land surveyor is a person licensed as a surveyor under Chapter 89C of the General Statutes.

(54) The following telecommunications services and charges:

a. Telecommunications service that is a component part of or is integrated into a telecommunications service that is resold. This exemption does not apply to service purchased by a pay telephone provider who uses the service to provide pay telephone service. Examples of services that are resold include carrier charges for access to an intrastate or interstate interexchange network, interconnection charges paid by a provider of mobile telecommunications service, and charges for the sale of unbundled network elements. An unbundled network element is a network element, as defined in 47 U.S.C. § 153(29), to which access is provided on an unbundled basis pursuant to 47 U.S.C. § 251(c)(3).

b. Pay telephone service.

c. 911 charges imposed under G.S. 62A-43 and remitted to the 911 Fund under that section.

d. Charges for telecommunications service made by a hotel, motel, or another entity whose gross receipts are taxable under G.S. 105-164.4(a)(3) when the charges are incidental to the occupancy of the entity's accommodations.

e. Telecommunications service purchased by a State agency or a unit of local government for the North Carolina Information Highway or another data network owned or leased by the State or unit of local government.

(55) Sales of electricity for use at an eligible Internet data center and eligible business property to be located and used at an eligible Internet data center. As used in this subdivision, "eligible business property" is property that is capitalized for tax purposes under the Code and is used either:

a. For the provision of Internet service or Web search portal services as contemplated by G.S. 105-164.3(8e)a., including equipment cooling systems for managing the performance of the property.

b. For the generation, transformation, transmission, distribution, or management of electricity, including exterior substations and other business personal property used for these purposes.

c. To provide related computer engineering or computer science research.

If the level of investment required by G.S. 105-164.3(8e)d. is not timely made, then the exemption provided under this subdivision is forfeited. If the level of investment required by G.S. 105-164.3(8e)d. is timely made but any specific eligible business property is not located and used at an eligible Internet data center, then the exemption provided for such eligible business property under this subdivision is forfeited. If the level of investment required by G.S. 105-164.3(8e)d. is timely made but any portion of the electricity is not used at an eligible Internet data center, then the exemption provided for such electricity under this subdivision is forfeited. A taxpayer that forfeits an exemption under this subdivision is liable for all past taxes avoided as a result of the forfeited exemption, computed from the date the taxes would have been due if the exemption had not been allowed, plus interest at the rate established under G.S. 105-241.21. If the forfeiture is triggered due to the lack of a timely investment required by G.S. 105-164.3(8e)d., then interest is computed from the date the taxes would have been due if the exemption had not been allowed. For all other forfeitures, interest is computed from the time as of which the eligible business property or electricity was put to a disqualifying use. The past taxes and interest are due 30 days after the date the exemption is forfeited. A taxpayer that fails to pay the past taxes and interest by the due date is subject to the provisions of G.S. 105-236.

(56) Sales to the owner or lessee of an eligible railroad intermodal facility of intermodal cranes, intermodal hostler trucks, and railroad locomotives that reside on the premises of the facility and are used at the facility.

(57) **(Effective July 1, 2010 — see notes)** Fuel and electricity sold to a manufacturer for use in connection with the operation of a manufacturing facility. (1957, c. 1340, s. 5; 1959, c. 670; c. 1259, s. 5; 1961, c. 826, s. 2; cc. 1103, 1163; 1963, c. 1169, ss. 7-9; 1965, c. 1041; 1967, c. 756; 1969, c. 907; 1971, c. 990; 1973, c. 476, s. 143; c. 708, s. 1; cc. 1064, 1076; c. 1287, s. 8; 1975, 2nd Sess., c. 982; 1977, c. 771, s. 4; 1977, 2nd Sess., c. 1219, s. 43.6; 1979, c. 46, ss. 1, 2; c. 156, s. 1; c. 201; c. 625, ss. 1, 2; c. 801, ss. 74, 75; 1979, 2nd Sess., c. 1099, s. 1; 1981, cc. 14, 207, 982; 1983, c. 156; c. 570, s. 21; c. 713, ss. 91, 92; c. 873; c. 887; 1983 (Reg. Sess., 1984), c. 1071, s. 1; 1985, c. 114, s. 4; c. 555; c. 656, ss. 24, 25; 1985 (Reg. Sess., 1986), c. 953; c. 973; c. 982, s. 2; 1987, c. 800, s. 1; 1987 (Reg. Sess., 1988), c. 937; 1989, c. 692, ss. 3.5, 3.6; c. 748, s. 1; 1989 (Reg. Sess., 1990), c. 989; c. 1060; c. 1068, ss. 1, 2; 1991, c. 45, s. 17; c. 79, s. 2; c. 618, s. 1; c. 689, s. 314; 1991 (Reg. Sess., 1992), c. 931, ss. 1, 2; c. 935, s. 1; c. 940, s. 1; c. 949, s. 1; c. 1007, s. 44; 1993, c. 484, s. 3; c. 513, s. 11; 1993 (Reg. Sess., 1994), c. 739, s. 1; 1995, c. 390, s. 14; c. 451, s. 1; c. 477, ss. 2, 3; 1995 (Reg. Sess., 1996), c. 646, ss. 4, 5; c. 649, s. 1; 1996, 2nd Ex. Sess., c. 14, ss. 15, 16; 1997-369, s. 2; 1997-370, s. 2; 1997-397, s. 1; 1997-423, s. 3; 1997-443, s. 11A.118(a); 1997-456, s. 27; 1997-506, s. 36; 1997-521, s. 1; 1998-22, s. 6; 1998-55, ss. 9, 15; 1998-98, ss. 14, 14.1, 49, 107; 1998-146, s. 9; 1998-171, s. 10(a), (b); 1998-225, s. 4.3; 1999-337, s. 31; 1999-360, s. 7(a)-(c); 1999-438, ss. 5-12; 2000-120, s. 5; 2000-153, s. 5; 2001-347, s. 2.12; 2001-424, s. 34.23(a); 2001-476, s. 17(e); 2001-509, s. 1; 2001-514, s. 1; 2002-184, s. 9; 2003-284, ss. 45.5, 45.5A; 2003-349, s. 11; 2003-416, ss. 18(a), 21; 2003-431, s. 1; 2004-124, ss. 32B.2, 32B.4; 2005-276, s. 33.9; 2005-435, ss. 30, 31; 2006-19, s. 1; 2006-33, s. 5; 2006-66, s. 24.17(b); 2006-162, ss. 8(a), 8(b); 2006-168, s. 4.2; 2006-252, s. 2.25(b); 2007-244, s. 4; 2007-323, s. 31.23(c); 2007-368, s. 1; 2007-383, s. 6; 2007-397, ss. 10(g), 10(h); 2007-491, s. 44(1)a; 2007-500, s. 1; 2007-527, ss. 10, 27.)

Sub-subdivision (1)d. Set Out Twice. — The first version of sub-subdivision (1)d. set out above is effective until July 1, 2010. The second version of sub-subdivision (1)d. set out above is effective July 1, 2010.

Editor's Note. — Subdivisions (39)(1) through (39)(4) were redesignated as subdivisions (39)a. to (39)d. pursuant to Session Laws 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Session Laws 1998-22, s. 6 and Session Laws 1998-55, s. 9 each added a subdivision (44). The subdivision (44) added by Session Laws 1998-55, s. 9 was to go into effect on January 1, 2001; it was redesignated as subdivision (45) at the direction of the Revisor of Statutes. This subdivision was subsequently repealed by Session

Laws 1999-360, s. 7(a), effective retroactively to May 1, 1999, and hence never went into effect. The present subdivision (45) was added by Session Laws, 1999-360, s. 7(b), effective respectively as of May 1, 1999.

Session Laws 2001-347, s. 2.12, added subdivisions (5a), (47), (48), (49) and (50). See editor's note for effective dates.

Session Laws 2001-347, s. 3.2, makes subdivision (5a) effective January 1, 2006, and subdivisions (47) through (50) effective January 1, 2002.

Session Laws 2003-284, s. 45.1, provides: "The Streamlined Sales and Use Tax Agreement is an historic multistate agreement designed to simplify and modernize sales and use tax collection and administration. The states and businesses involved in the Streamlined Sales Tax Project recognize that a simplified and uniform system saves businesses compliance and audit costs, while also saving states administrative costs and improving voluntary compliance, which should increase state collections. To participate in the Agreement, North Carolina must amend or modify some of its sales and use tax law to conform to the simplifications and uniformity in the Agreement. This part [Part XLV of Session Laws 2003-284] makes those necessary changes."

Session Laws 2003-284, s. 45.12, provides that the amendments to subdivisions (12), (13), and (43), and the additions of subdivisions (43A) and (51) by s. 45.5 are effective July 15, 2003, and the amendment to subdivision (50) by s. 45.5A is effective January 1, 2004.

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2004-124, s. 32B.5, provides that s. 32B.2 is effective October 1, 2004, and applies to sales made on or after that date; s. 32B.4 is effective July 1, 2005, and applies to sales made on or after that date.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-19, s. 3, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended by this act before the effective date of this act, nor does it affect the right to any refund of a tax that accrued under the amended statute before the effective date of its amendment."

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 31.23(c), and Session Laws 2007-397, s. 10(h), each added a new subdivision (56). The subdivision added by Session Laws 2007-397 has been renumbered as subdivision (57) at the direction of the Revisor of Statutes.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2007-397, s. 15 is a severability clause.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Session Laws 2007-525, s. 14, provides: "The Revenue Laws Study Committee may study whether to continue the sales tax exemption for nutritional supplements sold by a chiropractic physician at a chiropractic office to a patient as part of the patient's plan of treatment."

Effect of Amendments. — Session Laws 2004-124, ss. 32B.2 and 32B.4, inserted "plastic mulch, plant bed covers" in subdivision (1); reenacted and rewrote subdivision (39); added subdivisions (45a) and (49a); and added subdivision (53). See editor's note for effective dates.

Session Laws 2005-276, s. 33.9, effective October 1, 2005, rewrote subdivision (1); added subdivision (1a); added sub-subdivision (2a)e.; in subdivision (4c), in the introductory language, inserted "items concerning the housing, raising, or feeding of animals"; rewrote subdivision (4d); added subdivision (4e); in subdivision (5a), substituted "Products" for "Mill machinery and mill machinery parts and accessories"; added subdivisions (5b) through (5d); rewrote subdivisions (10) and (10a); designated subdivision (10b) as sub-subdivision (10a)c.; deleted subdivision (18); rewrote subdivision (45) and added subdivision (45b).

Session Laws 2005-435, ss. 30 and 31, effective January 1, 2006, deleted former subdivision (29), which read: "Sales to the North Carolina Museum of Art of paintings and other objects or works of art for public display, the purchases of which are financed in whole or in part by gifts or donations"; and inserted "continuously" preceding "published on a periodic basis" in the second sentence of subdivision (39).

Session Laws 2006-19, s. 1, effective July 1, 2006, and applicable to items purchased on or after that date, added subdivision (4f).

Session Laws 2006-33, s. 5, effective January 1, 2007, added subdivision (54).

Session Laws 2006-66, s. 24.17(b), effective October 1, 2006, and applicable to sales made on or after that date, added new subdivision (55).

Session Laws 2006-162, ss. 8(a) and (b), effective July 24, 2006, rewrote (1a) which read: "A container sold to a farmer, as defined in subdivision (1) of this section, used for a purpose set out in that subdivision or in packaging and transporting the farmer's product for sale"; and deleted former (4e) which read: "A grain, feed, or soybean storage facility, and parts and accessories attached to the facility."

Session Laws 2006-168, s. 4.2, and Session Laws 2006-252, s. 2.25(b), effective October 1, 2006, and applicable to sales made on or after that date, substituted "such" for "the" twice in the last undesignated paragraph in the fourth sentence of the last paragraph of subdivision (55).

Session Laws 2007-244, s. 4, effective October 1, 2007, rewrote subdivision (9).

Session Laws 2007-323, s. 31.23(c), effective January 1, 2007, and applicable to sales made on or after January 1, 2007, added subdivision (56).

Session Laws 2007-368, s. 1, effective October 1, 2007, and applicable to sales made on or after that date, added subdivision (27a).

Session Laws 2007-383, s. 6, effective January 1, 2008, rewrote subdivision (54)c.

Session Laws 2007-397, ss. 10(g), (h), effective July 1, 2010, and applicable to sales occurring on or after that date, rewrote sub-subdivision (1)d.; and added subdivision (1b) and the subdivision designated herein as subdivision (57).

Session Laws 2007-491, s. 44(1)a., effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in the fourth sentence of the last paragraph of subdivision (55). For applicability, see Editor's note.

Session Laws 2007-500, s. 1, effective October 1, 2007, and applicable to sales made on or after that date, inserted "baler twine" following "potting soil" in subdivision (1)(a).

Session Laws 2007-527, ss. 10, 27, effective August 31, 2007, in subsection (38), substituted "7 U.S.C. § 2011" for "7 U.S.C. § 51"; and in subsection (52), inserted "and ancillary service as defined in G.S. 105-164.4"; and made minor stylistic changes.

Legal Periodicals. — For article, "All the News That's Fit to Tax: First Amendment Limitations on State and Local Taxation of the Press," see 21 Wake Forest L. Rev. 59 (1985).

For note on the North Carolina sales and use tax exemption for newspapers, in light of In re Village Publishing Corp., 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, — U.S. —, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985), see 21 Wake Forest L. Rev. 145 (1985).

For 1997 legislative survey, see 20 Campbell L. Rev. 481.

See legislative survey, 21 Campbell L. Rev. 323 (1999).

CASE NOTES

I. General Consideration.
II. Farm Products.
III. Insecticides.
IV. Property Incorporated into Manufactured Product.

V. Sales of Used Articles.
VI. Materials Used for Packaging, Shipment, or Delivery.
VII. Newspapers.

I. GENERAL CONSIDERATION.

Editor's Note. *— Some of the cases cited below were decided under the former law.*

Subsection (14) Violates Free Press Clause of United States Constitution. — Religious literature exemption contained in subsection (14) of this section violates free press clause of United States Constitution. Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990).

And Violates Establishment Clause of United States Constitution. — Religious literature exemption contained in subsection (14) of this section contravenes the establishment clause of United States Constitution. Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990).

Religious literature exemption contained in subsection (14) of this section differentiates between Christian sacred text and other publications, both sacred and nonsacred and Christian and non-Christian. This distinction forces State to discriminate on basis of contents of book, text or other published work, which is intolerable under U.S. Const., Amend. I. Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990).

Power to exempt from taxation, as well as the power to tax, is an essential attribute of sovereignty. Sale v. Johnson, 258 N.C. 749, 129 S.E.2d 465 (1963).

Statutes Strictly Construed. — Statutes providing exemption from taxation are strictly construed. Sale v. Johnson, 258 N.C. 749, 129 S.E.2d 465 (1963).

Provisions in a tax statute granting exemptions from the tax thereby imposed are to be strictly construed in favor of the imposition of the tax and against the claim of exemption. Hatteras Yacht Co. v. High, 265 N.C. 653, 144 S.E.2d 821 (1965).

Exemption Is Never Presumed. — The general rule is that a grant of exemption from taxation is never presumed. Sale v. Johnson, 258 N.C. 749, 129 S.E.2d 465 (1963).

Claimant Has Burden. — One who claims an exemption or exception from tax coverage has the burden of bringing himself within the exemption or exception. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

For meaning of "original or unmanufactured state" in subdivision (3), see Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968).

Sales Tax Is Unconstitutional if Transaction Is Interstate. — A sales tax is a tax on the freedom of purchase, and, when applied to interstate transactions, is a tax on the privilege of doing interstate commerce, creates a burden on interstate commerce, and runs counter to the Commerce Clause of the federal Constitution. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

Delivery to Carrier for Transportation Out of State Makes Property Immune from Local Taxation. — The unconditional commitment of property to a common carrier for transportation in regular course to another state or country is generally held to place it in the stream of interstate or foreign commerce, so as to render it immune from local taxation. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

But Principle Is Inapplicable to Deliveries to Purchasers in State. — The principle of law that the unconditional commitment of property to a common carrier for transportation in regular course to another state or country places it in the stream of interstate or foreign commerce, so as to render it immune from local taxation, is not applicable where the material was delivered to the purchasers in North Carolina, the taxing jurisdiction. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

Despite Intention to Use Goods Out of State. — The mere intention of the buyer and the seller that the goods sold be used outside of the State does not make the sales transaction any less a local intrastate activity. Where the delivery of the goods sold is in the taxing state and is accepted within the taxing state, a sales tax may lawfully be imposed upon the transaction. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

Incidental interstate attributes do not transform purely local transactions into interstate transactions and thereby create a burden on interstate commerce and run counter to the Commerce Clause of the federal Constitution. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

Sales Held Intrastate and Subject to Sales Tax. — Sale of goods to interstate carriers for use by the carriers at terminals outside this State are intrastate transactions subject to the North Carolina sales tax when the goods are delivered to the carriers at the seller's plant in this State notwithstanding the carriers take the goods f.o.b. the seller's plant under bills of lading with themselves as consignees at the respective terminals, without transportation charges, and inspection of the goods is had at, and payment is forwarded from, such foreign terminals. The imposition of such tax does not offend the Commerce Clause of the federal Constitution. Excel, Inc. v. Clayton, 269 N.C.

127, 152 S.E.2d 171 (1967).

Purchases by Housing Authority. — Neither the Constitution of this State nor the Constitution and laws of the United States prohibit the collection of a sales tax on purchases of tangible personal property made by a housing authority duly created, organized and existing under and by virtue of the Housing Authorities Law (G.S. 157-1 et seq.) enacted in 1935 by the General Assembly of North Carolina. Housing Auth. v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

Local Use Taxes Generally Applicable. — Under G.S. 105-467 and G.S. 105-68, exemptions from local use taxes are explicitly limited to and made dependent on the existence of codified exemptions from the State sales and use taxes, and in G.S. 105-164.13, the legislature has meticulously set forth approximately 50 exemptions and exclusions to the states sales and use taxes, many of which are subcategorized by industry but nowhere in G.S. 105-164.13 are insurance companies exempted from state sales and use tax; thus, local use taxes are generally applicable, and the North Carolina General Assembly did not intend to make them inapplicable to insurance companies. Proposed Assessments of Additional Sales & Use Tax v. Jefferson-Pilot Ins. Co., 161 N.C. App. 558, 589 S.E.2d 179, 2003 N.C. App. LEXIS 2274 (2003).

Local Sales Tax Not Precluded by Exemption from State Tax. — The limitation, in G.S. 105-467(1), of local sales tax to sales "subject to" the State sales tax refers not to those transactions for which a state sales tax is actually assessed, but to any transaction described in (former) G.S. 105-164.4(1) without regard to whether the transaction might be exempted or excluded from taxation by the operation of G.S. 105-164.13. Thus, exemption from state sales tax does not preclude the assessment of a local sales tax. Gregory Poole Equip. Co. v. Coble, 38 N.C. App. 483, 248 S.E.2d 378 (1978), aff'd, 297 N.C. 19, 252 S.E.2d 729 (1979).

Burden of Proof. — Where the tax coverage is challenged by virtue of an exemption or exception, the burden is upon the challenger to bring himself within the exemption or exception. Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948).

Cited in In re Halifax Paper Co., Inc., 259 N.C. 589, 131 S.E.2d 441 (1963); Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

II. FARM PRODUCTS.

Flowers grown upon the vendors' own land are farm products within the meaning of the exemption of such products from the sales tax. Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948).

Sale by Florist of Flowers Grown on Own Land. — Plaintiffs operated a florist shop and sold therein flowers grown by themselves on their own land and also flowers purchased from wholesalers. It was held that the sale of flowers grown by them on their own land was not exempt from the sales tax, since even though such flowers are regarded as farm products, such sales were made by plaintiffs in their character and capacity of florists and not as farmers or producers. Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948).

III. INSECTICIDES.

Section does not define "insecticides," so the term must be given its ordinary meaning. Olin Mathieson Chem. Corp. v. Johnson, 257 N.C. 666, 127 S.E.2d 262 (1962).

MH-30 is an agent for destroying weeds and plants, an herbicide. It is no more an insecticide than would be a forest fire which destroyed the balsam firs upon which the woolly aphids feed. Olin Mathieson Chem. Corp. v. Johnson, 257 N.C. 666, 127 S.E.2d 262 (1962).

IV. PROPERTY INCORPORATED INTO MANUFACTURED PRODUCT.

Purpose. — The clear intent of subdivision (8) is that a sale of such property to a "manufacturer" is not taxed and neither is its use by the manufacturer as an ingredient or component of another "manufactured" article. In re Clayton-Marcus Co., 286 N.C. 215, 210 S.E.2d 199 (1974).

"Manufacturing" Defined. — See In re Appeal of Clayton-Marcus Co., 286 N.C. 215, 210 S.E.2d 199 (1974).

Construed Against One Claiming Exemption. — Subdivision (8), being an exemption from the tax otherwise imposed upon a "use" of tangible personal property, is to be construed strictly against the claim of exemption, insofar as its meaning is in doubt. In re Clayton-Marcus Co., 286 N.C. 215, 210 S.E.2d 199 (1974).

Inapplicable to Sales Promotional Material. — The exemption provided in subdivision (8) was not intended by the legislature to apply, and does not apply, to use of material by a manufacturer in the production of an article intended for use by the manufacturer, itself, through its distribution to potential customers as sales promotional material. In re Clayton-Marcus Co., 286 N.C. 215, 210 S.E.2d 199 (1974).

Furniture manufacturer producing swatch books for use of its sales representatives and its customers has "manufactured" these swatch books. In re Clayton-Marcus Co., 286 N.C. 215, 210 S.E.2d 199 (1974).

V. SALES OF USED ARTICLES.

Policy behind subdivision (16) of this section is to prevent the same tax from being imposed twice on what are essentially the proceeds of one sale. Gregory Poole Equip. Co. v. Coble, 297 N.C. 19, 252 S.E.2d 729 (1979).

VI. MATERIALS USED FOR PACKAGING, SHIPMENT, OR DELIVERY.

Poultry Coops. — Where plaintiffs alleged that they "sell their coops to farmers, poultrymen, and persons, firms, and corporations engaged in the poultry business, and such coops are used for packaging, shipment, and delivery of tangible personal property which is sold either at wholesale or retail, or such coops are delivered with the chickens or turkeys to the customer," and defendant admitted "that the plaintiffs sell their coops to farmers, poultrymen and persons, firms and corporations engaged in the poultry business, and that such coops are used by such customers in the delivery of live poultry, which is sold by such customers at either wholesale or retail," such allegations in the complaint and admissions in the answer are not sufficient to exempt plaintiffs' sales of coops from the sales tax within the purview and intent of subdivision (23) of this section, since there was no allegation in the complaint to the effect that when plaintiffs' vendees sold poultry the coops constituted a part of the sale of such poultry and were delivered with the poultry to the customer. Sale v. Johnson, 258 N.C. 749, 129 S.E.2d 465 (1963).

VII. NEWSPAPERS.

The North Carolina use tax can be constitutionally assessed against a newspaper which enjoys protection under U.S. Const., Amend. I. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984).

"Newspaper" Defined. — A newspaper is a publication appearing at short intervals of time containing news which may be of various types, and intended for the general reader. In re Assessment of Additional N.C. & Orange County Use Taxes, 66 N.C. App. 423, 311 S.E.2d 366, modified and aff'd, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

Publication devoted almost entirely to advertising which does not disseminate news except in very small amounts, does not qualify as a newspaper but is instead an advertising circular. In re Assessment of Additional N.C. & Orange County Use Taxes, 66 N.C. App. 423, 311 S.E.2d 366, modified and aff'd, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

OPINIONS OF ATTORNEY GENERAL

Sand and crushed stone which have been washed and screened remain in their "original or unmanufactured state," and sale by producer as producer and not retail merchant is exempt from the sales tax. See opinion of Attorney General to Mr. Eric L. Gooch, Department of Revenue, 41 N.C.A.G. 511 (1971).

§ 105-164.13A. Service charges on food, beverages, or meals.

When a service charge is imposed on food, beverages, or meals, so much of the service charge that does not exceed twenty percent (20%) of the sales price is considered a tip and is specifically exempted from the tax imposed by this Article if it meets both of the following conditions:

(1) Is separately stated in the price list, menu, or written proposal and also in the invoice or bill.

(2) Is turned over to the personnel directly involved in the service of the food, beverages, or meals, in accordance with G.S. 95-25.6. (1979, c. 801, s. 76; 1979, 2nd Sess., c. 1101; 1999-438, s. 13.)

§ 105-164.13B. Food exempt from tax.

(a) State Exemption. — Food is exempt from the taxes imposed by this Article unless the food is included in one of the subdivisions in this subsection. The following food items are subject to tax:

(1) Repealed by Session Laws 2005-276, s. 33.10, effective October 1, 2005.

(2) Dietary supplements.
(3) Food sold through a vending machine.
(4) Prepared food.
(5) Soft drinks.
(6) Repealed by Session Laws 2003-284, s. 45.6B, effective January 1, 2004.
(7) Candy.

(b) Administration of Local Food Tax. — The Secretary must administer local sales and use taxes imposed on food as if they were imposed under this Article. This applies to local taxes on food imposed under Subchapter VIII of this Chapter and under Chapter 1096 of the 1967 Session Laws. (1998-212, s. 29A.1(b); 2001-347, s. 2.13; 2001-489, s. 3(b); 2003-284, ss. 45.6, 45.6A, 45.6B; 2003-416, s. 22; 2005-276, s. 33.10.)

Cross References. — As to applicability of this section to local government sales and use tax for beach nourishment, see Editor's note under G.S. 105-522.

Editor's Note. — Session Laws 2003-284, s. 45.1, provides: "The Streamlined Sales and Use Tax Agreement is an historic multistate agreement designed to simplify and modernize sales and use tax collection and administration. The states and businesses involved in the Streamlined Sales Tax Project recognize that a simplified and uniform system saves businesses compliance and audit costs, while also saving states administrative costs and improving voluntary compliance, which should increase state collections. To participate in the Agreement, North Carolina must amend or modify some of its sales and use tax law to conform to the simplifications and uniformity in the Agreement. This part [Part XLV of Session Laws 2003-284] makes those necessary changes."

Session Laws 2003-284, s. 45.12, provides that the rewriting and redesignation of the former provisions of this section as subsection (a) by s. 45.6 is effective July 15, 2003, the addition of subsection (b) by s. 45.6A is effective October 1, 2003, and the repeal of subdivision (a)(6) by s. 45.6B is effective January 1, 2004.

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-368, s. 3, amended Session Laws 1967, c. 1096, s. 4, to address the applicability of sales tax to bread sold at bakery thrift stores.

Effect of Amendments. — Session Laws 2005-276, s. 33.10, effective October 1, 2005, repealed subdivision (a)(1), which read: "Alcoholic beverages, as defined in G.S. 105 113.68."; and added subdivision (a)(7).

§ 105-164.13C. Sales and use tax holiday.

(a) The taxes imposed by this Article do not apply to the following items of tangible personal property if sold between 12:01 A.M. on the first Friday of August and 11:59 P.M. the following Sunday:

(1) Clothing with a sales price of one hundred dollars ($100.00) or less per item.

(2) School supplies with a sales price of one hundred dollars ($100.00) or less per item.
(2a) School instructional materials with a sales price of three hundred dollars ($300.00) or less per item.
(3) Computers with a sales price of three thousand five hundred dollars ($3,500) or less per item.
(3a) Computer supplies with a sales price of two hundred fifty dollars ($250.00) or less per item.
(4) Sport or recreational equipment with a sales price of fifty dollars ($50.00) or less per item.

(b) The exemption allowed by this section does not apply to the following:
(1) Sales of clothing accessories or equipment.
(2) Sales of protective equipment.
(3) Sales of furniture.
(4) Repealed by Session Laws 2003-284, s. 45.7, effective October 1, 2003.
(5) Sales of an item for use in a trade or business.
(6) Rentals.

(c) Repealed by Session Laws 2003-284, s. 45.7, effective October 1, 2003. (2001-424, s. 34.16(a); 2001-476, s. 18(b); 2003-284, s. 45.7; 2005-276, s. 33.11; 2007-323, s. 31.14(b).)

Editor's Note. — Session Laws 2001-424, s. 34.16(d), made this section effective January 1, 2002, and applicable to sales made on or after that date.

Session Laws 2003-284, s. 45.1, provides: "The Streamlined Sales and Use Tax Agreement is an historic multistate agreement designed to simplify and modernize sales and use tax collection and administration. The states and businesses involved in the Streamlined Sales Tax Project recognize that a simplified and uniform system saves businesses compliance and audit costs, while also saving states administrative costs and improving voluntary compliance, which should increase state collections. To participate in the Agreement, North Carolina must amend or modify some of its sales and use tax law to conform to the simplifications and uniformity in the Agreement. This part [Part XLV of Session Laws 2003-284] makes those necessary changes."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 33.11, effective October 1, 2005, added subdivision (a)(3a).

Session Laws 2007-323, s. 31.14(b), effective October 1, 2007, and applicable to sales made on or after October 1, 2007, added subdivision (a)(2a).

§ 105-164.14. Certain refunds authorized.

(a) Interstate Carriers. — An interstate carrier is allowed a refund, in accordance with this section, of part of the sales and use taxes paid by it on the purchase in this State of railway cars and locomotives, and fuel, lubricants, repair parts, and accessories for a motor vehicle, railroad car, locomotive, or airplane the carrier operates. An "interstate carrier" is a person who is engaged in transporting persons or property in interstate commerce for compensation. The Secretary shall prescribe the periods of time, whether monthly, quarterly, semiannually, or otherwise, with respect to which refunds may be claimed, and shall prescribe the time within which, following these periods, an application for refund may be made.

An applicant for refund shall furnish the following information and any proof of the information required by the Secretary:

(1) A list identifying the railway cars, locomotives, fuel, lubricants, repair parts, and accessories purchased by the applicant inside or outside this State during the refund period.

(2) The purchase price of the items listed in subdivision (1) of this subsection.

(3) The sales and use taxes paid in this State on the listed items.

(4) The number of miles the applicant's motor vehicles, railroad cars, locomotives, and airplanes were operated both inside and outside this State during the refund period.

(5) Any other information required by the Secretary.

For each applicant, the Secretary shall compute the amount to be refunded as follows. First, the Secretary shall determine the ratio of the number of miles the applicant operated its motor vehicles, railroad cars, locomotives, and airplanes in this State during the refund period to the number of miles it operated them both inside and outside this State during the refund period. Second, the Secretary shall determine the applicant's proportional liability for the refund period by multiplying this mileage ratio by the purchase price of the items identified in subdivision (1) of this subsection and then multiplying the resulting product by the tax rate that would have applied to the items if they had all been purchased in this State. Third, the Secretary shall refund to each applicant the excess of the amount of sales and use taxes the applicant paid in this State during the refund period on these items over the applicant's proportional liability for the refund period.

(a1) **(Repealed for purchases made on or after January 1, 2009)** Passenger Plane Maximum. — An interstate passenger air carrier is allowed a refund of the net amount of sales and use tax paid by it in this State on fuel during a calendar year in excess of two million five hundred thousand dollars ($2,500,000). The "net amount of sales and use tax paid" is the amount paid less the refund allowed under subsection (a) of this section. A request for a refund must be in writing and must include any information and documentation the Secretary requires. A request for a refund is due within six months after the end of the calendar year for which the refund is claimed. The refund allowed by this subsection is in addition to the refund allowed in subsection (a) of this section. This subsection is repealed for purchases made on or after January 1, 2009.

(a2) Utility Companies. — A utility company is allowed a refund, in accordance with this section, of part of the sales and use taxes paid by it on the purchase in this State of railway cars and locomotives and accessories for a railway car or locomotive the utility company operates. The Secretary shall prescribe the periods of time, whether monthly, quarterly, semiannually, or otherwise, with respect to which refunds may be claimed and shall prescribe the time within which, following these periods, an application for refund may be made.

An applicant for refund shall furnish the following information and any proof of the information required by the Secretary:

(1) A list identifying the railway cars, locomotives, and accessories purchased by the applicant inside or outside this State during the refund period.

(2) The purchase price of the items listed in subdivision (1) of this subsection.

(3) The sales and use taxes paid in this State on the listed items.

(4) The number of miles the applicant's railway cars and locomotives were operated both inside and outside this State during the refund period.

(5) Any other information required by the Secretary.

For each applicant, the Secretary shall compute the amount to be refunded as follows. First, the Secretary shall determine the ratio of the number of miles the applicant operated its railway cars and locomotives in this State during the refund period to the number of miles it operated them both inside and outside this State during the refund period. Second, the Secretary shall determine the applicant's proportional liability for the refund period by multiplying this mileage ratio by the purchase price of the items identified in subdivision (1) of this subsection and then multiplying the resulting product by the tax rate that would have applied to the items if they had all been purchased in this State. Third, the Secretary shall refund to each applicant the excess of the amount of sales and use taxes the applicant paid in this State during the refund period on these items over the applicant's proportional liability for the refund period.

(b) Nonprofit Entities and Hospital Drugs. — A nonprofit entity included in the following list is allowed a semiannual refund of sales and use taxes paid by it under this Article on direct purchases of tangible personal property and services, other than electricity, telecommunications service, and ancillary service, for use in carrying on the work of the nonprofit entity:

(1) Hospitals not operated for profit, including hospitals and medical accommodations operated by an authority created under the Hospital Authorities Law, Article 2 of Chapter 131E of the General Statutes.

(2) Educational institutions not operated for profit.

(3) Churches, orphanages, and other charitable or religious institutions and organizations not operated for profit.

(4) Qualified retirement facilities whose property is excluded from property tax under G.S. 105-278.6A.

Sales and use tax liability indirectly incurred by a nonprofit entity on building materials, supplies, fixtures, and equipment that become a part of or annexed to any building or structure that is owned or leased by the nonprofit entity and is being erected, altered, or repaired for use by the nonprofit entity for carrying on its nonprofit activities is considered a sales or use tax liability incurred on direct purchases by the nonprofit entity.

A hospital that is not allowed a refund under this subsection of sales and use taxes paid on its direct purchases of tangible personal property is allowed a semiannual refund of sales and use taxes paid by it on medicines and drugs purchased for use in carrying out its work.

The refunds allowed under this subsection for certain nonprofit entities and for medicines and drugs purchased by hospitals do not apply to organizations, corporations, and institutions that are owned and controlled by the United States, the State, or a unit of local government, except hospital facilities created under Article 2 of Chapter 131E of the General Statutes and nonprofit hospitals owned and controlled by a unit of local government that elect to receive semiannual refunds under this subsection instead of annual refunds under subsection (c).

A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund for the first six months of a calendar year is due the following October 15; a request for a refund for the second six months of a calendar year is due the following April 15.

(c) Certain Governmental Entities. — A governmental entity listed in this subsection is allowed an annual refund of sales and use taxes paid by it under this Article on direct purchases of tangible personal property and services, other than electricity, telecommunications service, and ancillary service. Sales and use tax liability indirectly incurred by a governmental entity on building materials, supplies, fixtures, and equipment that become a part of or annexed to any building or structure that is owned or leased by the governmental entity and is being erected, altered, or repaired for use by the governmental entity is considered a sales or use tax liability incurred on direct purchases by the governmental entity for the purpose of this subsection. A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the governmental entity's fiscal year.

This subsection applies only to the following governmental entities:

(1) A county.
(2) A city as defined in G.S. 160A-1.
(2a) A consolidated city-county as defined in G.S. 160B-2.
(2b), (2c) Repealed by Session Laws 2005-276, s. 7.51(a), effective July 1, 2005, and applicable to sales made on or after that date.
(3) A metropolitan sewerage district or a metropolitan water district in this State.
(4) A water and sewer authority created under Chapter 162A of the General Statutes.
(5) A lake authority created by a board of county commissioners pursuant to an act of the General Assembly.
(6) A sanitary district.
(7) A regional solid waste management authority created pursuant to G.S. 153A-421.
(8) An area mental health, developmental disabilities, and substance abuse authority, other than a single-county area authority, established pursuant to Article 4 of Chapter 122C of the General Statutes.
(9) A district health department, or a public health authority created pursuant to Part 1A of Article 2 of Chapter 130A of the General Statutes.
(10) A regional council of governments created pursuant to G.S. 160A-470.
(11) A regional planning and economic development commission or a regional economic development commission created pursuant to Chapter 158 of the General Statutes.
(12) A regional planning commission created pursuant to G.S. 153A-391.
(13) A regional sports authority created pursuant to G.S. 160A-479.
(14) A public transportation authority created pursuant to Article 25 of Chapter 160A of the General Statutes.
(14a) A facility authority created pursuant to Part 4 of Article 20 of Chapter 160A of the General Statutes.
(15) A regional public transportation authority created pursuant to Article 26 of Chapter 160A of the General Statutes, or a regional transportation authority created pursuant to Article 27 of Chapter 160A of the General Statutes.
(16) A local airport authority that was created pursuant to a local act of the General Assembly.
(17) A joint agency created by interlocal agreement pursuant to G.S. 160A-462 to operate a public broadcasting television station.
(18) Repealed by Session Laws 2001-474, s. 7, effective November 29, 2001.

(19) Repealed by Session Laws 2001-474, s. 7, effective November 29, 2001.

(20) A constituent institution of The University of North Carolina, but only with respect to sales and use tax paid by it for tangible personal property or services that are eligible for refund under this subsection acquired by it through the expenditure of contract and grant funds.

(21) The University of North Carolina Health Care System.

(22) A regional natural gas district created pursuant to Article 28 of Chapter 160A of the General Statutes.

(d) Late Applications. — Refunds applied for more than three years after the due date are barred.

(d1) Alcoholic Beverages. — The refunds authorized by this section do not apply to purchases of alcoholic beverages, as defined in G.S. 18B-101.

(e) State Agencies. — The State is allowed quarterly refunds of local sales and use taxes paid indirectly by the State agency on building materials, supplies, fixtures, and equipment that become a part of or annexed to a building or structure that is owned or leased by the State agency and is being erected, altered, or repaired for use by the State agency.

A person who pays local sales and use taxes on building materials or other tangible personal property for a State building project shall give the State agency for whose project the property was purchased a signed statement containing all of the following information:

(1) The date the property was purchased.

(2) The type of property purchased.

(3) The project for which the property was used.

(4) If the property was purchased in this State, the county in which it was purchased.

(5) If the property was not purchased in this State, the county in which the property was used.

(6) The amount of sales and use taxes paid.

If the property was purchased in this State, the person shall attach a copy of the sales receipt to the statement. A State agency to whom a statement is submitted shall verify the accuracy of the statement.

Within 15 days after the end of each calendar quarter, every State agency shall file with the Secretary a written application for a refund of taxes to which this subsection applies paid by the agency during the quarter. The application shall contain all information required by the Secretary. The Secretary shall credit the local sales and use tax refunds directly to the General Fund.

(f) Information to Counties and Cities. — The Secretary must give information on refunds of tax made under this section to a designated county or city official within 30 days after the official makes a written request to the Secretary for the information. For a request made by a county official, the Secretary must give the official a list of each claimant that received a refund in the past 12 months of at least one thousand dollars ($1,000) of tax paid to the county. For a request made by a city official, the Secretary must give the official a list of each claimant that received a refund in the past 12 months of at least one thousand dollars ($1,000) of tax paid to all the counties in which the city is located. The list must include the name and address of each of these claimants and the amount of the refund received from each county covered by the request.

A claimant that has received a refund under this section of tax paid to a county must give information on the refund to a designated official of the county or a city located in the county. The claimant must give the information to the county or city official within 30 days after the official makes a written request to the claimant for the information. For a request by a county or city official, the claimant must give the official a copy of the request for the refund and any supporting documentation requested by the official to verify the request. If a claimant determines that a refund it has received under this section is incorrect, the claimant must file an amended request for a refund.

For the purpose of this subsection, a designated county official is the chair of the board of county commissioners or a county official designated in a resolution adopted by the Board, and a designated city official is the mayor of the city or a city official designated in a resolution adopted by the city's governing board. Information given to a county or city official under this section is not a public record and may not be disclosed except as provided in G.S. 153A-148.1 or G.S. 160A-208.1.

(g) Major Recycling Facilities. — The owner of a major recycling facility is allowed an annual refund of sales and use taxes paid by it under this Article on building materials, building supplies, fixtures, and equipment that become a part of the real property of the recycling facility. Liability incurred indirectly by the owner for sales and use taxes on these items is considered tax paid by the owner. A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the major recycling facility's fiscal year. Refunds applied for after the due date are barred.

(h) Low Enterprise or Development Tier Machinery. — Eligible taxpayers are allowed an annual refund of sales and use taxes paid under this Article as provided in this subsection.

(1) Refunds. — An eligible person is allowed an annual refund of sales and use taxes paid by it under this Article at the general rate of tax on eligible machinery and equipment it purchases for use in an enterprise tier one area or an enterprise tier two area, as defined in G.S. 105-129.3 or a development tier one area, as defined in G.S. 143B-437.08. Liability incurred indirectly by the taxpayer for sales and use taxes on these items is considered tax paid by the taxpayer. A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the State's fiscal year. Refunds applied for after the due date are barred.

(2) Eligibility. — A person is eligible for the refund provided in this subsection if it is engaged primarily in one of the businesses listed in G.S. 105-129.4(a) in an enterprise tier one area or an enterprise tier two area, as defined in G.S. 105-129.3 or if it is engaged primarily in one of the businesses listed in G.S. 105-129.83(a) in a development tier one area, as defined in G.S. 143B-437.08.

(3) Machinery and equipment. — For the purpose of this subsection, the term "machinery and equipment" means engines, machinery, equipment, tools, and implements used or designed to be used in one of the businesses listed in G.S. 105-129.4(a) or G.S. 105-129.83(a). Machinery and equipment are eligible for the refund provided in this subsection if the taxpayer places them in service in an enterprise tier one area or an enterprise tier two area, as defined in G.S. 105-129.3, or a development tier one area, as defined in G.S. 143B-437.08, capitalizes them for tax purposes under the Code, and does not lease them to another party.

(i) **(Repealed for taxes paid on or after January 1, 2008)** Nonprofit Insurance Companies. — Eligible nonprofit insurance companies are allowed an annual refund of sales and use taxes paid under this Article as provided in this subsection.

(1) Refunds. — An eligible nonprofit insurance company is allowed an annual refund of sales and use taxes paid by it under this Article on building materials, building supplies, fixtures, and equipment that

become a part of its real property. Liability incurred indirectly by the company for sales and use taxes on these items is considered tax paid by the company. A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the insurance company's fiscal year. Refunds applied for after the due date are barred.

(2) Eligibility. — An insurance company is eligible for the refund provided in this subsection if it meets all of the following conditions:

a. It is a nonprofit corporation.

b. It is operated for the exclusive purpose of providing insurance and annuity contracts to or for the benefit of (i) organizations exempt from federal income tax under section 501(c)(3) of the Code and their employees or (ii) public institutions and their employees.

c. The Secretary of Commerce has certified that the insurance company will invest at least twenty million dollars ($20,000,000) in constructing a facility in this State for the conduct of its operations.

(3) Forfeiture. — If an eligible insurance company does not make the required minimum investment within five years after its first refund under this subsection, it loses its eligibility and forfeits all refunds already received under this subsection. Upon forfeiture, the company is liable for tax under this Article equal to the amount of all past taxes refunded under this subsection, plus interest at the rate established in G.S. 105-241.21, computed from the date each refund was issued. The tax and interest are due 30 days after the date of the forfeiture. A company that fails to pay the tax and interest is subject to the penalties provided in G.S. 105-236.

(j) **(Repealed for sales made on or after January 1, 2013)** Certain Industrial Facilities. — The owner of an eligible facility is allowed an annual refund of sales and use taxes as provided in this subsection.

(1) Refund. — The owner of an eligible facility is allowed an annual refund of sales and use taxes paid by it under this Article on qualified building materials, building supplies, fixtures, and equipment that become a part of the real property of the eligible facility. Liability incurred indirectly by the owner for sales and use taxes on these items is considered tax paid by the owner. Building materials, building supplies, fixtures, and equipment are qualified if they are installed in the construction of the facility. Purchases for subsequent repair, renovation, or equipment replacement are not qualified.

A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the State's fiscal year. Refunds applied for after the due date are barred.

(2) Eligibility. — A facility is eligible under this subsection if it meets all of the following conditions:

a. It is primarily engaged in one of the industries listed in this subsection.

b. **(See editor's note for effective date)** The Secretary of Commerce has certified that the owner of the facility will invest at least the required amount of private funds to construct the facility in this State. For the purpose of this subsection, costs of construction may include costs of acquiring and improving land for the facility and costs of equipment for the facility. If the facility is located in a development tier one area as defined in G.S. 143B-437.08 the required amount is fifty million dollars

($50,000,000). For all other facilities, the required amount is one hundred million dollars ($100,000,000). In the case of a computer manufacturing facility, the owner may invest these funds either directly or indirectly through a related entity or strategic partner as those terms are defined in G.S. 105-129.61. For the purpose of this subsection, the term "facility" has the same meaning as under G.S. 105-129.61.

c. If the facility is primarily engaged in financial services, securities operations, and related systems development, it satisfies all of the following conditions:

1. It is owned and operated by the business for which the services are provided or by a related entity of that business as defined in G.S. 105-130.7A.
2. No part of it is leased to a third-party tenant that is not a related entity of the business.

(3) Industries. — This subsection applies to the following industries:

a. Air courier services. Air courier services has the same meaning as in G.S. 105-129.2.

b. Aircraft manufacturing. Aircraft manufacturing means the manufacturing or assembling of complete aircraft or of aircraft engines, blisks, fuselage sections, flight decks, flight deck systems or components, wings, fuselage fairings, fins, moving leading and trailing wing edges, wing boxes, nose sections, tailplanes, passenger doors, nacelles, thrust reversers, landing gear, braking systems, or any combination thereof.

c. Bioprocessing. Bioprocessing means biomanufacturing or processing that includes the culture of cells to make commercial products, the purification of biomolecules from cells, or the use of these molecules in manufacturing.

d. Computer manufacturing. Computer manufacturing means manufacturing or assembling electronic computers, such as personal computers, workstations, laptops, and computer servers. The term includes the assembly or integration of processors, coprocessors, memory, storage, and input/output devices into a user-programmable final product. The term includes manufacturing or assembling computer peripheral equipment, such as storage devices, printers, monitors, input/output devices, and terminals only if the manufacture or assembly of this peripheral equipment occurs at a facility or campus at which the taxpayer also manufactures or assembles electronic computers.

e. Reserved for future codification purposes.

f. Financial services, securities operations, and related systems development. Financial services, securities operations, and related systems development means one or both of the following functions:

1. Performing analysis, operations, trading, or sales functions for investment banking, securities dealing and brokering, securities trading and underwriting, investment portfolio/mutual fund management, retirement services, or employee benefit administration.
2. Developing information technology systems and applications, managing and enhancing operating applications and databases, or providing, operating, and maintaining telecommunications networks and distributed and mainframe computing resources for investment banking, securities dealing and brokering, securities trading and underwriting, investment

portfolio/mutual fund management, retirement services, or employee benefit administration.

g. Motor vehicle manufacturing. Motor vehicle manufacturing means any of the following:

  1. Manufacturing complete automobiles and light-duty motor vehicles.
  2. Manufacturing heavy-duty truck chassis and assembling complete heavy-duty trucks, buses, heavy-duty motor homes, and other special purpose heavy-duty motor vehicles for highway use.
  3. Manufacturing complete military armored vehicles, nonarmored military universal carriers, combat tanks, and specialized components for combat tanks.

h. Reserved for future codification purposes.

i. Reserved for future codification purposes.

j. Pharmaceutical and medicine manufacturing and distribution of pharmaceuticals and medicines. Pharmaceutical and medicine manufacturing means any of the following:

  1. Manufacturing biological and medicinal products. For the purpose of this sub-subdivision, a biological product is a preparation that is synthesized from living organisms or their products and used medically as a diagnostic, preventive, or therapeutic agent. For the purpose of this sub-subdivision, bacteria, viruses, and their parts are considered living organisms.
  2. Processing botanical drugs and herbs by grading, grinding, and milling.
  3. Isolating active medicinal principals from botanical drugs and herbs.
  4. Manufacturing pharmaceutical products intended for internal and external consumption in forms such as ampoules, tablets, capsules, vials, ointments, powders, solutions, and suspensions.

k. Reserved for future codification purposes.

l. Reserved for future codification purposes.

m. Semiconductor manufacturing. Semiconductor manufacturing means development and production of semiconductor material, devices, or components.

(4) Forfeiture. — If the owner of an eligible facility does not make the required minimum investment within five years after the first refund under this subsection with respect to the facility, the facility loses its eligibility and the owner forfeits all refunds already received under this subsection. Upon forfeiture, the owner is liable for tax under this Article equal to the amount of all past taxes refunded under this subsection, plus interest at the rate established in G.S. 105-241.21, computed from the date each refund was issued. The tax and interest are due 30 days after the date of the forfeiture. A person that fails to pay the tax and interest is subject to the penalties provided in G.S. 105-236.

(5) Sunset. This subsection is repealed for sales made on or after January 1, 2013.

(k) Reports. — The Department of Revenue shall publish by May 1 of each year the following information itemized by taxpayer for the 12-month period ending the preceding December 31:

(1) The number of taxpayers claiming a refund allowed in subsections (a1), (g), (h), (i), (j), and (l) of this section.

(2) The total amount of purchases with respect to which refunds were claimed.

(3) The total cost to the General Fund of the refunds claimed.

(*l*) **(Repealed for purchases made on or after January 1, 2009)** Aviation Fuel for Motorsports Events. — A professional motorsports racing team or a motorsports sanctioning body is allowed a refund of the sales and use tax paid by it in this State on aviation fuel that is used to travel to or from a motorsports event in this State, to travel to a motorsports event in another state from a location in this State, or to travel to this State from a motorsports event in another state. For the purposes of this subsection, a "motorsports event" includes a motorsports race, a motorsports sponsor event, and motor sports testing. A request for a refund must be in writing and must include any information and documentation the Secretary requires. A request for a refund is due within six months after the end of the State's fiscal year. Refunds applied for after the due date are barred. This subsection is repealed for purchases made on or after January 1, 2009.

(m) Professional Motor Racing Vehicles. — A professional motorsports racing team is allowed a refund of fifty percent (50%) of the sales and use tax paid by it in this State on tangible personal property, other than tires or accessories, that comprises any part of a professional motor racing vehicle. For the purposes of this subsection, "accessories" includes instrumentation, telemetry, consumables, and paint. A request for a refund must be in writing and must include any information and documentation the Secretary requires. A request for a refund is due within six months after the end of the State's fiscal year. Refunds applied for after the due date are barred.

(n) Analytical Services Supplies. — A taxpayer engaged in analytical services in this State is allowed a refund of sales and use tax paid by it in this State. The amount of the refund is the greater of the following:

(1) Fifty percent (50%) of the eligible amount sales and use tax paid by it on tangible personal property that is consumed or transformed in analytical service activities. The eligible amount of sales and use tax paid by the taxpayer in this State is the amount by which sales and use taxes paid by the taxpayer in this State in the fiscal year exceed the amount paid by the taxpayer in this State in the 2006-2007 State fiscal year.

(2) Fifty percent (50%) of the amount of sales and use tax paid by it in the fiscal year on medical reagents.

A request for a refund must be in writing and must include any information and documentation that the Secretary requires. A request for a refund is due within six months after the end of the State's fiscal year. Refunds applied for after the due date are barred.

(o) Eligible Railroad Intermodal Facilities. The owner or lessee of an eligible railroad intermodal facility is allowed an annual refund of sales and use taxes paid by it under this Article on building materials, building supplies, fixtures, and equipment that become a part of the real property of the facility. Liability incurred indirectly by the owner or lessee of the facility for sales and use taxes on these items is considered tax paid by the owner or lessee. A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the State's fiscal year. Refunds applied for after the due date are barred. (1957, c. 1340, s. 5; 1961, c. 826, s. 2; 1963, cc. 169, 1134; 1965, c. 1006; 1967, c. 1110, s. 6; 1969, c. 1298, s. 1; 1971, cc. 89, 286; 1973, c. 476, s. 193; 1977, c. 895, s. 1; 1979, c. 47; c. 801, ss. 77, 79-82; 1983, c. 594, s. 1; c. 891, s. 13; 1983 (Reg. Sess., 1984), c. 1097, s. 7; 1985, cc. 431, 523; 1985 (Reg. Sess., 1986), c. 863, s. 5; 1987, c. 557, ss. 8, 9; c. 850, s. 16; 1987 (Reg. Sess., 1988), c. 1044, s. 5; 1989, c. 168, s. 5; c. 251; c. 780, s. 1.1; 1989 (Reg. Sess., 1990), c. 936,

s. 4; 1991, c. 356, s. 1; c. 689, s. 190.1(b); 1991 (Reg. Sess., 1992), c. 814, s. 1; c. 917, s. 1; c. 1030, s. 25; 1995, c. 17, s. 8; c. 21, s. 1; c. 458, s. 7; c. 461, s. 13; c. 472, s. 1; 1995 (Reg. Sess., 1996), c. 646, s. 6; 1996, 2nd Ex. Sess., c. 18, s. 15.7(a); 1997-340, s. 1; 1997-393, s. 2; 1997-423, s. 1; 1997-426, s. 5; 1997-502, s. 3; 1998-55, ss. 16, 17; 1998-98, s. 15; 1998-212, ss. 29A.4(a), 29A.14(i), 29A.18(b); 1999-360, ss. 4, 5(a), (b), 9; 1999-438, s. 14; 2000-56, s. 9; 2000-140, s. 92.A(c); 2001-414, s. 1; 2001-474, s. 7; 2003-416, ss. 18(b)-(e), 23; 2003-431, ss. 2, 3; 2003-435, 2nd Ex. Sess., s. 4.1; 2004-110, s. 5.1; 2004-124, s. 32B.1; 2004-170, s. 21(a); 2004-204, 1st Ex. Sess., s. 3; 2005-276, ss. 7.27(a), 7.51(a), 33.12; 2005-429, s. 2.12; 2005-435, ss. 32(a), 33(a)-(c), 61, 61.1; 2006-33, s. 6; 2006-66, ss. 24.6(a), (b), (c), 24.10(b), 24.13(b), 24A.1(a); 2006-162, ss. 9, 27; 2006-168, s. 3.1; 2006-252, ss. 2.2, 2.3; 2007-323, ss. 31.10(a), 31.20(b), 31.23(d); 2007-345, s. 14.6(a); 2007-491, s. 44(1)a.)

Local Modification. — City of Raeford: 1995, c. 16, s. 1.

Cross References. — As to hospital authorities, see G.S. 131E-15 et seq.

Editor's Note. — Session Laws 1999-360, s. 31 provides that s. 5 of the act, which added subsection (i) effective May 1, 1999, and amended subdivision (i)(1) effective January 1, 2004, is repealed for taxes paid on or after January 1, 2008.

Session Laws 2000-56, which amended G.S. 105-164.14(i)(2)b., in s. 10(h), as amended by Session Laws 2000-140, s. 92.A(c), and Session Laws 2001-414, s. 1, amended Session Laws 2000-56, s. 10(h), which had provides: "Section 9 of this act becomes effective May 1, 1999, and applies to taxes paid on or after that date. Section 9 is repealed for taxes paid on or after January 1, 2008."

Session Laws 2003-435, 2nd Ex. Sess., s. 4.2, provides: "It is the intent of the General Assembly that the provisions of this part [Part 4 of Session Laws 2003-435, 2nd Ex. Sess.] not be expanded. If a court of competent jurisdiction holds any provision of this part invalid, the section containing that provision is repealed. The repeal of a section of this part under this section does not affect other provisions of this part that may be given affect without the invalid provision."

Session Laws 2004-124, s. 32B.5, as amended by Session Laws 2005-435, s. 33(c), provides that the amendment to subdivision (j)(2) is effective on and after January 1, 2004, and applies to sales made on or after that date; the amendments to subdivision (j)(3) are effective July 1, 2004, and apply to sales made on or after that date.

Subdivision (j)(3)d. was added by Session Laws 2004-124, s. 32B.1, and included a sunset provision with a repeal date of July 1, 2009. Subdivision (j)(3)d. was subsequently amended by Session Laws 2004-204, 1st Ex. Sess., s. 3, but the amendments made by that act had no sunset provision. Subsequently, Session Laws 2005-435, s. 33(c), deleted the sunset provision for subdivision (j)(3)d.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 7.27(c), provides: "In addition to the report required under G.S. 105-164.14(c), as amended by this section, the Secretary of Revenue shall make a report to the Department of Public Instruction and the Fiscal Research Division of the General Assembly within 30 days after this act becomes law of the amount of refunds, identified by taxpayer, claimed under subdivisions (2b) and (2c) of G.S. 105-164.14(c) during the 2002-2003, 2003-2004, and 2004-2005 fiscal years."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2005-429, s. 3, provides: "The Economic Development Oversight Committee shall study the issue of public disclosure as it relates to economic development efforts. Specifically, the Committee shall study ways of providing the public information about the employment levels, and any changes in employment levels, of businesses that receive economic development incentives from the State or local governments. The Committee may make an interim report on this study, including any recommendations for legislative proposals, to the 2006 Regular Session of the 2005 General Assembly and shall make a final report on this study to the 2007 General Assembly."

Subsection (k) as added by Session Laws 2005-435, s. 61.1 was recodified as subsection (l) at the direction of the revisor of statutes.

Session Laws 2005-435, s. 62, as amended by Session Laws 2006-66, s. 24.6(c), provides that Part III of the act, which adds new subsections (a1) and (k) [recodified as (*l*)] to G.S. 105-164.14, becomes effective January 1, 2005, and applies to purchases made on or after that date. Part III of Session Laws 2005-435 does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by Part III before the effective date of its amendment or repeal; nor does it affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal. Session Laws 2006-66, s. 24.6(c), deleted the sunset provision for G.S. 105-164.14 for purchases made on or after January 1, 2007.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-168, s. 3.2, provides: "The changes made to G.S. 105-164.14(j)(2)b. by Section 3.1 of this act become effective January 1, 2005, and apply to sales made on or after that date. The remainder of this part becomes effective July 1, 2006, and applies to purchases made on or after that date."

Session Laws 2007-323, ss. 31.20(b) and 31.23(d), each added subsections designated as subsection (n). The subsection added by s. 31.23(d) has been redesignated as subsection (o) at the direction of the Revisor of Statutes.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 1999-360, s. 5(b), effective January 1, 2004, and applicable to taxes paid on or after that date, deleted "and on computer systems hardware and software it capitalizes for tax purposes under the Code" from the end of the first sentence of subdivision (i)(1). For repeal of this amendment, see Editor's note.

Session Laws 2000-140, s. 92.A(c), effective July 21, 2000, amended Session Laws 2000-56, s. 10(h) to provide that the amendment to this section by Session Laws 2000-140, s. 9 would be effective May 1, 1999, and would be applicable to taxes paid on or after that date. Session Laws 2001-414, s. 1, effective September 14, 2001, further amended Session Laws 2001-56, s. 10(h) to provide that s. 9 of the 2000 act is repealed for taxes paid on or after January 1, 2008.

Session Laws 2004-124, s. 32B.1, rewrote sub-subdivision (j)(2)b. and subdivision (j)(3). See editor's note for effective date and applicability.

Session Laws 2004-204, s. 3, effective January 1, 2005, and applicable to sales made on or after that date, in subsection (j)(2), added the last sentence; and in subsection (j)(3), substituted "includes" for "does not include", and rewrote the last sentence.

Session Laws 2005-276, ss. 7.27(a), 7.51(a), effective July 1, 2005, and s. 33.12, effective January 1, 2006, in subsection (a), in the first sentence, added "the purchase in this State of railway cars and locomotives, and" and deleted "purchased in this State" following "accessories" and in subdivision (a)(1), inserted "railway cars, locomotives,"; in subsection (c), in the introductory paragraph, added the last sentence; and repealed subdivisions (c)(2b) and (c)(2c).

Session Laws 2005-429, s. 2.12, effective January 1, 2007, added subsection (k).

Session Laws 2005-435, s. 32.(a), effective September 27, 2005, rewrote subsection (f).

Session Laws 2005-435, ss. 33.(a) and 33.(b), effective August 1, 2005, and applicable to sales made on or after that date, added subdivision (j)(3)a., and redesignated former subdivision (j)(3)a. as present subdivision (j)(3)b. and designated remaining subdivisions accordingly; and added subdivision (j)(5).

Session Laws 2005-435, ss. 61 and 61.1, effective January 1, 2005, added subsections (a1) and (k) because a subsection (k) had already been added by Session Laws 2005-429, s. 2.12, the subsection added by this act was redesignated as (*l*) at the direction of the Revisor of Statutes. See Editor's notes, Session Laws 2006-435, s. 62, for applicability.

Session Laws 2006-33, s. 6, effective January 1, 2007, substituted "electricity, telecommunications service, and ancillary" for "electricity and telecommunications" in subsections (b) and (c).

Session Laws 2006-66, s. 24.6(a) and (b), effective July 1, 2006, in subsection (a1), added the last sentence; and in subsection (*l*), added "Aviation Fuel for" preceding "Motorsports Events" and "professional" preceding "motorsports racing" and added the last sentence.

Session Laws 2006-66, s. 24.10(b), effective July 1, 2007, and applicable to purchases made on or after that date, added new subsection (m).

Session Laws 2006-66, s. 24.13(b), effective July 1, 2006, and applicable to purchases made on or after that date, added new subsection (a2).

Session Laws 2006-66, s. 24A.1(a), effective July 1, 2006, and applicable to purchases made on or after that date, added new subsection (d1).

Session Laws 2006-162, s. 9, effective July 24, 2006, substituted "subsections (a1), (g), (h), (i), (j), and (l)" for "subsections (g), (h), (i), and (j)" in the middle of subdivision (k)(1).

Session Laws 2006-162, s. 27, effective July 24, 2006, deleted the former last sentence in the first paragraph of subsection (c), which read: "The Secretary shall make an annual report ot the Department of Public Instruction and the Fiscal Research Division of the General Assembly by March 1 of the amount of refunds, identified by taxpayer, claimed under subdivisions (2b) and (2c) of this subsection over the preceding year."

Session Laws 2006-168, s. 3.1, effective January 1, 2005, and applicable to sales made on or after that date, substituted "For the purpose of this subsection," for "In the case of a computer manufacturing facility," at the beginning of the last sentence in subdivision (j)(2)(b); effective July 1, 2006, and applicable to purchases made on or after that date, in subdivision (j)(2), substituted "all" for "both" in the introductory paragraph and added subdivision (j)(2)(c); added subdivision (j)(3)(f); and substituted "January 1, 2013" for "January 1, 2010" at the end of subdivision (j)(5).

Session Laws 2006-252, ss. 2.2 and 2.3, effective January 1, 2007, in subsection (h), inserted "or Development" in the catchline, inserted "or a development tier one area, as defined in G.S. 143B-437.08" in the first sentence of subdivision (1), added "or if it is engaged primarily in one of the businesses listed in G.S. 105-129.83(a) in a development tier one area, as defined in G.S. 143B-437.08" at the end of subdivision (2), and inserted "or G.S. 105-129.83(a)" at the end of the first sentence, and "or a development tier one area, as defined in G.S. 143B-437.08" in the second sentence, of subdivision (3); and in subdivision (j)(2)b, substituted "located in a development tier one area as defined in G.S. 143B-437.08" for "located in an enterprise tier one, two, or three area as defined in G.S. 105-129.3."

Session Laws 2007-323, s. 31.10(a), effective July 1, 2007, and applicable to purchases made on or after July 1, 2007, in sub-subdivision (j)(3)b., inserted "of" following "assembling" and added "or of aircraft engines, blisks, fuselage sections, flight decks, flight deck systems or components, wings, fuselage fairings, fins, moving leading and trailing wing edges, wing boxes, nose sections, tailplanes, passenger doors, nacelles, thrust reversers, landing gear, braking systems, or any combination thereof" at the end.

Session Laws 2007-323, s. 31.20(b), effective July 1, 2007, and applicable to purchases made on or after July 1, 2007, the subsection designated herein as subsection (o).

Session Laws 2007-323, s. 31.23(d), effective January 1, 2007, and applicable to sales made on or after January 1, 2007, added subsection (n).

Session Laws 2007-345, s. 14.6(a), effective July 1, 2007, and applicable to purchases made on or after July 1, 2007, rewrote subsection (n) as added by Session Laws 2007-323, s. 31.20(b).

Session Laws 2007-491, s. 44(1)a., effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in subdivisions (i)(3) and (j)(4). For applicability, see Editor's note.

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

CASE NOTES

Purpose. — This provision is designed to fairly apportion sales and use taxes imposed on interstate air carriers, so that the carriers are taxed on the basis of the relative amount of the use of their commercial aircraft in the state. USAIR, Inc. v. Faulkner, 126 N.C. App. 501, 485 S.E.2d 847 (1997).

Source of Property Basis for Classification. — Court of Appeals was not persuaded that the Legislature intended the source of the property to be the determinative factor in classifying accessories. USAIR, Inc. v. Faulkner, 126 N.C. App. 501, 485 S.E.2d 847 (1997).

Seats and Furnishings Not Accessories. — Items such as seats, galley, other furnishings, electronic communication devices and other aircraft control devices are not accessories because they are essential to the primary operation of a commercial passenger aircraft; thus, buyer furnished equipment should not be classified as accessories pursuant to subsection (a)c. USAIR, Inc. v. Faulkner, 126 N.C. App. 501, 485 S.E.2d 847 (1997).

Provisions Which Deny Refund to United States Are Void. — Those (but only those) provisions of the Sales and Use Tax Act and the regulations which operate to deny the United States a tax refund when an appropriate and timely request therefor is made are null and void. United States v. Clayton, 250 F. Supp. 827 (E.D.N.C. 1965), appeal dismissed, 384 U.S. 154, 86 S. Ct. 1383, 16 L. Ed. 2d 434, 384 U.S. 156, 86 S. Ct. 1379, 16 L. Ed. 2d 432 (1966).

Housing Authority Not Entitled to Refund. — A housing authority created pursuant to the provisions of the Housing Authorities Law (G.S. 157-1 et seq.) is a municipal corporation but is not an incorporated city or town, and is not entitled to the refund of sales taxes paid on purchases of tangible personal property pursuant to the provisions of subsection (c) of this section. Housing Auth. v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

A municipal corporation or public agency created, organized and existing under and by virtue of the laws of this State, more particularly the Housing Authorities Law, codified as G.S. 157-1 et seq., is not a charitable organization within the meaning of the refund provisions of subsection (b) of this section. Housing Auth. v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

Residential Care Facility for the Elderly. — The term "charitable organization" easily accommodated the nature of plaintiffs' residential care facility for the elderly; plaintiffs were engaged in a humane and philanthropic endeavor to aid and assist the rapidly growing class of elderly citizens of this State, and their activities benefited the larger community which only recently had come to realize the problems associated with an aging population. Southminster, Inc. v. Justus, 119 N.C. App. 669, 459 S.E.2d 793 (1995).

Aircraft Control Devices. — Items such as seats, galleys, other furnishings, electronic communication devices and other aircraft control devices are not accessories because they are essential and contribute to the primary operation of a commercial passenger aircraft; thus, taxpayer was entitled to refund of taxes paid. USAIR, Inc. v. Faulkner, 126 N.C. App. 501, 485 S.E.2d 847 (1997).

Part 4. Reporting and Payment.

§ 105-164.15. Secretary shall provide forms.

The Secretary shall design, prepare, print and furnish to all retailers and wholesale merchants all necessary forms for filing returns and instructions to insure a full collection from retailers and wholesale merchants and an accounting for taxes due. But the failure of any retailer or wholesale merchant to obtain or receive forms shall not relieve such taxpayer from the payment of said tax at the time and in the manner herein provided. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 1998-98, s. 50.)

Editor's Note. — Session Laws 1998-98, s. 50, effective August 14, 1998, redesignated Division IV as Part 4.

§ 105-164.15A. Effective date of rate changes for services and items taxed at combined general rate.

(a) Services. — The effective date of a rate change for a service taxable under this Article is administered as follows:

(1) For a rate increase, the new rate applies to the first billing period that starts on or after the effective date. For a service billed after it is provided, the first billing period starts on the effective date. For a service billed before it is provided, the first billing period starts on the first day of the month after the effective date.

(2) For a rate decrease, the new rate applies to bills rendered on or after the effective date.

(b) Combined Rate Items. — The effective date of a rate change for an item that is taxable under this Article at the combined general rate is the effective date of any of the following:

(1) The effective date of a change in the State general rate of tax set in G.S. 105-164.4.

(2) For an increase in the authorization for local sales and use taxes, the date on which local sales and use taxes authorized by Subchapter VIII of this Chapter for every county become effective in the first county or group of counties to levy the authorized taxes.

(3) For a repeal in the authorization for local sales and use taxes, the effective date of the repeal. (2005-276, s. 33.13; 2006-162, s. 10; 2007-323, s. 31.17(c).)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, made this section effective October 1, 2005.

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-162, s. 10, effective July 24, 2006, added the second and third sentences in subdivision (1).

Session Laws 2007-323, s. 31.17(c), effective July 1, 2007, added "and items taxed at combined general rate" at the end of the section heading; designated the existing provisions as subsection (a); added "Services" at the beginning of subsection (a); and added subsection (b).

§ 105-164.16. Returns and payment of taxes.

(a) General. — Sales and use taxes are payable when a return is due. A return is due quarterly or monthly as specified in this section. A return must be filed with the Secretary on a form prescribed by the Secretary and in the manner required by the Secretary. A return must be signed by the taxpayer or the taxpayer's agent.

A sales tax return must state the taxpayer's gross sales for the reporting period, the amount and type of sales made in the period that are exempt from tax under G.S. 105-164.13 or are elsewhere excluded from tax, the amount of tax due, and any other information required by the Secretary. A use tax return must state the purchase price of tangible personal property or services that were purchased or received during the reporting period and are subject to tax under G.S. 105-164.6, the amount of tax due, and any other information required by the Secretary. Returns that do not contain the required information will not be accepted. When an unacceptable return is submitted, the Secretary will require a corrected return to be filed.

(b) Quarterly. — A taxpayer who is consistently liable for less than one hundred dollars ($100.00) a month in State and local sales and use taxes must file a return and pay the taxes due on a quarterly basis. A quarterly return covers a calendar quarter and is due by the last day of the month following the end of the quarter.

(b1) Monthly. — A taxpayer who is consistently liable for at least one hundred dollars ($100.00) but less than ten thousand dollars ($10,000) a month in State and local sales and use taxes must file a return and pay the taxes due on a monthly basis. A monthly return is due by the 20th day of the month following the calendar month covered by the return.

(b2) Prepayment. — A taxpayer who is consistently liable for at least ten thousand dollars ($10,000) a month in State and local sales and use taxes must make a monthly prepayment of the next month's tax liability. The prepayment is due on the date a monthly return is due. The prepayment must equal at least sixty-five percent (65%) of any of the following:

(1) The amount of tax due for the current month.
(2) The amount of tax due for the same month in the preceding year.
(3) The average monthly amount of tax due in the preceding calendar year.

(b3) Category. — The Secretary must monitor the amount of State and local sales and use taxes paid by a taxpayer or estimate the amount of taxes to be paid by a new taxpayer and must direct each taxpayer to pay tax and file returns as required by this section. In determining the amount of taxes due from a taxpayer, the Secretary must consider the total amount due from all places of business owned or operated by the same person as the amount due from that person. A taxpayer must file a return and pay tax in accordance with the Secretary's direction.

(c) Repealed by Session Laws 2001-427, s. 6(a), effective January 1, 2002, and applicable to taxes levied on or after that date.

(d) **(Effective for taxable years beginning before January 1, 2010)** Use Tax on Out-of-State Purchases. — Use tax payable by an individual who purchases tangible personal property, excluding purchases of boats and aircraft, outside the State for a nonbusiness purpose is due on an annual basis. For an individual who is not required to file an individual income tax return under Part 2 of Article 4 of this Chapter, the annual reporting period ends on the last day of the calendar year and a use tax return is due by the following April 15. For an individual who is required to file an individual income tax return, the annual reporting period ends on the last day of the individual's income tax year, and the use tax must be paid on the income tax return as provided in G.S. 105-269.14.

(d) **(Effective for taxable years beginning on or after January 1, 2010)** Use Tax on Out-of-State Purchases. — Notwithstanding subsection (b), an individual who purchases tangible personal property, excluding purchases of boats and aircraft, outside the State for a nonbusiness purpose shall file a use tax return on an annual basis. The annual reporting period ends on the last day of the calendar year. The return is due by the due date, including any approved extensions, for filing the individual's income tax return. (1957, c. 1340, s. 5; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; 1979, c. 801, s. 83; 1983 (Reg. Sess., 1984), c. 1097, s. 14; 1985, c. 656, s. 26; 1985 (Reg. Sess., 1986), c. 1007; 1987, c. 557, s. 6; 1989 (Reg. Sess., 1990), c. 945, s. 1; 1991, c. 690, s. 4; 1993, c. 450, s. 7; 1997-77, s. 1; 1998-121, s. 1; 1999-341, s. 1; 2000-120, s. 11; 2001-347, s. 2.14; 2001-414, s. 18; 2001-427, s. 6(a); 2001-430, s. 7; 2002-184, ss. 10, 11; 2003-284, ss. 44.1, 45.8; 2003-416, s. 26; 2005-276, s. 33.24; 2006-162, s. 5(b); 2006-33, s. 9; 2007-527, ss. 11, 12.)

Subsection (d) Set Out Twice. — The first version of subsection (d) set out above is effective for taxable years beginning before January 1, 2010. The second version of subsection (d) set out above is effective for taxable years beginning on or after January 1, 2010.

Editor's Note. — Session Laws 2003-284, s. 45.1, provides: "The Streamlined Sales and Use Tax Agreement is an historic multistate agreement designed to simplify and modernize sales and use tax collection and administration. The states and businesses involved in the Streamlined Sales Tax Project recognize that a simplified and uniform system saves businesses compliance and audit costs, while also saving states administrative costs and improving voluntary compliance, which should increase state collections. To participate in the Agreement, North Carolina must amend or modify some of its sales and use tax law to conform to the simplifications and uniformity in the Agreement. This part [Part XLV of Session Laws 2003-284] makes those necessary changes."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2000-120, s. 11, as amended by Session Laws 2003-284, s. 44.1, and by Session Laws 2005-276, s. 33. 24,effective for taxable years beginning on or after January 1, 2010, rewrote subsection (d).

Session Laws 2003-284, s. 45.8, as amended by Session Laws 2003-416, s. 26, effective October 1, 2003, substituted "20th day of the month" for "15th day of the month" in subsection (b1).

Session Laws 2006-33, s. 9, effective October 1, 2007, substituted "when a return is due" for "quarterly, monthly, or semimonthly as specified in this section" in the first sentence of subsection (a); deleted "but less than ten thousand dollars ($10,000)" following "($100.00)" in the first sentence of subsection (b1); rewrote subsection (b2); in (b3), substituted "as required by this section" for "in accordance with the appropriate schedule" at the end of the first sentence, and "direction" for "direction until notified in writing to file and pay under a different schedule" in the last sentence.

Session Laws 2006-162, s. 5(b), effective July 24, 2006, in the second sentence of the second paragraph in (a), substituted "property or services that were purchased" for "property that was purchased" and substituted "are subject" for "is subject."

Session Laws 2007-527, ss. 11, 12, effective August 31, 2007, in subsection (b1), substituted "at least one hundred" for "more than one hundred"; and in the first sentence of subsection (d), inserted "excluding purchases of boats and aircraft."

CASE NOTES

Cited in Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

§§ 105-164.17, 105-164.18: Repealed by Session Laws 1993, c. 450, ss. 8, 9.

Cross References. — For present similar provisions, see G.S. 105-241.

§ 105-164.19. Extension of time for making returns and payment.

The Secretary for good cause may extend the time for making any return under the provisions of this Article and may grant such additional time within which to make such return as he may deem proper but the time for filing any such return shall not be extended for more than 30 days after the regular due date of such return. If the time for filing a return be extended, interest at the rate established pursuant to G.S. 105-241.21 from the time the return was due to be filed to the date of payment shall be added and paid. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 1977, c. 1114, s. 10; 1985, c. 656, s. 30; 2007-491, s. 44(1)a.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 44(1)a., effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in the last sentence. For applicability, see Editor's note.

§ 105-164.20. Cash or accrual basis of reporting.

Any retailer, except a retailer who sells electricity or telecommunications service, may report sales on either the cash or accrual basis of accounting upon making application to the Secretary for permission to use the basis selected. Permission granted by the Secretary to report on a selected basis continues in effect until revoked by the Secretary or the taxpayer receives permission from the Secretary to change the basis selected. A retailer who sells electricity or telecommunications service must report its sales on an accrual basis. A sale of electricity or telecommunications service is considered to accrue when the retailer bills its customer for the sale. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 1983 (Reg. Sess., 1984), c. 1097, s. 15; 1998-22, s. 7; 2001-430, s. 8.)

§ 105-164.21: Repealed by Session Laws 1987, c. 622, s. 10.

§ 105-164.21A. Deduction for municipalities that sell electric power.

A municipality that pays the retail sales tax imposed by this Article on electricity may deduct from the amount of tax payable by the municipality an amount equal to three percent (3%) of the difference between its gross receipts from sales of electricity for the preceding reporting period and the amount paid by the municipality for purchased power and related services during that reporting period. (1983 (Reg. Sess., 1984), c. 1097, s. 12; 1989 (Reg. Sess., 1990), c. 945, s. 2.)

§ 105-164.21B: Repealed by Session Laws 2006-151, s. 9, effective January 1, 2007.

Part 5. Records Required to Be Kept.

§ 105-164.22. Retailer must keep records.

Every retailer shall keep and preserve suitable records of the gross income, gross receipts and/or gross receipts of sales of such business and such other books or accounts as may be necessary to determine the amount of tax for which he is liable under the provisions of this Article. And it shall be the duty of every retailer to keep and preserve for a period of three years all invoices of goods, wares and merchandise purchased for resale and all such books, invoices and other records shall be open for examination at all reasonable hours during the day by the Secretary or his duly authorized agent. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 1998-98, s. 51.)

Editor's Note. — Session Laws 1998-98, s. 51, effective August 14, 1998, redesignated Division V as Part 5.

CASE NOTES

Cited in Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

§ 105-164.23. Consumer must keep records.

Every consumer shall keep such records, receipts, invoices and other pertinent papers in such form as may be required by the Secretary and all such books, invoices and other records shall be open for examination by the Department of Revenue. In the event the retailer, user or consumer has imported the tangible personal property and fails to produce an invoice showing the purchase price of the tangible personal property as defined in this Article which is subject to tax or the invoices do not reflect the true or actual cost as defined in this Article, then the Secretary shall ascertain in any manner feasible the true purchase price and assess and collect the tax with interest, plus penalties, if such have accrued, on the true purchase price as determined by the Secretary. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 2001-414, s. 19; 2002-72, s. 17.)

§ 105-164.24. Separate accounting required.

Every retailer shall keep separate records disclosing sales of tangible personal property taxable under this Article and sales transactions not taxable because exempt under G.S. 105-164.13 or elsewhere excluded from taxation. Such records shall be kept in such form as may be accurately and conveniently checked by the Secretary or his authorized agents and unless such records shall be kept the exemptions and exclusions provided in this Article shall not be allowed and it shall be the duty of the Secretary or his agents to assess a tax upon the total gross sales at the rate levied upon retail sales and if records are not kept disclosing gross sales, it shall be the duty of the Secretary to assess a tax upon an estimation of sales based upon the best information available. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1973, c. 476, s. 193.)

§ 105-164.25. Wholesale merchant must keep records.

Every wholesale merchant selling tangible personal property to other merchants for resale or tangible personal property the sale of which is otherwise defined as a wholesale sale under the terms of this Article shall deliver to the customer a bill of sale for each sale of such tangible personal property whether sold for cash or on terms of credit, and shall make and retain a duplicate or carbon copy of each bill of sale and shall keep a file of all such duplicate bills of sale for at least three years from the date of sale. Such bills of sale shall contain and include the name and address of the purchaser, the date of the purchase, the article purchased and the price at which the article is sold to the customer. These records shall be kept for a period of three years and shall be open for inspection by the Secretary or his duly authorized agents at all reasonable hours. Failure to comply with the provisions of this section shall subject the wholesale merchant to liability for tax upon such sales at the rate of tax levied in this Article upon retail sales. (1957, c. 1340, s. 5; 1973, c. 476, s. 193.)

§ 105-164.26. Presumption that sales are taxable.

For the purpose of the proper administration of this Article and to prevent evasion of the retail sales tax, it shall be presumed that all gross receipts of wholesale merchants and retailers are subject to the retail sales tax until the contrary is established by proper records as required in this Article. It shall be prima facie presumed that tangible personal property sold by any person for delivery in this State, however made, and by carrier or otherwise, is sold for storage, use, or other consumption in this State, and a like presumption shall apply to tangible personal property delivered outside this State and brought to this State by the purchaser. (1957, c. 1340, s. 5; 1998-98, s. 108.)

CASE NOTES

Burden of showing exemptions or exceptions from a taxing statute is upon the one asserting the exemption or exclusion. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

School Picture Sales as Retail Sales. — Evidence supported Secretary's finding and conclusions that "commission" picture sales were retail sales, where taxpayer's letter stated that the price of packages available for order included sales tax, and where although proof envelope described the picture sales as a school project on which the school retained a commission, it did not say that the school was selling the pictures. In re Assessment of Additional Sales & Use Tax Against Strawbridge Studios, Inc., 94 N.C. App. 300, 380 S.E.2d 142 (1989).

Department's Statements Not Evidence That Sales Were Wholesale Sales. — Statements in Department of Revenue's internal correspondence and correspondence with taxpayer's attorney stating that "contract sales" were or appeared to be sales for resale did not constitute evidence that the "contract sales" were wholesale sales, where in each case the correspondence made it clear that in order to be taxable as wholesale sales, the statutory and regulatory requirements had to be met, and the characterizations were not judicial admissions that the requirements for wholesale taxation had been met. In re Assessment of Additional Sales & Use Tax Against Strawbridge Studios, Inc., 94 N.C. App. 300, 380 S.E.2d 142 (1989).

Cited in Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962); Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965); Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

§ 105-164.27: Repealed by Session Laws 1961, c. 826, s. 2.

§ 105-164.27A. Direct pay permit.

(a) Tangible Personal Property. — A direct pay permit for tangible personal property authorizes its holder to purchase any tangible personal property without paying tax to the seller and authorizes the seller to not collect any tax on a sale to the permit holder. A person who purchases tangible personal property under a direct pay permit issued under this subsection is liable for use tax due on the purchase. The tax is payable when the property is placed in use. A direct pay permit issued under this subsection does not apply to taxes imposed under G.S. 105-164.4(a)(1f) or G.S. 105-164.4(a)(4a).

A person who purchases direct mail may apply to the Secretary for a direct pay permit for the purchase of direct mail. The direct pay permit issued for direct mail does not apply to any purchase other than the purchase of direct mail.

A person who purchases tangible personal property whose tax status cannot be determined at the time of the purchase because of one of the reasons listed below may apply to the Secretary for a direct pay permit for tangible personal property:

(1) The place of business where the property will be used is not known at the time of the purchase and a different tax consequence applies depending on where the property is used.

(2) The manner in which the property will be used is not known at the time of the purchase and one or more of the potential uses is taxable but others are not taxable.

(b) Telecommunications Service. — A direct pay permit for telecommunications service authorizes its holder to purchase telecommunications service and ancillary service without paying tax to the seller and authorizes the seller to not collect any tax on a sale to the permit holder. A person who purchases these services under a direct pay permit must file a return and pay the tax due monthly to the Secretary. A direct pay permit issued under this subsection does not apply to any tax other than the tax on telecommunications service and ancillary service.

A call center that purchases telecommunications service that originates outside this State and terminates in this State may apply to the Secretary for a direct pay permit for telecommunications service and ancillary service. A call center is a business that is primarily engaged in providing support services to customers by telephone to support products or services of the business. A business is primarily engaged in providing support services by telephone if at least sixty percent (60%) of its calls are incoming.

(c) Application. — An application for a direct pay permit must be made on a form provided by the Secretary and contain the information required by the Secretary. The Secretary may grant the application if the Secretary finds that the applicant complies with the sales and use tax laws and that the applicant's compliance burden will be greatly reduced by use of the permit.

(d) Revocation. — A direct pay permit is valid until the holder returns it to the Secretary or the Secretary revokes it. The Secretary may revoke a direct pay permit if the holder of the permit does not file a sales and use tax return on time, does not pay sales and use tax on time, or otherwise fails to comply with the sales and use tax laws. (2000-120, s. 1; 2001-414, s. 20; 2001-430, s. 9; 2002-72, s. 18; 2003-284, s. 45.9; 2003-416, s. 16(b); 2006-33, s. 7.)

Editor's Note. — Session Laws 2001-430, s. 9, amended this section in the coded bill drafting format provided by G.S. 120-20.1. The amendment omitted some words that had been in subsection (b) in striking through that subsection. The subsection is set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2003-284, s. 45.1, provides: "The Streamlined Sales and Use Tax Agreement is an historic multistate agreement designed to simplify and modernize sales and use tax collection and administration. The states and businesses involved in the Streamlined Sales Tax Project recognize that a simplified and uniform system saves businesses compliance and audit costs, while also saving states administrative costs and improving voluntary compliance, which should increase state collections. To participate in the Agreement, North

Carolina must amend or modify some of its sales and use tax law to conform to the simplifications and uniformity in the Agreement. This part [Part XLV of Session Laws 2003-284] makes those necessary changes."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-33, s. 7, effective January 1, 2007, in subsection (b), in the first paragraph added "and ancillary service" in the first and last sentences, substituted "these services" for "telecommunications service" in the second sentence; and, in the second paragraph, inserted "service and ancillary" following "telecommunications" in the first sentence.

§ 105-164.28. Certificate of resale.

(a) Seller's Responsibility. — A seller who accepts a certificate of resale from a purchaser of tangible personal property has the burden of proving that the sale was not a retail sale unless all of the following conditions are met:

(1) For a sale made in person, the certificate is signed by the purchaser and states the purchaser's name, address, registration number, and type of business.

(2) For a sale made in person, the tangible personal property sold is the type of property typically sold by the type of business stated on the certificate.

(3) For a sale made over the Internet or by other remote means, the seller obtains the purchaser's name, address, registration number, and type of business and maintains this information in a retrievable format in its records.

(b) Purchaser's Liability. — A purchaser who does not resell property purchased under a certificate of resale is liable for any tax subsequently determined to be due on the sale. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 1991 (Reg. Sess., 1992), c. 914, s. 1; 2000-120, s. 6; 2005-276, s. 33.15.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 33.15, effective October 1, 2005, rewrote the section.

CASE NOTES

Taxpayer Not Denied Due Process and Equal Protection. — Burden of proof and requirement of a Form E-590, which creates a conclusive presumption of retail sales, did not deny taxpayer due process and equal protection, as no part of the tax law required the taxpayer to obtain a Form E-590 from schools, since the taxpayer could present other written evidence to establish that the schools were registered to pay the retail tax and that pictures were purchased for resale. In re Assessment of Additional Sales & Use Tax Against Strawbridge Studios, Inc., 94 N.C. App. 300, 380 S.E.2d 142 (1989).

Lessor Has Burden to Show That Leasing Transactions Constituted Sale for Re-

sale. — A lessor of television sets who had not procured resale certificates from any of its customers had the burden to show that its leasing transactions constituted a sale for resale, entitling the lessor to an exemption from the sales tax. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

Cited in Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965); In re Rock-Ola Cafe, 111 N.C. App. 683, 433 S.E.2d 236 (1993).

§ 105-164.28A. Other exemption certificates.

(a) Authorization. — The Secretary may require a person who purchases tangible personal property that is exempt from tax or is subject to a preferential rate of tax depending on the status of the purchaser or the intended use of the property to obtain an exemption certificate from the Department to receive the exemption or preferential rate. An exemption certificate authorizes a retailer to sell tangible personal property to the holder of the certificate and either collect tax at a preferential rate or not collect tax on the sale, as appropriate. A person who purchases tangible personal property under an exemption certificate is liable for any tax due on the sale if the Department determines that the person is not eligible for the certificate or the property was not used as intended.

(b) Scope. — This section does not apply to a direct pay permit or a certificate of resale. G.S. 105-164.27A addresses a direct pay permit, and G.S. 105-164.28 addresses a certificate of resale. (2002-184, s. 12.)

Editor's Note. — Session Laws 2002-184, s. 13, makes this section effective October 31, 2002.

§ 105-164.29. Application for certificate of registration by wholesale merchants and retailers.

(a) Application. — To obtain a certificate of registration, a person must register with the Department. A wholesale merchant or retailer who has more than one business is required to obtain only one certificate of registration to cover all operations of the business throughout the State. An application for registration must be signed as follows:

(1) By the owner, if the owner is an individual.

(2) By a manager, member, or partner, if the owner is an association, a partnership, or a limited liability company.

(3) By an executive officer or some other person specifically authorized by the corporation to sign the application, if the owner is a corporation. If the application is signed by a person authorized to do so by the corporation, written evidence of the person's authority must be attached to the application.

(b) Issuance. — A certificate of registration is not assignable and is valid only for the person in whose name it is issued. A copy of the certificate of registration must be displayed at each place of business.

(c) Term. — A certificate of registration is valid unless it is revoked for failure to comply with the provisions of this Article or becomes void. A certificate issued to a retailer who makes taxable sales becomes void if, for a period of 18 months, the retailer files no returns or files returns showing no sales.

(d) Revocation. — The failure of a wholesale merchant or retailer to comply with this Article or G.S. 14-401.18 is grounds for revocation of the wholesale merchant's or retailer's certificate of registration. Before the Secretary revokes a wholesale merchant's or retailer's certificate of registration, the Secretary must notify the wholesale merchant or retailer that the Secretary proposes to revoke the certificate of registration and that the proposed revocation will become final unless the wholesale merchant or retailer objects to the proposed revocation and files a request for a Departmental review within the time set in G.S. 105-241.11 for requesting a Departmental review of a proposed assessment. The notice must be sent in accordance with the methods authorized in G.S. 105-241.20. The procedures in Article 9 of this Chapter for review of a proposed assessment apply to the review of a proposed revocation. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 1979, 2nd Sess., c. 1084; 1991, c. 690, s. 5; 1993, c. 354, s. 17; c. 539, s. 705; 1994, Ex. Sess., c. 24, s. 14(c); 1999-333, s. 8; 2000-140, s. 67(b); 2007-491, s. 19.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 19, effective January 1, 2008, rewrote subsection (d). For applicability, see Editor's note.

§ 105-164.29A. State government exemption process.

(a) Application. — To be eligible for the exemption provided in G.S. 105-164.13(52), a State agency must obtain from the Department a sales tax exemption number. The application for exemption must be in the form required by the Secretary, be signed by the State agency's head, and contain any information required by the Secretary. The Secretary must assign a sales tax exemption number to a State agency that submits a proper application.

(b) Liability. — A State agency that does not use the items purchased with its exemption number must pay the tax that should have been paid on the items purchased, plus interest calculated from the date the tax would otherwise have been paid. (2003-431, s. 4; 2004-170, s. 22.)

Part 6. Examination of Records.

§ 105-164.30. Secretary or agent may examine books, etc.

For the purpose of enforcing the collection of the tax levied by this Article, the Secretary or his duly authorized agent is hereby specifically authorized and empowered to examine at all reasonable hours during the day the books, papers, records, documents or other data of all retailers or wholesale merchants bearing upon the correctness of any return or for the purpose of making a return where none has been made as required by this Article, and may require the attendance of any person and take his testimony with respect to any such matter, with power to administer oaths to such person or persons. If any person summoned as a witness shall fail to obey any summons to appear before the Secretary or his authorized agent, or shall refuse to testify or answer any material question or to produce any book, record, paper, or other data when required to do so, such failure or refusal shall be reported to the Attorney General or the district solicitor, who shall thereupon institute proceedings in the superior court of the county where such witness resides to compel obedience to any summons of the Secretary or his authorized agent. Officers who serve summonses or subpoenas, and witnesses attending, shall receive like compensation as officers and witnesses in the superior courts, to be paid from the proper appropriation for the administration of this Article.

In the event any retailer or wholesale merchant shall fail or refuse to permit examination of his books, papers, accounts, records, documents or other data by the Secretary or his authorized agents as aforesaid, the Secretary shall have the power to proceed by citing said retailer or wholesale merchant to show cause before the superior court of the county in which said taxpayer resides or has its principal place of business as to why such books, records, papers, or documents should not be examined and said superior court shall have jurisdiction to enter an order requiring the production of all necessary books, records, papers, or documents and to punish for contempt of such order any person violating the same. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 1998-98, s. 52.)

Editor's Note. — Session Laws 1998-98, s. 52, effective August 14, 1998, redesignated Division VI as Part 6.

§ 105-164.31. Complete records must be kept for three years.

Every retailer, wholesale merchant or consumer as defined by this Article shall secure, maintain and keep for a period of three years a complete record of tangible personal property received, used, sold at retail or wholesale, distributed or stored, leased or rented within this State by said retailer, wholesale merchant or consumer together with invoices, bills of lading and other pertinent papers and records as may be required by the Secretary for the reasonable administration of this Article and all such records shall be open for inspection by the Secretary or his duly authorized agent at all reasonable hours during the day. (1957, c. 1340, s. 5; 1973, c. 476, s. 193.)

§ 105-164.32. Incorrect returns; estimate.

In the event any retailer, wholesale merchant or consumer fails to make a return and to pay the tax as provided by this Article or in case any retailer, wholesale merchant or consumer makes a grossly incorrect return or a report that is false or fraudulent, it shall be the duty of the Secretary or his authorized agent to make an estimate for the taxable period of wholesale and/or retail sales of such retailer or wholesale merchant or of the gross proceeds of rentals or leases of tangible personal property by the retailer and to estimate the purchase price of all articles of tangible personal property imported by the consumer for use, storage, or consumption in this State and to assess and collect the tax and interest, plus penalties, if such have accrued, upon the basis of such estimate. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 2001-414, s. 21.)

Part 7. Failure to Make Returns; Overpayments.

§§ 105-164.33, 105-164.34: Repealed by Session Laws 1963, c. 1169, s. 3.

§ 105-164.35. Excessive payments; recomputing tax.

As soon as practicable after a return is filed, the Secretary shall examine it. If it then appears that the correct amount of tax is greater or less than the amount shown in the return, the tax shall be recomputed.

(1) Excessive Payments. — If the amount already paid exceeds that which should have been paid on the basis of the tax so recomputed, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of this Article.

(2) to (5) Repealed by Session Laws 1959, c. 1259, s. 9. (1957, c. 1340, s. 5; 1959, c. 1259, s. 9; 1973, c. 476, s. 193.)

CASE NOTES

Taxpayer who has prepaid his liability is entitled to a refund or credit on subsequently accruing taxes. Park-N-Shop, Inc. v. Clayton, 264 N.C. 218, 141 S.E.2d 294 (1965).

§ 105-164.36: Repealed by Session Laws 1959, c. 1259, s. 9.

§ 105-164.37. Bankruptcy, receivership, etc.

If any taxpayer subject to the provisions of this Article goes into bankruptcy, receivership or turns over his stock of merchandise by voluntary transfer to creditors, the tax liability under this Article shall constitute a prior lien upon such stock of merchandise and shall become subject to levy under execution and it shall be the duty of the transferee in any such case to retain the amount of the tax due from the first sales of such stock of merchandise and pay the same to the Secretary. (1957, c. 1340, s. 5; 1973, c. 476, s. 193.)

§ 105-164.38. Tax is a lien.

(a) The tax imposed by this Article is a lien upon all personal property of any person who is required by this Article to obtain a certificate of registration to engage in business and who stops engaging in the business by transferring the business, transferring the stock of goods of the business, or going out of business. A person who stops engaging in business must file the return required by this Article within 30 days after transferring the business, transferring the stock of goods of the business, or going out of business.

(b) Any person to whom the business or the stock of goods was transferred must withhold from the consideration paid for the business or stock of goods an amount sufficient to cover the taxes due until the person selling the business or stock of goods produces a statement from the Secretary showing that the taxes have been paid or that no taxes are due. If the person who buys a business or stock of goods fails to withhold an amount sufficient to cover the taxes and the taxes remain unpaid after the 30-day period allowed, the buyer is personally liable for the unpaid taxes to the extent of the greater of the following:

(1) The consideration paid by the buyer for the business or the stock of goods.

(2) The fair market value of the business or the stock of goods.

(c) Assessment. — The period of limitations for assessing liability against the buyer of a business or the stock of goods of a business and for enforcing the lien against the property expires one year after the end of the period of limitations for assessment against the person who sold the business or the stock of goods. Except as otherwise provided in this section, the assessment procedures in Article 9 of this Chapter apply to a person who buys a business or the stock of goods of a business to the same extent as if the person had incurred the original tax liability. (1957, c. 1340, s. 5; 1963, c. 1169, s. 3; 1973, c. 476, s. 193; 1991, c. 690, s. 6; 1991 (Reg. Sess., 1992), c. 949, s. 2; 2000-140, s. 67(c); 2007-491, s. 20.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 20, effective January 1, 2008, in subsection (c), added "Assessment —" to the beginning, and rewrote the second sentence. For applicability, see Editor's note.

§ 105-164.39. Attachment.

In the event any retailer or wholesale merchant is delinquent in the payment of the tax herein provided for, the Secretary may give notice of the amount of such delinquency by registered mail to all persons having in their possession or under their control any credits or other personal property belonging to such retailer or wholesale merchant or owing any debts to such taxpayer at the time of the receipt by them of such notice and thereafter any person so notified shall neither transfer nor make any other disposition of such credits, other personal property or debts until the Secretary shall have consented to a transfer or disposition or until 30 days shall have elapsed from and after the receipt of such notice. All persons so notified must within five days after receipt of such notice advise the Secretary of any and all such credits, other personal property or debts in their possession, under their control or owing by them as the case may be. The remedy provided by this section shall be cumulative and optional and in addition to all other remedies now provided by law for the collection of taxes due the State. (1957, c. 1340, s. 5; 1973, c. 476, s. 193.)

§ 105-164.40. Jeopardy assessment.

If the Secretary is of the opinion that the collection of any tax or any amount of tax required to be collected and paid to the State under this Article will be jeopardized by delay, he shall make an assessment of the tax or amount of tax required to be collected and shall mail or issue a notice of such assessment to the taxpayer together with a demand for immediate payment of the tax or of the deficiency in tax declared to be in jeopardy including interest and penalties. In the case of a tax for a current period, the Secretary may declare the taxable period of the taxpayer immediately terminated and shall cause notice of such finding and declaration to be mailed or issued to the taxpayer together with a demand for immediate payment of the tax based on the period declared terminated and such tax shall be immediately due and payable, whether or not the time otherwise allowed by law for filing a return and paying the tax has expired. Assessments provided for in this section shall be immediately due and payable and proceedings for the collection shall commence at once and if any such tax, penalty or interest is not paid upon demand of the Secretary, he shall forthwith cause a levy to be made on the property of the taxpayer or, in his discretion the Secretary may require the taxpayer to file such indemnity bond as in his judgment may be sufficient to protect the interest of the State. (1957, c. 1340, s. 5; 1973, c. 476, s. 193.)

§ 105-164.41. Excess payments; refunds.

If upon examination of any return made under this Article, it appears that an amount of tax has been paid in excess of that properly due, then the amount in excess shall be credited against any tax or installment thereof then due from the taxpayer, under any other subsequent return, or shall be refunded to the taxpayer by the Secretary out of any funds appropriated for that purpose. (1957, c. 1340, s. 5; 1963, c. 1169, s. 3; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; 1985, c. 656, s. 29; 1993, c. 257, s. 7.)

§ 105-164.42: Repealed by Session Laws 1959, c. 1259, s. 9.

Part 7A. Uniform Sales and Use Tax Administration Act.

§ 105-164.42A. Short title.

This Part is the "Uniform Sales and Use Tax Administration Act" and may be cited by that name. (2001-347, s. 1.3; 2005-276, s. 33.31.)

Editor's Note. — Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13, provided for a January 1, 2006, contingent expiration date. However, Session Laws 2005-276, s. 33.31, deleted the contingent expiration date by amending Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13 to read: "Part 1 of this act [which enacted Part 7A of Article 5 of Chapter 105] is effective when it becomes law [August 8, 2001]."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

§ 105-164.42B. Definitions.

The following definitions apply in this Part:

(1) Agreement. — Streamlined Agreement, as defined in G.S. 105-164.3.

(2) Certified automated system. — Software certified jointly by the states that are signatories to the Agreement to calculate the tax imposed by each jurisdiction on a transaction, determine the amount of tax to remit to the appropriate state, and maintain a record of the transaction.

(3) Certified service provider. — An agent certified jointly by the states that are signatories to the Agreement to perform all of the seller's sales tax functions.

(4) Member state. — A state that has entered into the Agreement.

(5) Person. — Defined in G.S. 105-228.90.

(6) Sales tax. — The tax levied in G.S. 105-164.4.

(7) Seller. — A person making sales, leases, or rentals of personal property or services.

(8) State. — The term "this State" means the State of North Carolina. Otherwise, the term "state" means any state of the United States and the District of Columbia.

(9) Use tax. — The tax levied in G.S. 105-164.6. (2001-347, s. 1.3; 2005-276, ss. 33.16, 33.31.)

Editor's Note. — Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13, provided for a January 1, 2006, contingent expiration date. However, Session Laws 2005-276, s. 33.31, amended Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13 to read: "Part 1 of this act [which enacted Part 7A of Article 5 of Chapter 105] is effective when it becomes law [August 8, 2001]."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 33.16, effective October 1, 2005, rewrote subdivision (1).

§ 105-164.42C. Authority to enter Agreement.

The Secretary is authorized to enter into the Agreement with one or more states to simplify and modernize sales and use tax administration in order to substantially reduce the burden of tax compliance for all sellers and for all types of commerce. The Secretary may act jointly with other member states to establish standards for certification of a certified service provider and a certified automated system and to establish performance standards for multistate sellers.

The Secretary is authorized to represent this State before the other member states. The Secretary may take any other actions reasonably required to implement this Part, including the joint procurement with other member states of goods and services in furtherance of the Agreement. (2001-347, s. 1.3; 2005-276, s. 33.31.)

Editor's Note. — Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13, provided for a January 1, 2006, contingent expiration date. However, Session Laws 2005-276, s. 33.31, amended Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13 to read: "Part 1 of this act [which enacted Part 7A of Article 5 of Chapter 105] is effective when it becomes law [August 8, 2001]."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

§ 105-164.42D. Relationship to North Carolina law.

No provision of the Agreement authorized by this Part invalidates or amends any provision of the law of this State Adoption of the Agreement by this State does not amend or modify any law of this State. Implementation of a condition of the Agreement in this State must be made pursuant to an act of the General Assembly. (2001-347, s. 1.3; 2005-276, s. 33.31.)

Editor's Note. — Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13, provided for a January 1, 2006, contingent expiration date. However, Session Laws 2005-276, s. 33.31, amended Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13 to read: "Part 1 of this act [which enacted Part 7A of Article 5 of Chapter 105] is effective when it becomes law [August 8, 2001]."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

§ 105-164.42E. Agreement requirements.

The Secretary may not enter into the Agreement unless the Agreement requires each state to abide by the following requirements:

(1) Uniform state rate. — The Agreement must set restrictions to achieve more uniform state rates through the following:
  a. Limiting the number of state rates.
  b. Limiting maximums on the amount of state tax that is due on a transaction.
  c. Limiting thresholds on the application of a state tax.

(2) Uniform standards. — The Agreement must establish uniform standards for all of the following:
  a. The sourcing of transactions to taxing jurisdictions.
  b. The administration of exempt sales.
  c. The allowances a seller can take for bad debts.
  d. Sales and use tax returns and remittances.

(3) Uniform definitions. — The Agreement must require states to develop and adopt uniform definitions of sales and use tax terms. The definitions must enable a state to preserve its ability to make policy choices not inconsistent with the uniform definitions.

(4) Central registration. — The Agreement must provide a central, electronic registration system that allows a seller to register to collect and remit sales and use taxes for all signatory states.

(5) No nexus attribution. — The Agreement must provide that registration with the central registration system and the collection of sales and use taxes in the signatory states will not be used as a factor in determining whether the seller has nexus with a state for any tax.

(6) Local sales and use taxes. — The Agreement must provide for reduction of the burdens of complying with local sales and use taxes through one or more of the following:
  a. Restricting variances between the state and local tax bases.
  b. Requiring states to administer any sales and use taxes levied by local jurisdictions within the state so that sellers collecting and remitting these taxes will not have to register or file returns with, remit funds to, or be subject to independent audits from local taxing jurisdictions.
  c. Restricting the frequency of changes in the local sales and use tax rates and setting effective dates for the application of local jurisdictional boundary changes to local sales and use taxes.
  d. Providing notice of changes in local sales and use tax rates and of changes in the boundaries of local taxing jurisdictions.

(7) Monetary allowances. — The Agreement must outline any monetary allowances that are to be provided by the states to sellers or certified service providers.

(8) State compliance. — The Agreement must require each state to certify compliance with the terms of the Agreement before becoming a member and to maintain compliance, under the laws of the member state, with all provisions of the Agreement while a member.

(9) Consumer privacy. — The Agreement must require each state to adopt a uniform policy for certified service providers that protects the privacy of consumers and maintains the confidentiality of tax information. (2001-347, s. 1.3; 2005-276, s. 33.31.)

Editor's Note. — Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13, provided for a January 1, 2006, contingent expiration date. However, Session Laws 2005-276, s. 33.31, amended Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13 to read: "Part 1 of this act [which enacted Part 7A of Article 5 of Chapter 105] is effective when it becomes law [August 8, 2001]."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

§ 105-164.42F. Cooperating sovereigns.

The Agreement authorized by this Part is an accord among individual cooperating sovereigns in furtherance of their governmental functions. The Agreement provides a mechanism among the member states to establish and maintain a cooperative, simplified system for the application and administration of sales and use taxes under the laws of each member state. (2001-347, s. 1.3; 2005-276, s. 33.31.)

Editor's Note. — Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13, provided for a January 1, 2006, contingent expiration date. However, Session Laws 2005-276, s. 33.31, amended Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13 to read: "Part 1 of this act [which enacted Part 7A of Article 5 of Chapter 105] is effective when it becomes law [August 8, 2001]."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

§ 105-164.42G. Effect of Agreement.

Entry of this State into the Agreement does not create a cause of action or a defense to an action. No person may challenge any action or inaction by a department, agency, or other instrumentality of this State, or a political subdivision of this State, on the ground that the action or inaction is inconsistent with the Agreement. No law of this State, or its application, may be declared invalid on the ground that the provision or application is inconsistent with the Agreement. (2001-347, s. 1.3; 2005-276, s. 33.31.)

Editor's Note. — Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13, provided for a January 1, 2006, contingent expiration date. However, Session Laws 2005-

276, s. 33.31, amended Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13 to read: "Part 1 of this act [which enacted Part 7A of Article 5 of Chapter 105] is effective when it becomes law [August 8, 2001]."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

§ 105-164.42H. Certification of certified automated system and effect of certification.

(a) Certification. — The Secretary may certify a software program as a certified automated system if the Secretary determines that the program correctly determines all of the following and that the software can generate reports and returns required by the Secretary:

(1) The applicable combined State and local sales and use tax rate for a sale, based on the sourcing principles in G.S. 105-164.4B.
(2) Whether or not an item is exempt from tax, based on a uniform product code or another method.
(3) Repealed by Session Laws 2006-33, s. 12, effective June 1, 2006.
(4) The amount of tax to be remitted for each taxpayer for a reporting period.
(5) Any other issue necessary for the application or calculation of sales and use tax due.

(b) Liability. — A seller may choose to use a certified automated system in performing its sales tax administration functions. A seller that uses a certified automated system is liable for sales and use taxes due on transactions it processes using the certified automated system except for underpayments of tax attributable to errors in the functioning of the system. A person that provides a certified automated system is responsible for the proper functioning of that system and is liable for underpayments of tax attributable to errors in the functioning of the system. (2000-120, s. 2; 2001-347, ss. 1.1, 1.3; 2005-276, s. 33.31; 2006-33, s. 12.)

Editor's Note. — Session Laws 2001-347, s. 1.1, effective August 8, 2001, recodifies G.S. 105-164.43A(a) as G.S. 104-164.42H(a).

Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13, provided for a January 1, 2006, contingent expiration date. However, Session Laws 2005-276, s. 33.31, amended Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13 to read: "Part 1 of this act [which enacted Part 7A of Article 5 of Chapter 105] is effective when it becomes law [August 8, 2001]."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-33, s. 12, effective June 1, 2006, repealed former subdivision (a)(3), which read: "Whether or not an exemption certificate offered by a purchaser is a valid certificate, based on the Department's registry of holders of exemption certificates."

§ 105-164.42I. Contract with certified service provider and effect of contract.

(a) Certification. — The Secretary may certify an entity as a certified service provider if the entity meets all of the following requirements:

(1) The entity uses a certified automated system.

(2) The entity has agreed to update its program upon notification by the Secretary.

(3) The entity integrates its certified automated system with the system of a seller for whom the entity collects tax so that the tax due on a sale is determined at the time of the sale.

(4) The entity remits the taxes it collects at the time and in the manner specified by the Secretary.

(5) The entity agrees to file sales and use tax returns on behalf of the sellers for whom it collects tax.

(6) The entity enters into a contract with the Secretary and agrees to comply with all the conditions of the contract.

(b) Contract. — The Secretary may contract with a certified service provider for the collection and remittance of sales and use taxes. A certified service provider must file with the Secretary a bond or an irrevocable letter of credit in the amount set by the Secretary. A bond must be conditioned upon compliance with the contract, be payable to the State, and be in the form required by the Secretary. The amount a certified service provider charges under the contract is a cost of collecting the tax and is payable from the amount collected.

(c) Liability. — A seller may contract with a certified service provider to collect and remit sales and use taxes payable to the State on sales made by the seller. A certified service provider with whom a seller contracts is the agent of the seller. As the seller's agent, the certified service provider, rather than the seller, is liable for sales and use taxes due this State on all sales transactions the certified service provider processes for the seller unless the seller misrepresents the type of products it sells or commits fraud. A seller that misrepresents the type of products it sells or commits fraud is liable for taxes not collected as a result of the misrepresentation or fraud.

(d) Audit and Review. — In the absence of misrepresentation or fraud, a seller that contracts with a certified service provider is not subject to audit on the transactions processed by the certified service provider. A seller is subject to audit for transactions not processed by the certified service provider. The State may perform a system check of a seller and review a seller's procedures to determine if the certified service provider's system is functioning properly and the extent to which the seller's transactions are being processed by the certified service provider. A certified service provider is subject to audit. (2000-120, s. 2; 2001-347, ss. 1.1, 1.3; 2005-276, s. 33.31.)

Editor's Note. — Session Laws 2001-347, s. 1.1, effective August 8, 2001, recodifies G.S. 105-164.43A(b) as G.S. 104-164.42I(a) and G.S. 105-164.43B as G.S. 105-164.42I(b).

Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13, provided for a January 1, 2006, contingent expiration date. However, Session Laws 2005-276, s. 33.31, amended Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13 to read: "Part 1 of this act [which enacted Part 7A of Article 5 of Chapter 105] is effective when it becomes law [August 8, 2001]."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

§ 105-164.42J. Performance standard for multistate seller.

The Secretary may establish a performance standard for a seller that is engaged in business in this State and at least 10 other states and has developed a proprietary system to determine the amount of sales and use taxes due on transactions. A seller that enters into an agreement with the Secretary that establishes a performance standard for that system is liable for the failure of the system to meet the performance standard. (2001-347, s. 1.3; 2005-276, s. 33.31.)

Editor's Note. — Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13, provided for a January 1, 2006, contingent expiration date. However, Session Laws 2005-276, s. 33.31, amended Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13 to read: "Part 1 of this act [which enacted Part 7A of Article 5 of Chapter 105] is effective when it becomes law [August 8, 2001]."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

§ 105-164.42K. Registration and effect of registration.

Registration under the Agreement satisfies the registration requirements under this Article. A seller who registers under the Agreement within 12 months after the State becomes a member of the Agreement and who meets the following conditions is not subject to assessment for sales tax for any period before the effective date of the seller's registration:

(1) The seller was not registered with the State during the 12-month period before the effective date of this State's participation in the Agreement.

(2) When the seller registered, the seller had not received a letter from the Department notifying the seller of an audit.

(3) The seller continues to be registered under the Agreement and to remit tax to the State for at least 36 months. (2005-276, s. 33.17.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, made this section effective October 1, 2005.

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

§ 105-164.42L. Databases on taxing jurisdictions.

The Secretary may develop databases that provide information on the boundaries of taxing jurisdictions and the tax rates applicable to those taxing jurisdictions. A person who relies on the information provided in these databases is not liable for underpayments of tax attributable to erroneous information provided by the Secretary in those databases. (2005-276, s. 33.18; 2007-244, s. 5.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, made this section effective October 1, 2005.

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-244, s. 5, effective October 1, 2007, substituted "A person who" for "A seller that" at the beginning of the second sentence.

Part 8. Administration and Enforcement.

§ **105-164.43:** Repealed by Session Laws 2007-491, s. 2, effective January 1, 2008.

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-164.43A. (Recodified effective August 8, 2001 — See note).

(a) Recodified as § 105-164.42H(a) by Session Laws 2001-347, s. 1.1, effective August 8, 2001. See note.

(b) Recodified as § 105-164.42I(a) by Session Laws 2001-347, s. 1.1, effective August 8, 2001. See note.

Editor's Note. — Session Laws 2001-347, s. 1.1, effective August 8, 2001, recodifies G.S. 105-164.43A(a) as G.S. 105-164.42H(a) and recodifies G.S. 105-164.43AB(b) as G.S. 105-164.42I(a).

Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13, provided for a January 1, 2006, contingent expiration date. However, Session Laws 2005-276, s. 33.31, amended Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13 to read: "Part 1 of this act [which enacted Part 7A of Article 5 of Chapter 105] is effective when it becomes law [August 8, 2001]."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

§ 105-164.43B. (Recodified effective August 8, 2001 — See note).

Recodified as § 105-164.42I(b) by Session Laws 2001-347, s. 1.1, effective August 8, 2001. See note.

Editor's Note. — Session Laws 2001-347, s. 1.1, effective August 8, 2001, recodifies G.S. 105-164.43B as G.S. 105-164.42I(b). For contingent expiration date, see note regarding Session Laws 2001-347, s. 3.1.

Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13, provided for a January 1, 2006, contingent expiration date. However, Session Laws 2005-276, s. 33.31, amended Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13 to read: "Part 1 of this act [which enacted Part 7A of Article 5 of Chapter 105] is effective when it becomes law [August 8, 2001]."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

§ 105-164.43C: Repealed by Session Laws 2001-347, s. 1.2, effective August 8, 2001. See note.

Editor's Note. — Sessions Laws 2001-347, s. 1.2, repealed this section effective August 8, 2001. For contingent expiration date of this repeal, see note regarding Session Laws 2001-347, s. 3.1.

Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13, provided for a January 1, 2006, contingent expiration date. However, Session Laws 2005-276, s. 33.31, amended Session Laws 2001-347, s. 3.1, as amended by Session Laws 2003-416, s. 13 to read: "Part 1 of this act [which enacted Part 7A of Article 5 of Chapter 105] is effective when it becomes law [August 8, 2001]."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

§ 105-164.44. Penalty and remedies of Article 9 applicable.

All provisions not inconsistent with this Article in Article 9, entitled "General Administration — Penalties and Remedies" of Subchapter I of Chapter 105 of the General Statutes, including but not limited to, administration, auditing, making returns, promulgation of rules and regulations by the Secretary, additional taxes, assessment procedure, imposition and collection of taxes and the lien thereof, assessments, refunds and penalties are hereby made a part of this Article and shall be applicable thereto. (1957, c. 1340, s. 5; 1973, c. 476, s. 193.)

§ 105-164.44A: Repealed by Session Laws 1991, c. 45, s. 18.

§ 105-164.44B. Transfer to Wildlife Resources Fund of taxes on hunting and fishing supplies and equipment.

Each fiscal year, the Secretary of Revenue shall transfer at the end of each quarter from the State sales and use tax net collections received by the Department of Revenue under Article 5 of Chapter 105 of the General Statutes to the State Treasurer for the Wildlife Resources Fund, one fourth of the amount transferred the preceding fiscal year plus or minus the percentage of that amount by which the total collection of State sales and use taxes increased or decreased during the preceding fiscal year. (1983 (Reg. Sess., 1984), c. 1116,

s. 88; 1987, c. 738, s. 150; 1989, c. 752, s. 159; 1993, c. 321, ss. 290(a), 290(b); 1993 (Reg. Sess., 1994), c. 591, s. 9, c. 769, s. 27.1(a), (b).)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1116, which amended this section, provided in s. 88(c): "All of the funds collected by the Secretary of Revenue and transferred to the North Carolina Wildlife Resources Commission pursuant to this section shall be obligated and expended by the Commission in accordance with Article 1 of Chapter 143 of the North Carolina General Statutes. Of the additional financial support generated annually by the provisions of this section for the Wildlife Commission, an amount not less than fifty percent (50%) shall be obligated and expended by the Commission annually for capital improvements and other nonrecurring purposes."

§ 105-164.44C: Repealed by Session Laws 2001-424, s. 34.15(a)(1), as amended by Session Laws 2002-126, s. 30A.1, effective July 1, 2002.

§ 105-164.44D. Reimbursement for sales tax exemption for purchases by the Department of Transportation.

The amount of sales and use tax revenue that is not realized by the General Fund as the result of the sales and use tax exemption in G.S. 105-164.13 for purchases by the Department of Transportation shall be transferred from the Highway Fund to the General Fund in accordance with this section. This direct transfer is made in lieu of eliminating the Department of Transportation's sales and use tax exemption to alleviate the administrative and accounting burden that would be placed on the Department of Transportation by eliminating the exemption.

For the 1991-92 fiscal year, the State Treasurer shall transfer the sum of eight million seven hundred thousand dollars ($8,700,000) from the Highway Fund to the General Fund. The transfer shall be made on a quarterly basis by transferring one-fourth of the annual amount each quarter.

For each fiscal year following the 1991-92 fiscal year, the State Treasurer shall transfer the sum transferred the previous fiscal year plus or minus the percentage of that amount by which the total collection of State sales and use taxes increased or decreased during the previous fiscal year. In each fiscal year, the transfer shall be made on a quarterly basis by transferring one-fourth of the annual amount each quarter. (1991, c. 689, s. 322.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 6.37(e) provides: "G.S. 105-164.44D does not apply in either the 2005-2006 or 2006-2007 fiscal years."

Session Laws 2005-276, s. 46.5 is a severability clause.

§ 105-164.44E. (Effective April 1, 2003, until June 30, 2010) Transfer to the Dry-Cleaning Solvent Cleanup Fund.

At the end of each quarter, the Secretary must transfer to the Dry-Cleaning Solvent Cleanup Fund established under G.S. 143-215.104C an amount equal to fifteen percent (15%) of the net State sales and use taxes collected under G.S. 105-164.4(a)(4) during the previous fiscal year, as determined by the Secretary based on available data. (2000-19, s. 1.1.)

Editor's Note. — Session Laws 2000-19, s. 23, makes this section effective April 1, 2003 and provides for its expiration on June 30, 2010.

§ 105-164.44F. Distribution of part of telecommunications taxes to cities.

(a) Amount. — The Secretary must distribute part of the taxes imposed by G.S. 105-164.4(a)(4c) on telecommunications service and ancillary service. The Secretary must make the distribution within 75 days after the end of each calendar quarter. The amount the Secretary must distribute is the following percentages of the net proceeds of the taxes collected during the quarter:

(1) Eighteen and seventy one hundredths percent (18.70%) minus two million six hundred twenty thousand nine hundred forty-eight dollars ($2,620,948), must be distributed to cities in accordance with this section. The deduction is one-fourth of the annual amount by which the distribution to cities of the gross receipts franchise tax on telephone companies, imposed by former G.S. 105-20, was required to be reduced beginning in fiscal year 1995-96 as a result of the "freeze deduction."

(2) Seven and seven tenths percent (7.7%) must be distributed to counties and cities as provided in G.S. 105-164.44I.

(b) Share of Cities Incorporated on or After January 1, 2001. — The share of a city incorporated on or after January 1, 2001, is its per capita share of the amount to be distributed to all cities incorporated on or after this date. This amount is the proportion of the total to be distributed under this section that is the same as the proportion of the population of cities incorporated on or after January 1, 2001, compared to the population of all cities. In making the distribution under this subsection, the Secretary must use the most recent annual population estimates certified to the Secretary by the State Budget Officer.

(c) Share of Cities Incorporated Before January 1, 2001. — The share of a city incorporated before January 1, 2001, is its proportionate share of the amount to be distributed to all cities incorporated before this date. A city's proportionate share for a quarter is based on the amount of telephone gross receipts franchise taxes attributed to the city under G.S. 105-116.1 for the same quarter that was the last quarter in which taxes were imposed on telephone companies under repealed G.S. 105-120. The amount to be distributed to all cities incorporated before January 1, 2001, is the amount determined under subsection (a) of this section, minus the amount distributed under subsection (b) of this section.

The following changes apply when a city incorporated before January 1, 2001, alters its corporate structure. When a change described in subdivision (2) or (3) occurs, the resulting cities are considered to be cities incorporated before January 1, 2001, and the distribution method set out in this subsection rather than the method set out in subsection (b) of this section applies:

(1) If a city dissolves and is no longer incorporated, the proportional shares of the remaining cities incorporated before January 1, 2001, must be recalculated to adjust for the dissolution of that city.

(2) If two or more cities merge or otherwise consolidate, their proportional shares are combined.

(3) If a city divides into two or more cities, the proportional share of the city that divides is allocated among the new cities on a per capita basis.

(d) Share of Cities Served by a Telephone Membership Corporation. — The share of a city served by a telephone membership corporation, as described in Chapter 117 of the General Statutes, is computed as if the city was incorporated on or after January 1, 2001, under subsection (b) of this section. If a city is served by a telephone membership corporation and another provider, then its per capita share under this subsection applies only to the population of the area served by the telephone membership corporation.

(e) Ineligible Cities. — An ineligible city is disregarded for all purposes under this section. A city incorporated on or after January 1, 2000, is not eligible for a distribution under this section unless it meets both of the following requirements:

(1) It is eligible to receive funds under G.S. 136-41.2.

(2) A majority of the mileage of its streets is open to the public.

(f) Nature. — The General Assembly finds that the revenue distributed under this section is local revenue, not a State expenditure, for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold the distribution. (2001-424, s. 34.25(b); 2001-430, s. 10; 2001-487, s. 67(d); 2002-120, s. 4; 2004-203, s. 5(g); 2005-276, s. 33.19; 2005-435, s. 34(c); 2006-33, s. 8; 2006-66, ss. 24.1(d), (e), (f), (g); 2006-151, s. 7; 2007-145, s. 9(a); 2007-323, ss. 31.2(a), (b).)

Editor's Note. — Session Laws 2001-424, s. 34.25(b) amends subsection (a) of this section, as enacted by House Bill 571, contingent on House Bill 571 becoming law on or before January 1, 2002. House Bill 571 is Session Laws 2001-430, effective January 1, 2002.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 24.1(d), which had amended subsection (a) by substituting "(18.70%)" for "(18.03%)" and making related changes, was contingent on House Bill 2047, 2005 General Assembly (2006-151) not becoming law. Session Laws 2006-151 did become law, so session laws 2006-66, s. 24.1(d) did not take effect.

Session Laws 2006-66, s. 24.1(e), which had amended subsection (a) by substituting "(19.42%)" for "(18.70%)" and made related changes, was contingent on House Bill 2047, 2005 General Assembly (2006-151) not becoming law. Since Session Laws 2006-151 did become law, S.L. 2006-66, s. 24.1(e) was not given effect. Session Laws 2006-66, s. 24.1(e), was repealed by Session Laws 2007-323, s. 31.2(a), effective July 31, 2007.

Session Laws 2006-66, s. 24.1(g), as amended by Session Laws 2007-145, s. 9(a), effective August 1, 2007, and applicable to taxes collected on or after that date, had substituted "Nineteen and forty-two one-hundredths percent (19.42%)" for "Eighteen and seventy one hundredths percent (18.70%)" in subdivision (a)(1); and had substituted "Eight percent (8%)" for "Seven and seven tenths percent (7.7%)" in subdivision (a)(2). Session Laws 2006-66, s. 24.1(g), was repealed by Session Laws 2007-323, s. 31.2(a), (b), effective July 31, 2007, and the amendments to this section have therefore not been given effect.

Session Laws 2006-151, s. 20, is a severability clause.

Session Laws 2007-323, s. 31.2(d), as added by Session Laws 2007-345, s. 14.9(a) provides: "A retailer is not liable for an over-collection or under-collection of sales tax if the retailer has made a good faith effort to comply with the law and collect the proper amount of tax and has, due to the change in the rate of tax imposed under this section, over-collected or under-collected the amount of sales tax that is due. This subsection applies only to the period beginning August 1, 2007, and ending September 1, 2007."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 33.19, effective October 1, 2005, substituted "eighteen and three one-hundredths percent (18.03%)" for "eighteen and twenty-six hundredths percent (18.26%)" in subsection (a).

Session Laws 2005-435, s. 34.(c), effective January 1, 2006, made a minor stylistic change in subdivision (e)(2).

Session Laws 2006-33, s. 8, effective January 1, 2007, inserted "service and ancillary" preceding "service" in the first sentence of subsection (a).

Session Laws 2006-66, s. 24.1(f), as amended by Session Laws 2007-323, s. 31.2(b), effective January 1, 2007, and applicable to taxes collected on or after that date, substituted "eighteen and seventy one-hundredths percent (18.70%)" for "eighteen and three one hundredths percent (18.03%)" in the first sentence of subdivision (a)(1); and in subdivision (a)(2), substituted "seven-tenths" for "twenty three one hundredths" and "(7.7%)" for "(7.23%)."

Session Laws 2006-151, s. 7, effective January 1, 2007, and applicable to the distribution made within 75 days after March 31, 2007, for the quarter starting January 1, 2007, in the introductory paragraph of subsection (a), deleted "to the cities" following "The secretary must distribute" near the beginning, substituted "the following percentages" for "eighteen and three one-hundredths percent (18.03%)", and made minor punctuation changes; in subdivision (a)(1), added "Eighteen and three one-hundredths percent (18.03%)," to the beginning of the first sentence, substituted "($2,620,948), must be distributed to cities in accordance with this section." for "($2,620,948)." at the end of the first sentence, substituted " The" for "This" at the beginning of the second sentence, and deleted the third sentence; added subdivision (a)(2).

§ 105-164.44G. Distribution of part of tax on modular homes.

The Secretary must distribute to counties twenty percent (20%) of the taxes collected under G.S. 105-164.4(a)(8) on modular homes. The Secretary must make the distribution on a monthly basis in accordance with the distribution formula in G.S. 105-520 by including the taxes on modular homes with local tax revenue that is not attributable to a particular county. (2003-400, s. 16.)

§ 105-164.44H. Transfer to State Public School Fund.

Each fiscal year, the Secretary of Revenue shall transfer at the end of each quarter from the State sales and use tax net collections received by the Department of Revenue under Article 5 of Chapter 105 of the General Statutes to the State Treasurer for the State Public School Fund, one-fourth of the amount transferred the preceding fiscal year plus or minus the percentage of that amount by which the total collection of State sales and use taxes increased or decreased during the preceding fiscal year. (2005-276, s. 7.51(b).)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 7.51(c), as amended by Session Laws 2005-345, s. 7, and as amended by Session Laws 2006-66, s. 7.20(b), provides: "Notwithstanding the provisions of G.S. 105-164.44H, for the 2006-2007 fiscal year, the amount transferred to the State Public School Fund each quarter shall equal one-fourth of the amount refunded under G.S. 105-164.14(c)(2b) and (2c) during the 2005-2006 fiscal year for State sales and use taxes only plus or minus the percentage of that amount by which the total collection of State sales and use tax increased or decreased during the preceding fiscal year. The remainder of this section becomes effective July 1, 2005, and applies to sales made on or after that date."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

§ 105-164.44I. Distribution of part of sales tax on video programming service and telecommunications service to counties and cities.

(a) Distribution. — The Secretary must distribute to the counties and cities part of the taxes imposed by G.S. 105-164.4(a)(4c) on telecommunications service and G.S. 105-164.4(a)(6) on video programming service. The Secretary must make the distribution within 75 days after the end of each calendar quarter. The amount the Secretary must distribute is the sum of the revenue listed in this subsection. The Secretary must distribute two million dollars ($2,000,000) of this amount in accordance with subsection (b) of this section and the remainder in accordance with subsections (c) and (d) of this section. The revenue to be distributed under this section consists of the following:

(1) The amount specified in G.S. 105-164.44F(a)(2).
(2) Twenty three and six tenths percent (23.6%) of the net proceeds of the taxes collected during the quarter on video programming, other than on direct-to-home satellite service.
(3) Thirty-seven and one tenths percent (37.1%) of the net proceeds of the taxes collected during the quarter on direct-to-home satellite service.

(b) Supplemental PEG Support. — The Secretary must include the applicable amount of supplemental PEG channel support in each quarterly distribution to a county or city. The amount to include is one-fourth of twenty-five thousand dollars ($25,000) for each qualifying PEG channel operated by the county or city. The amount of money distributed under this subsection may not exceed two million dollars ($2,000,000) in a fiscal year. If the amount to be distributed for qualifying PEG channels in a fiscal year would otherwise exceed this maximum amount, the Secretary must proportionately reduce the applicable amount distributable for each PEG channel. If the amount to be distributed for qualifying PEG channels in a fiscal year is less than two million dollars ($2,000,000), the Secretary must credit the excess amount to the PEG Channel Fund established in G.S. 66-359.

A county or city must certify to the Secretary by July 15 of each year the number of qualifying PEG channels it operates. A qualifying PEG channel is one that meets the programming requirements under G.S. 66-357(d). A county or city may not receive PEG channel support under this subsection for more than three qualifying PEG channels.

The amount included under this subsection in a distribution to a county or city is intended to supplement the PEG channel support available in the amount distributed under this section. The money distributed to a county or city under this subsection must be used by it for the operation and support of PEG channels. For purposes of this subsection, the term "PEG channel" has the same meaning as in G.S. 66-350.

(c) 2006-2007 Fiscal Year Distribution. — The share of a county or city is its proportionate share of the amount to be distributed to all counties and cities under this subsection. The proportionate share of a county or city is the base amount for the county or city compared to the base amount for all other counties and cities. The base amount of a county or city that did not impose a cable franchise tax under G.S. 153A-154 or G.S. 160A-214 before July 1, 2006, is two dollars ($2.00) times the most recent annual population estimate for that county or city. The base amount of a county or city that imposed a cable franchise tax under either G.S. 153A-154 or G.S. 160A-214 before July 1, 2006, is the amount of cable franchise tax and subscriber fee revenue the county or city certifies to the Secretary that it imposed during the first six months of the 2006-2007 fiscal year. A county or city must make this certification by March 15, 2007. The certification must specify the amount of revenue that is derived from the cable franchise tax and the amount that is derived from the subscriber fee.

(c1) Revised Certification. — If a county or city determines that the amount of cable franchise tax it imposed during the first six months of the 2006-2007 fiscal year differs from the amount certified to the Secretary under subsection (c) of this section, the county or city may submit a new certification to the Secretary revising the amount. For distributions for quarters beginning on or after October 1, 2007, the Secretary must determine the proportionate share of a county or city based upon certifications submitted on or before October 1, 2007. For distributions for quarters beginning on or after April 1, 2008, the Secretary must determine the proportionate share of a county or city based upon certifications submitted on or before April 1, 2008. Certifications submitted after April 1, 2008, may not be used toad just a county's or city's base amount under subsection (c) of this section.

(d) Subsequent Distributions. — For subsequent fiscal years, the Secretary must multiply the amount of a county's or city's share under this section for the preceding fiscal year by the percentage change in its population for that fiscal year and add the result to the county's or city's share for the preceding fiscal year to obtain the county's or city's adjusted amount. Each county's or city's proportionate share for that year is its adjusted amount compared to the sum of the adjusted amounts for all counties and cities.

(e) Use of Proceeds. — A county or city that imposed subscriber fees during the first six months of the 2006-2007 fiscal year must use a portion of the funds distributed to it under subsections (c) and (d) of this section for the operation and support of PEG channels. The amount of funds that must be used for PEG channel operation and support is two times the amount of subscriber fee revenue the county or city certified to the Secretary that it imposed during the first six months of the 2006-2007 fiscal year. A county or city that used part of its franchise tax revenue in fiscal year 2005-2006 for the operation and support of PEG channels or a publicly owned and operated television station must use the funds distributed to it under subsections (c) and (d) of this section to continue the same level of support for the PEG channels and public stations. The remainder of the distribution may be used for any public purpose.

(f) Late Information. — A county or city that does not submit information that the Secretary needs to make a distribution by the date the information is due is excluded from the distribution. If the county or city later submits the required information, the Secretary must include the county or city in the distribution for the quarter that begins after the date the information is received.

(g) Population Determination. — In making population determinations under this section, the Secretary must use the most recent annual population estimates certified to the Secretary by the State Budget Officer. For purposes of the distributions made under this section, the population of a county is the population of its unincorporated areas plus the population of an ineligible city in the county, as determined under this section.

(h) City Changes. — The following changes apply when a city alters its corporate structure or incorporates:

(1) If a city dissolves and is no longer incorporated, the proportional shares of the remaining counties and cities must be recalculated to adjust for the dissolution of that city.

(2) If two or more cities merge or otherwise consolidate, their proportional shares are combined.

(3) If a city divides into two or more cities, the proportional share of the city that divides is allocated among the new cities on a per capita basis.

(4) If a city incorporates after January 1, 2007, and the incorporation is not addressed by subdivisions (2) or (3) of this subsection, the share of the county in which the new city is located is allocated between the county and the new city on a per capita basis.

(i) Ineligible Cities. — An ineligible city is disregarded for all purposes under this section. A city incorporated on or after January 1, 2000, is not eligible for a distribution under this section unless it meets both of the following requirements:

(1) It is eligible to receive funds under G.S. 136-41.2.

(2) A majority of the mileage of its streets is open to the public.

(j) Nature. — The General Assembly finds that the revenue distributed under this section is local revenue, not a State expenditure, for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold the distribution. (2006-151, s. 8; 2006-66, ss. 24.1(h), (i); 2007-145, s. 9(a); 2007-323, ss. 31.2(a), (b); 2007-527, s. 28.)

Editor's Note. — Session Laws 2006-151, s. 22, makes this section effective January 1, 2007, and applicable to the distribution made within 75 days after March 31, 2007, for the quarter starting January 1, 2007.

G.S. 160A-214, referred to in subsection (c), was repealed by Session Laws 2006-151, s. 13, effective January 1, 2007.

G.S. 153A-154, referred to in subsection (c), was repealed by Session Laws 2006-151, s. 11, effective January 1, 2007.

Session Laws 2006-66, s. 24.1(i), as amended by Session Laws 2007-145, s. 9(a), effective August 1, 2007, and applicable to taxes collected on or after that date, had substituted "Twenty-five percent (25%)" for "Twenty three and six tenths percent (23.6%)" in subdivision (a)(2); and in subdivision (a)(3), had substituted "five tenths" for "one tenths" and "(37.5%)" for "(37.1%)." Session Laws 2006-66, s. 24.1(g), was repealed by Session Laws 2007-323, s. 31.2(a), (b), effective July 31, 2007, and the amendments to this section have therefore not been given effect.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-151, s. 16, provides: "To make the distribution required under G.S. 105-164.44I(b), as enacted by this act, for the 2006-2007 fiscal year, a county or city must certify to the Secretary of Revenue by March 15, 2007, the number of qualifying PEG channels it operates."

Session Laws 2006-151, s. 20, is a severability clause.

Session Laws 2007-323, s. 31.2(d), as added by Session Laws 2007-345, s. 14.9(a) provides: "A retailer is not liable for an over-collection or under-collection of sales tax if the retailer has made a good faith effort to comply with the law and collect the proper amount of tax and has, due to the change in the rate of tax imposed under this section, over-collected or under-collected the amount of sales tax that is due. This subsection applies only to the period beginning August 1, 2007, and ending September 1, 2007."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 24.1(h), as amended by Session Laws 2007-323, s. 31.2(b), effective January 1, 2007, and applicable to taxes collected on or after that date, substituted "Twenty-three and six tenths percent (23.6%)" for "Twenty-two and sixty-one one-hundredths percent (22.61%)" in subdivision (a)(2); in subdivision (a)(3), added "and one-tenths" preceding "percent" and substituted "(37.1%)" for "(37%)."

Session Laws 2007-527, s. 28, effective August 31, 2007, added subsection (c1).

CASE NOTES

Tax Does Not Violate Supremacy Clause. — Session Laws 2006-151, § 8, does not violate the supremacy clause of U.S. Const., Art. VI because: (1) 47 U.S.C. § 548(b), 17 U.S.C. § 122, and 47 U.S.C. § 341(a) do not mandate equal tax treatment by states of satellite and cable operators; and (2) 47 U.S.C. § 152 expressly permits state taxation of satellite operators, and authorizes the transfer by states of collected funds to local governments. Directv, Inc. v. Tolson, 498 F. Supp. 2d 784, 2007 U.S. Dist. LEXIS 55774 (E.D.N.C. 2007).

Tax Does Not Violate Commerce Clause. — In requiring satellite operators and cable operators to pay the same amount in sales taxes, Session Laws 2006-151, § 8, does not violate the commerce clause of U.S. Const., Art. I, because the dormant commerce clause does not forbid cable operators from receiving rights-of-way without making additional payments. Directv, Inc. v. Tolson, 498 F. Supp. 2d 784, 2007 U.S. Dist. LEXIS 55774 (E.D.N.C. 2007).

Satellite Operators Lacked Standing to Challenge Tax. — Although satellite operators argued that enforcement of Session Laws 2006-151, § 8, would subsidize cable operators' cost of doing business, the alleged subsidy did not exist because obtaining rights-of-way was never a cost of a cable operator's business in North Carolina. Directv, Inc. v. Tolson, 498 F. Supp. 2d 784, 2007 U.S. Dist. LEXIS 55774 (E.D.N.C. 2007).

Federal Court Review of Constitutional Challenges Precluded on Grounds of Comity. — Satellite operators that sought: (1) a declaratory judgment that Session Laws 2006-151, § 8, violated the commerce and supremacy clauses of U.S. Const., Arts. I and VI; and (2) an injunction prohibiting enforcement of Session Laws 2006-151, § 8, could not pursue their claims because the Tax Injunction Act, 28 U.S.C. § 1341, prohibited the court from enjoining or altering tax collection and principles of comity precluded the court from requiring local governments to levy franchise fees on cable operators. Directv, Inc. v. Tolson, 498 F. Supp. 2d 784, 2007 U.S. Dist. LEXIS 55774 (E.D.N.C. 2007).

Division IX. Local Option Sales and Use Taxes.

§§ 105-164.45 through 105-164.58: Repealed by Session Laws 1971, c. 77, s. 1.

Cross References. — As to local government sales and use taxes, see G.S. 105-463 through 105-474.

§§ 105-165 through 105-176: Repealed by Session Laws 1957, c. 1340, s. 5.

§§ 105-177, 105-178: Repealed by Session Laws 1951, c. 643, s. 5.

§ 105-179: Repealed by Session Laws 1957, c. 1340, s. 5.

§ 105-180: Repealed by Session Laws 1951, c. 643, s. 5.

§ 105-181: Repealed by Session Laws 1957, c. 1340, s. 5.

§ 105-182: Repealed by Session Laws 1955, c. 1350, s. 19.

§§ 105-183 through 105-187: Repealed by Session Laws 1957, c. 1340, s. 5.

Article 5A.

North Carolina Highway Use Tax.

§ 105-187.1. Definitions.

The following definitions and the definitions in G.S. 105-164.3 apply to this Article:

(1) Commissioner. — The Commissioner of Motor Vehicles.

(2) Division. — The Division of Motor Vehicles, Department of Transportation.
(3) Long-term lease or rental. — A lease or rental made under a written agreement to lease or rent property to the same person for a period of at least 365 continuous days.
(4) Recreational vehicle. — Defined in G.S. 20-4.01.
(5) Rescue squad. — An organization that provides rescue services, emergency medical services, or both.
(6) Retailer. — A retailer as defined in G.S. 105-164.3 who is engaged in the business of selling, leasing, or renting motor vehicles.
(7) Short-term lease or rental. — A lease or rental that is not a long-term lease or rental. (1989, c. 692, s. 4.1; 1991, c. 79, s. 4; 2000-173, s. 10(a); 2001-424, s. 34.24(e); 2001-497, s. 2(b); 2002-72, s. 19(a).)

Editor's Note. — Session Laws 2003-383, s. 4, provides: "The General Assembly reaffirms its intent that the proceeds of the issuance of any bonds pursuant to the Highway Bond Act of 1996, Chapter 590 of the 1995 Session Laws, shall be used only for the purposes stated in that act, and for no other purpose."

§ 105-187.2. Highway use tax imposed.

A tax is imposed on the privilege of using the highways of this State. This tax is in addition to all other taxes and fees imposed. (1989, c. 692, s. 4.1.)

§ 105-187.3. Rate of tax.

(a) Amount. — The rate of the use tax imposed by this Article is three percent (3%) of the retail value of a motor vehicle for which a certificate of title is issued. The tax is payable as provided in G.S. 105-187.4. The maximum tax is one thousand dollars ($1,000) for each certificate of title issued for a Class A or Class B motor vehicle that is a commercial motor vehicle, as defined in G.S. 20-4.01. The maximum tax is one thousand five hundred dollars ($1,500) for each certificate of title issued for a recreational vehicle that is not subject to the one thousand dollar ($1,000) maximum tax.

(b) Retail Value. — The retail value of a motor vehicle for which a certificate of title is issued because of a sale of the motor vehicle by a retailer is the sales price of the motor vehicle, including all accessories attached to the vehicle when it is delivered to the purchaser, less the amount of any allowance given by the retailer for a motor vehicle taken in trade as a full or partial payment for the purchased motor vehicle. The retail value of a motor vehicle for which a certificate of title is issued because of a sale of the motor vehicle by a seller who is not a retailer is the market value of the vehicle, less the amount of any allowance given by the seller for a motor vehicle taken in trade as a full or partial payment for the purchased motor vehicle. A transaction in which two parties exchange motor vehicles is considered a sale regardless of whether either party gives additional consideration as part of the transaction. The retail value of a motor vehicle for which a certificate of title is issued because of a reason other than the sale of the motor vehicle is the market value of the vehicle. The market value of a vehicle is presumed to be the value of the vehicle set in a schedule of values adopted by the Commissioner.

(c) Schedules. — In adopting a schedule of values for motor vehicles, the Commissioner shall adopt a schedule whose values do not exceed the wholesale values of motor vehicles as published in a recognized automotive reference manual. (1989, c. 692, ss. 4.1, 4.2; c. 770, s. 74.13; 1993, c. 467, s. 3; 1995, c. 349, s. 1; c. 390, s. 30; 2001-424, s. 34.24(a); 2001-497, s. 2(a).)

Editor's Note. — Session Laws 2003-5, s. 1, provides: "Notwithstanding the provisions of G.S. 105-187.5 to the contrary, a retailer that leases or rents motor vehicles and that has paid the tax on the motor vehicles imposed pursuant to G.S. 105-187.3 may elect to pay the tax imposed pursuant to G.S. 105-187.5 in addition to the taxes previously paid. This election must be submitted to the Division of Motor Vehicles and Secretary of Revenue in writing and must specifically identify the motor vehicles to which the election applies, the date upon which the retailer will begin to collect the additional taxes, and any additional information needed to collect the tax. An election made under this act is irrevocable and does not relieve the taxpayer of liability for a tax previously imposed. An election under this act must be made prior to July 1, 2003."

§ 105-187.4. Payment of tax.

(a) Method. — The tax imposed by this Article must be paid to the Commissioner when applying for a certificate of title for a motor vehicle. The Commissioner may not issue a certificate of title for a vehicle until the tax imposed by this Article has been paid. The tax may be paid in cash or by check.

(b) Sale by Retailer. — When a certificate of title for a motor vehicle is issued because of a sale of the motor vehicle by a retailer, the applicant for the certificate of title must attach a copy of the bill of sale for the motor vehicle to the application. A retailer who sells a motor vehicle may collect from the purchaser of the vehicle the tax payable upon the issuance of a certificate of title for the vehicle, apply for a certificate of title on behalf of the purchaser, and remit the tax due on behalf of the purchaser. If a check submitted by a retailer in payment of taxes collected under this section is not honored by the financial institution upon which it is drawn because the retailer's account did not have sufficient funds to pay the check or the retailer did not have an account at the institution, the Division may suspend or revoke the license issued to the retailer under Article 12 of Chapter 20 of the General Statutes. (1989, c. 692, s. 4.1; 1991, c. 193, s. 1.)

§ 105-187.5. Alternate tax for those who rent or lease motor vehicles.

(a) Election. — A retailer may elect not to pay the tax imposed by this Article at the rate set in G.S. 105-187.3 when applying for a certificate of title for a motor vehicle purchased by the retailer for lease or rental. A retailer who makes this election shall pay a tax on the gross receipts of the lease or rental of the vehicle. Like the tax imposed by G.S. 105-187.3, this alternate tax is a tax on the privilege of using the highways of this State. The tax is imposed on a retailer, but is to be added to the lease or rental price of a motor vehicle and thereby be paid by the person who leases or rents the vehicle.

(b) Rate. — The tax rate on the gross receipts from the short-term lease or rental of a motor vehicle is eight percent (8%) and the tax rate on the gross receipts from the long-term lease or rental of a motor vehicle is three percent (3%). Gross receipts does not include the amount of any allowance given for a motor vehicle taken in trade as a partial payment on the lease or rental price. The maximum tax in G.S. 105-187.3(a) on certain motor vehicles applies to a continuous lease or rental of such a motor vehicle to the same person.

(c) Method. — A retailer who elects to pay tax on the gross receipts of the lease or rental of a motor vehicle shall make this election when applying for a certificate of title for the vehicle. To make the election, the retailer shall complete a form provided by the Division giving information needed to collect the alternate tax based on gross receipts. Once made, an election is irrevocable.

(d) Administration. — The Division shall notify the Secretary of Revenue of a retailer who makes the election under this section. A retailer who makes this election shall report and remit to the Secretary the tax on the gross receipts of the lease or rental of the motor vehicle. The Secretary shall administer the tax imposed by this section on gross receipts in the same manner as the tax levied under G.S. 105-164.4(a)(2). The administrative provisions and powers of the Secretary that apply to the tax levied under G.S. 105-164.4(a)(2) apply to the tax imposed by this section. In addition, the Division may request the Secretary to audit a retailer who elects to pay tax on gross receipts under this section. When the Secretary conducts an audit at the request of the Division, the Division shall reimburse the Secretary for the cost of the audit, as determined by the Secretary. In conducting an audit of a retailer under this section, the Secretary may audit any sales of motor vehicles made by the retailer. (1989, c. 692, s. 4.1; 1991, c. 79, s. 5; c. 193, s. 3; 1995, c. 410, s. 1; 2000-173, s. 10(b); 2001-424, s. 34.24(b); 2001-497, s. 2(c).)

Editor's Note. — Session Laws 2003-5, s. 1, provides: "Notwithstanding the provisions of G.S. 105-187.5 to the contrary, a retailer that leases or rents motor vehicles and that has paid the tax on the motor vehicles imposed pursuant to G.S. 105-187.3 may elect to pay the tax imposed pursuant to G.S. 105-187.5 in addition to the taxes previously paid. This election must be submitted to the Division of Motor Vehicles and Secretary of Revenue in writing and must specifically identify the motor vehicles to which the election applies, the date upon which the retailer will begin to collect the additional taxes, and any additional information needed to collect the tax. An election made under this act is irrevocable and does not relieve the taxpayer of liability for a tax previously imposed. An election under this act must be made prior to July 1, 2003."

§ 105-187.6. Exemptions from highway use tax.

(a) Full Exemptions. — The tax imposed by this Article does not apply when a certificate of title is issued as the result of a transfer of a motor vehicle:

(1) To the insurer of the motor vehicle under G.S. 20-109.1 because the vehicle is a salvage vehicle.

(2) To either a manufacturer, as defined in G.S. 20-286, or a motor vehicle retailer for the purpose of resale.

(3) To the same owner to reflect a change or correction in the owner's name.

(3a) To one or more of the same co-owners to reflect the removal of one or more other co-owners, when there is no consideration for the transfer.

(4) By will or intestacy.

(5) By a gift between a husband and wife, a parent and child, or a stepparent and a stepchild.

(6) By a distribution of marital or divisible property incident to a marital separation or divorce.

(7) To a handicapped person from the Department of Health and Human Services after the vehicle has been equipped by the Department for use by the handicapped.

(8) To a local board of education for use in the driver education program of a public school when the motor vehicle is transferred:
   a. By a retailer and is to be transferred back to the retailer within 300 days after the transfer to the local board.
   b. By a local board of education.

(9) To a volunteer fire department or volunteer rescue squad that is not part of a unit of local government, has no more than two paid employees, and is exempt from State income tax under G.S. 105-130.11, when the motor vehicle is one of the following:
   a. A fire truck, a pump truck, a tanker truck, or a ladder truck used to suppress fire.
   b. A four-wheel drive vehicle intended to be mounted with a water tank and hose and used for forest fire fighting.

c. An emergency services vehicle.

(b) Partial Exemptions. — A maximum tax of forty dollars ($40.00) applies when a certificate of title is issued as the result of a transfer of a motor vehicle:

(1) To a secured party who has a perfected security interest in the motor vehicle.

(2) To a partnership, limited liability company, corporation, trust, or other person where no gain or loss arises on the transfer of the motor vehicle under section 351 or section 721 of the Code, or because the transfer is treated under the Code as being to an entity that is not a separate entity from its owner or whose separate existence is otherwise disregarded, or to a partnership, limited liability company, or corporation by merger, conversion, or consolidation in accordance with applicable law.

(c) Out-of-state Vehicles. — A maximum tax of one hundred fifty dollars ($150.00) applies when a certificate of title is issued for a motor vehicle that, at the time of applying for a certificate of title, is and has been titled in another state for at least 90 days. (1989, c. 692, s. 4.1; c. 770, ss. 74.9, 74.10; 1991, c. 193, s. 4; c. 689, s. 323; 1993, c. 467, s. 1; 1995, c. 390, s. 31; 1997-443, s. 11A.118(a); 1998-98, s. 15.1; 1999-369, s. 5.9; 2000-140, s. 68; 2001-387, s. 151; 2001-424, s. 34.24(d); 2001-487, s. 68.)

§ 105-187.7. Credits.

(a) Tax Paid in Another State. — A person who, within 90 days before applying for a certificate of title for a motor vehicle on which the tax imposed by this Article is due, has paid a sales tax, an excise tax, or a tax substantially equivalent to the tax imposed by this Article on the vehicle to a taxing jurisdiction outside this State is allowed a credit against the tax due under this Article for the amount of tax paid to the other jurisdiction.

(b) Tax Paid Within One Year. — A person who applies for a certificate of title for a motor vehicle that is titled in another state but was formerly titled in this State is allowed a credit against the tax due under this Article for the amount of tax paid under this Article by that person on the same vehicle within one year before the application for a certificate of title. (1989, c. 692, s. 4.1; 1995, c. 390, s. 32; c. 512, s. 1.)

§ 105-187.8. Refund for return of purchased motor vehicle.

When a purchaser of a motor vehicle returns the motor vehicle to the seller of the motor vehicle within 90 days after the purchase and receives a vehicle replacement for the returned vehicle or a refund of the price paid the seller, whether from the seller or the manufacturer of the vehicle, the purchaser may obtain a refund of the privilege tax paid on the certificate of title issued for the returned motor vehicle.

To obtain a refund, the purchaser must apply to the Division for a refund within 30 days after receiving the replacement vehicle or refund of the purchase price. The application must be made on a form prescribed by the Commission and must be supported by documentation from the seller of the returned vehicle. (1989, c. 692, s. 4.1; 1995, c. 390, s. 33.)

§ 105-187.9. Disposition of tax proceeds.

(a) Distribution. — Taxes collected under this Article at the rate of eight percent (8%) shall be credited to the General Fund. Taxes collected under this Article at the rate of three percent (3%) shall be credited to the North Carolina Highway Trust Fund.

(b) Transfer. — In each fiscal year the State Treasurer shall transfer the amounts provided below from the taxes deposited in the Trust Fund to the General Fund. The transfer of funds authorized by this section may be made by transferring one-fourth of the amount at the end of each quarter in the fiscal year or by transferring the full amount annually on July 1 of each fiscal year, subject to the availability of revenue.

(1) The sum of one hundred seventy million dollars ($170,000,000).

(2) In addition to the amount transferred under subdivision (1) of this subsection, the sum of one million seven hundred thousand dollars ($1,700,000) shall be transferred in the 2001-2002 fiscal year. The amount distributed under this subdivision shall increase in the 2002-2003 fiscal year to the sum of two million four hundred thousand dollars ($2,400,000). In each fiscal year thereafter, the sum transferred under this subdivision shall be the amount distributed in the previous fiscal year plus or minus a percentage of this sum equal to the percentage by which tax collections under this Article increased or decreased for the most recent 12-month period for which data are available. (1989, c. 692, s. 4.1; c. 799, s. 33; 1993, c. 321, s. 164(a); 2001-424, s. 34.24(c); 2001-513, s. 15.)

Editor's Note. — Session Laws 2003-284, s. 2.2(j), provides: "When the Highway Trust Fund was created in 1989, the revenue from the sales tax on motor vehicles was transferred from the General Fund to the Highway Trust Fund. To offset this loss of revenue from the General Fund, the Highway Trust Fund was required to transfer one hundred seventy million dollars ($170,000,000) to the General Fund each year, an amount equal to the revenue in 1989 from the sales tax on motor vehicles. This transfer did not, however, make the General Fund whole after the transfer of the sales tax revenue because no provision has been made to adjust the amount for the increased volume of transactions and increased vehicle prices. The additional funds transferred from the Highway Trust Fund to the General Fund by this act is an effort to recover a portion of the sales tax revenues that would have gone to the General Fund over the last 14 years.

"In addition to the transfer authorized under G.S. 105-187.9(b)(2), and notwithstanding Section 26.14 of S.L. 2002-126 and G.S. 105-187.9(b)(1), the sum to be transferred to the General Fund for fiscal year 2003-2004 is two hundred fifty million dollars ($250,000,000) and for fiscal year 2004-2005 is two hundred forty million dollars ($240,000,000). Any funds transferred from the Highway Trust Fund to the General Fund in addition to the transfer authorized by G.S. 105-187.9(b) shall be fully repaid to the Highway Trust Fund in five years beginning in the 2004-2005 fiscal year, using the sum of the digits formula, according to the following repayment schedule: FY 2004-2005 — 7%, FY 2005-2006 — 13%, FY 2006-2007 — 20%, FY 2007-2008 — 27%, and FY 2008-2009 — 33%. The repayment each year shall include interest at the net rate of return generated by the State Treasurer's Short Term Investment Fund."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2005-276, s. 2.2(f), as amended by Session Laws 2006-66, s.2.2(e), provides: "Notwithstanding G.S. 105-187.9(b)(1), the sum to be transferred under that subdivision for the 2005-2006 fiscal year is two hundred fifty million dollars ($250,000,000) and for the 2006-2007 fiscal year is fifty-five million dollars ($55,000,000)."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 2.2(f), provides: "Pursuant to G.S. 105-187.9(b)(2), the sum to be transferred under that subdivision for the 2006-2007 fiscal year is two million four hundred eighty-six thousand six hundred two dollars ($2,486,602)."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 2.2(d), provides: "Notwithstanding the provisions of G.S. 105-187.9(b)(1), the sum to be transferred under that subdivision for the 2007-2008 fiscal year is one hundred seventy million dollars ($170,000,000) and for the 2008-2009 fiscal year is one hundred seventy million dollars ($170,000,000)."

Session Laws 2007-323, s. 2.2(e), provides: "Pursuant to G.S. 105-187.9(b)(2), the sum to be transferred under that subdivision for the 2007-2008 fiscal year is two million five hundred thousand dollars ($2,500,000) and for the 2008-2009 fiscal year is two million five hundred thousand dollars ($2,500,000)."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 105-187.10. Penalties and remedies.

(a) Penalties. — The penalty for bad checks in G.S. 105-236(1) applies to a check offered in payment of the tax imposed by this Article. In addition, if a check offered to the Division in payment of the tax imposed by this Article is returned unpaid and the tax for which the check was offered, plus the penalty imposed under G.S. 105-236(1), is not paid within 30 days after the Commissioner demands its payment, the Commissioner may revoke the registration plate of the vehicle for which a certificate of title was issued when the check was offered.

(b) Unpaid Taxes. — The remedies for collection of taxes in Article 9 of this Chapter apply to the taxes levied by this Article and collected by the Commissioner. In applying these remedies, the Commissioner has the same authority as the Secretary.

(c) Appeals. — A taxpayer who disagrees with the presumed value of a motor vehicle must pay the tax based on the presumed value, but may appeal the value to the Commissioner. A taxpayer who appeals the value must provide two estimates of the value of the vehicle to the Commissioner. If the Commissioner finds that the value of the vehicle is less than the presumed value of the vehicle, the Commissioner shall refund any overpayment of tax made by the taxpayer with interest at the rate specified in G.S. 105-241.21 from the date of the overpayment. (1989, c. 692, s. 4.1; c. 770, s. 74.8; 2007-491, ss. 21, 44(1)b.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, ss. 21, 44(1)b., effective January 1, 2008, in subsection (b), substituted "Article 9 of this Chapter" for "G.S. 20-99" in the first sentence, and added the last sentence; and in subsection (c), substituted "G.S. 105-241.21" for "G.S. 105-241.1" in the last sentence. For applicability, see Editor's note.

§ 105-187.11: Repealed by Session Laws 2007-527, s. 30, effective August 31, 2007.

§§ 105-187.12 through 105-187.14: Reserved for future codification purposes.

Article 5B.

Scrap Tire Disposal Tax.

§ 105-187.15. Definitions.

The definitions in G.S. 105-164.3 apply to this Article, except that the term "sale" does not include lease or rental, and the following definitions apply to this Article:

(1) Scrap tire. — A tire that is no longer suitable for its original, intended purpose because of wear, damage, or defect.
(2) Tire. — A continuous solid or pneumatic rubber covering encircling a wheel. (1991, c. 221, s. 1.)

§ 105-187.16. Tax imposed.

(a) Levy. A privilege tax is imposed on a tire retailer at a percentage rate of the sales price of each new tire sold at retail by the retailer. A privilege tax is imposed on a tire retailer and on a tire wholesale merchant at a percentage rate of the sales price of each new tire sold by the retailer or wholesale merchant to a wholesale merchant or retailer for placement on a vehicle offered for sale, lease, or rental by the retailer or wholesale merchant. An excise tax is imposed on a new tire purchased for storage, use, or consumption in this State or for placement in this State on a vehicle offered for sale, lease, or rental. This excise tax is a percentage rate of the purchase price of the tire. These taxes are in addition to all other taxes.

(b) Rate. The percentage rate of the taxes imposed by subsection (a) of this section is set by the following table; the rate is based on the bead diameter of the new tire sold or purchased:

Bead Diameter of Tire	Percentage Rate
Less than 20 inches	2%
At least 20 inches	1%.

(1991, c. 221, s. 1; 1993, c. 548, s. 1; 1997-209, s. 1; 2001-414, s. 22; 2002-10, s. 1.)

Editor's Note. — Session Laws 1993, c. 548, s. 9, provided that the amendment by c. 548, s. 1 would expire June 30, 1997. Session Laws 1997-209, s. 1, changed the expiration date to June 30, 2002. Session Laws 2002-10, s. 1, repealed the expiration provision for Section 1 of Session Laws 1993, c. 548.

§ 105-187.17. Administration.

The privilege tax this Article imposes on a tire retailer who sells new tires at retail is an additional State sales tax and the excise tax this Article imposes on the storage, use, or consumption of a new tire in this State is an additional

State use tax. Except as otherwise provided in this Article, these taxes shall be collected and administered in the same manner as the State sales and use taxes imposed by Article 5 of this Chapter. As under Article 5 of this Chapter, the additional State sales tax paid when a new tire is sold is a credit against the additional State use tax imposed on the storage, use, or consumption of the same tire.

The privilege tax this Article imposes on a tire retailer and on a tire wholesale merchant who sell new tires for placement in this State on a vehicle offered for sale, lease, or rental is a tax on the wholesale sale of the tires. This tax and the excise tax this Article imposes on a new tire purchased for placement in this State on a vehicle offered for sale, lease, or rental shall, to the extent practical, be collected and administered as if they were additional State sales and use taxes. The privilege tax paid when a new tire is sold for placement on a vehicle offered for sale, lease, or rental is a credit against the use tax imposed on the purchase of the same tire for placement in this State on a vehicle offered for sale, lease, or rental. (1991, c. 221, s. 1.)

§ 105-187.18. Exemptions.

(a) The taxes imposed by this Article do not apply to:

(1) Bicycle tires and other tires for vehicles propelled by human power.
(2) Recapped tires.
(3) Tires sold for placement on newly manufactured vehicles.

(b) Except for the exemption for sales a state cannot constitutionally tax, the exemptions in G.S. 105-164.13 and the refunds allowed in G.S. 105-164.14 do not apply to the taxes imposed by this Article. (1991, c. 221, s. 1; 1991 (Reg. Sess., 1992), c. 867, s. 1; 1993, c. 364, s. 2; 2003-416, s. 19(a).)

Editor's Note. — Session Laws 1993, c. 364, s. 2, effective July 16, 1993, rewrote Session Laws 1991, c. 867, s. 2 to make the amendment by c. 867, s. 1 to G.S. 105-187.18 effective upon ratification (July 15, 1992) and to make it applicable retroactively to tires sold on or after July 1, 1991.

§ 105-187.19. Use of tax proceeds.

(a) The Secretary shall distribute the taxes collected under this Article, less the allowance to the Department of Revenue for administrative expenses, in accordance with this section. The Secretary may retain the cost of collection by the Department, not to exceed four hundred twenty-five thousand dollars ($425,000) a year, as reimbursement to the Department.

(b) Each quarter, the Secretary shall credit eight percent (8%) of the net tax proceeds to the Solid Waste Management Trust Fund and shall credit twenty-two percent (22%) of the net tax proceeds to the Scrap Tire Disposal Account. The Secretary shall distribute the remaining seventy percent (70%) of the net tax proceeds among the counties on a per capita basis according to the most recent annual population estimates certified to the Secretary by the State Budget Officer.

(c) A county may use funds distributed to it under this section only as provided in G.S. 130A-309.54. A county that receives funds under this section and that has an agreement with another unit of local government under which the other unit of local government provides for the disposal of solid waste for the county shall transfer the amount received under this section to the other unit of local government. A unit of local government to which funds are transferred is subject to the same restrictions on use of the funds as the county. (1991, c. 221, s. 1; 1993, c. 485, s. 13; c. 548, ss. 2, 8; 1997-209, ss. 1, 3; 2004-203, s. 5(h); 2007-153, s. 1; 2007-323, s. 24.2.)

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-153, s. 1, effective July 1, 2007, in subsection (b), in the first sentence, substituted "eight percent (8%)" for "five percent (5%)" and substituted "twenty-two percent (22%)" for "twenty-seven percent (27%)," and substituted "seventy percent (70%)" for "sixty eight percent (68%)" in the second sentence.

Session Laws 2007-323, s. 24.2, effective July 1, 2007, substituted "four hundred twenty-five thousand dollars ($425,000)" for "two hundred twenty five thousand dollars ($225,000)" near the end of the second sentence in subsection (a).

Article 5C.

White Goods Disposal Tax.

§ 105-187.20. Definitions.

The definitions in G.S. 105-164.3 apply to this Article, except that the term "sale" does not include lease or rental, and the following definition applies to this Article:

(1) Repealed by Session Laws 2005-435, s. 35, effective September 27, 2005.

(2) White goods. — Defined in G.S. 130A-290(a). (1993, c. 471, s. 3; 1998-24, s. 7; 2000-109, s. 9(a); 2005-435, s. 35.)

Editor's Note. — Session Laws 1993, c. 471, s. 11, as amended by Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 15.1(b), and further amended by Session Laws 1998-24, s. 7, made this section effective January 1, 1994 and provided that it would expire July 1, 2001. Session Laws 2000-109, s. 9(a), effective July 13, 2000, deleted the expiration date.

Effect of Amendments. — Session Laws 2005-435, s. 35, effective January 1, 2006, made a minor stylistic change and deleted former subdivision (1), which read: "Chlorofluorocarbon refrigerant.—Defined in G.S. 130A-290(a)."

§ 105-187.21. Tax imposed.

A privilege tax is imposed on a white goods retailer at a flat rate for each new white good that is sold by the retailer. An excise tax is imposed on a new white good purchased outside the State for storage, use, or consumption in this State. The rate of the privilege tax and the excise tax is three dollars ($3.00). These taxes are in addition to all other taxes. (1993, c. 471, s. 3; 1998-24, ss. 1, 7; 2000-109, s. 9(a).)

Editor's Note. — Session Laws 1993, c. 471, s. 11, as amended by Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 15.1(b), and further amended by Session Laws 1998-24, s. 7, made this section effective January 1, 1994 and provided that it would expire July 1, 2001. Session Laws 2000-109, s. 9(a), effective July 13, 2000, deleted the expiration date.

§ 105-187.22. Administration.

The privilege tax this Article imposes on a white goods retailer is an additional State sales tax and the excise tax this Article imposes on the storage, use, or consumption of a new white good in this State is an additional State use tax. Except as otherwise provided in this Article, these taxes shall be collected and administered in the same manner as the State sales and use taxes imposed by Article 5 of this Chapter. As under Article 5 of this Chapter, the additional State sales tax paid when a new white good is sold at retail is a credit against the additional State use tax imposed on the storage, use, or consumption of the same white good. (1993, c. 471, s. 3; 1998-24, s. 7; 2000-109, s. 9(a).)

Editor's Note. — Session Laws 1993, c. 471, s. 11, as amended by Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 15.1(b), and further amended by Session Laws 1998-24, s. 7, made this section effective January 1, 1994 and provided that it would expire July 1, 2001. Session Laws 2000-109, s. 9(a), effective July 13, 2000, deleted the expiration date.

§ 105-187.23. Exemptions and refunds.

(a) Exemptions. — Except for the exemption for sales a state cannot constitutionally tax, the exemptions in G.S. 105-164.13 do not apply to the taxes imposed by this Article.

(b) Refunds. — The refunds allowed in G.S. 105-164.14 do not apply to the taxes imposed by this Article. A person who buys at least 50 new white goods of any kind in the same sale or purchase may obtain a refund equal to sixty percent (60%) of the amount of tax imposed by this Article on the white goods when all of the white goods purchased are to be placed in new or remodeled dwelling units that are located in this State and do not contain the kind of white goods purchased. To obtain a refund, a person must file an application for a refund with the Secretary. The application must contain the information required by the Secretary, be signed by the purchaser of the white goods, and be submitted by the date set by the Secretary. (1993, c. 471, s. 3; 1998-24, s. 7; 2000-109, s. 9(a); 2003-416, s. 19(b).)

Editor's Note. — Session Laws 1993, c. 471, s. 11, as amended by Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 15.1(b), and further amended by Session Laws 1998-24, s. 7, made this section effective January 1, 1994 and provided that it would expire July 1, 2001. Session Laws 2000-109, s. 9(a), effective July 13, 2000, deleted the expiration date.

§ 105-187.24. Use of tax proceeds.

The Secretary shall distribute the taxes collected under this Article, less the Department of Revenue's allowance for administrative expenses, in accordance with this section. The Secretary may retain the Department's cost of collection, not to exceed four hundred twenty-five thousand dollars ($425,000) a year, as reimbursement to the Department.

Each quarter, the Secretary shall credit eight percent (8%) of the net tax proceeds to the Solid Waste Management Trust Fund and shall credit twenty percent (20%) of the net tax proceeds to the White Goods Management Account. The Secretary shall distribute the remaining seventy-two percent (72%) of the net tax proceeds among the counties on a per capita basis according to the most recent annual population estimates certified to the Secretary by the State Budget Officer. The Department shall not distribute the tax proceeds to a county when notified not to do so by the Department of Environment and Natural Resources under G.S. 130A-309.87. If a county is not entitled to a distribution, the proceeds allocated for that county will be credited to the White Goods Management Account.

A county may use funds distributed to it under this section only as provided in G.S. 130A-309.82. A county that receives funds under this section and that has an interlocal agreement with another unit of local government under which the other unit provides for the disposal of solid waste for the county must transfer the amount received under this section to that other unit. A unit to which funds are transferred is subject to the same restrictions on use of the funds as the county. (1993, c. 471, s. 3; 1993 (Reg. Sess., 1994), c. 769, s. 15.1(b); 1998-24, ss. 2, 7; 2000-109, s. 9(a); 2004-203, s. 5(i); 2007-323, s. 24.1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 15.1(a), effective July 1, 1994, repealed Session Laws 1993, c. 471, s. 10, which would have amended this section effective January 1, 1995.

Session Laws 1993, c. 471, s. 11, as amended by Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 15.1(b), and further amended by Session Laws 1998-24, s. 7, made this section effective January 1, 1994 and provided that it would expire July 1, 2001. Session Laws 2000-109, s. 9(a), effective July 13, 2000, deleted the expiration date.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 24.1, effective July 1, 2007, substituted "four hundred twenty-five thousand dollars ($425,000)" for "two hundred twenty five thousand dollars ($225,000)" near the end of the first paragraph.

§§ 105-187.25 through 105-187.29: Reserved for future codification purposes.

ARTICLE 5D.

Dry-Cleaning Solvent Tax.

(Repealed effective January 1, 2010)

§ 105-187.30. (Repealed effective January 1, 2010) Definitions.

The definitions in G.S. 105-164.3 apply to this Article, and the following definitions apply to this Article:

(1) Dry-cleaning facility. — Defined in G.S. 143-215.104B.
(2) Dry-cleaning solvent. — Defined in G.S. 143-215.104B. (1997-392, s. 4.)

Editor's Note. — Session Laws 1997-392, s. 8 provides in part that section 4 (which enacts Article 5D) is repealed effective January 1, 2010.

§ 105-187.31. (Repealed effective January 1, 2010) Tax imposed.

A privilege tax is imposed on a dry-cleaning solvent retailer at a flat rate for each gallon of dry-cleaning solvent sold by the retailer to a dry-cleaning facility. An excise tax is imposed on dry-cleaning solvent purchased outside the State for storage, use, or consumption by a dry-cleaning facility in this State. The rate of the privilege tax and the excise tax is ten dollars ($10.00) for each gallon of halogenated hydrocarbon-based dry-cleaning solvent and one dollar and thirty-five cents ($1.35) for each gallon of hydrocarbon-based dry-cleaning solvent. These taxes are in addition to all other taxes. (1997-392, s. 4; 2000-19, s. 1.2; 2001-265, s. 1; 2007-530, s. 13.)

Editor's Note. — Session Laws 1997-392, s. 8 provides in part that section 4 (which enacts Article 5D) is repealed effective January 1, 2010.

Session Laws 2007-530, s. 14, provides: "If the Environmental Management Commission adopts rules establishing a risk-based approach applicable to the assessment, prioritization, and remediation of dry-cleaning solvent contamination, the original notice of text for which was published at 21 N.C. Reg. 1818 (April 16, 2007); the Rules Review Commission approves these rules, including any changes incorporated as a result of public comments or Rules Review Commission requirements; and the Rules Review Commission receives 10 or more letters of objection to these rules in accordance with G.S. 150B-21.3(b2), the Environmental Management Commission, notwithstanding the requirements of G.S. 150B-21.1 and G.S. 150B-21.3, may adopt these rules as temporary rules in accordance with the temporary rule-making procedures set out in Chapter 150B of the General Statutes."

Effect of Amendments. — Session Laws 2000-19, s. 1.2, as amended by Session Laws 2001-265, s. 1, effective August 1, 2001, and expiring January 1, 2010, in the third sentence, substituted "ten dollars ($10.00)" for "five dollars and eighty-five cents ($5.85)" and "one dollar and thirty-five cents ($1.35)" for "eighty cents (80¢)."

Session Laws 2007-530, s.13, effective August 31, 2007, substituted "gallon of halogenated hydrocarbon-based dry-cleaning solvent and one dollar and thirty-five cents ($1.35) for each gallon of hydrocarbon-based dry-cleaning solvent" for "gallon of dry-cleaning solvent that is chlorine based and one dollar and thirty-five cents ($1.35) for each gallon of dry-cleaning solvent that is hydrocarbon based."

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 443.

§ 105-187.32. (Repealed effective January 1, 2010) Administration.

The privilege tax this Article imposes on a dry-cleaning solvent retailer is an additional State sales tax, and the excise tax this Article imposes on the storage, use, or consumption of dry-cleaning solvent by a dry-cleaning facility in this State is an additional State use tax. Except as otherwise provided in this Article these taxes shall be collected and administered in the same manner as the State sales and use taxes imposed by Article 5 of this Chapter. As under Article 5 of this Chapter, the additional State sales tax paid when dry-cleaning solvent is sold at retail is a credit against the additional State use tax imposed on the storage, use, or consumption of the same dry-cleaning solvent. (1997-392, s. 4.)

Editor's Note. — Session Laws 1997-392, s. 8 provides in part that section 4 (which enacts Article 5D) is repealed effective January 1, 2010.

§ 105-187.33. (Repealed effective January 1, 2010) Exemptions and refunds.

Except for the exemption for sales a state cannot constitutionally tax, the exemptions in G.S. 105-164.13 do not apply to the taxes imposed by this Article. The refunds allowed in G.S. 105-164.14 do not apply to the taxes imposed by this Article. (1997-392, s. 4; 2003-416, s. 19(c).)

Editor's Note. — Session Laws 1997-392, s. 8 provides in part that section 4 (which enacts Article 5D) is repealed effective January 1, 2010.

§ 105-187.34. (Repealed effective January 1, 2010) Use of tax proceeds.

The Secretary must credit the taxes collected under this Article, less the Department of Revenue's allowance for administrative expenses, to the Dry-Cleaning Solvent Cleanup Fund. The Secretary may retain the Department's cost of collection, not to exceed one hundred twenty-five thousand dollars ($125,000) a year, as reimbursement to the Department. (1997-392, s. 4.)

Editor's Note. — Session Laws 1997-392, s. 8 provides in part that section 4 (which enacts Article 5D) is repealed effective January 1, 2010.

Article 5D has a delayed repeal date. See note.

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§§ 105-187.35 through 105-187.39: Reserved for future codification purposes.

ARTICLE 5E.

Piped Natural Gas Tax.

§ 105-187.40. Definitions.

The definitions in G.S. 105-228.90 and the following definitions apply in this Article:

(1) Gas city. — A city in this State that operated a piped natural gas distribution system as of July 1, 1998. These cities are Bessemer City, Greenville, Kings Mountain, Lexington, Monroe, Rocky Mount, Shelby, and Wilson.

(2) Local distribution company. — A natural gas company to whom the North Carolina Utilities Commission has issued a franchise under Chapter 62 of the General Statutes to serve an area of this State.

(3) Premises. — Defined in G.S. 62-110.2. When applying the definition of premises to this Article, electric service is to be construed as piped natural gas service.

(4) Sales customer. — An end-user who does not have direct access to an interstate gas pipeline and whose piped natural gas is delivered by the seller of the gas.

(5) Transportation customer. — An end-user who does not have direct access to an interstate gas pipeline and whose piped natural gas is delivered by a person who is not the seller of the gas. (1998-22, s. 1.)

§ 105-187.41. Tax imposed on piped natural gas.

(a) Scope. — An excise tax is imposed on piped natural gas received for consumption in this State. This tax is imposed in lieu of a sales and use tax and a percentage gross receipts tax on piped natural gas.

(b) Rate. — The tax rate is set in the table below. The tax rate is based on monthly therm volumes of piped natural gas received by the end-user of the gas. If an end-user receives piped natural gas that is metered through two or more separate measuring devices, the tax is calculated separately on the volume metered through each device rather than on the total volume metered through all measuring devices, unless the devices are located on the same premises and are part of the same billing account. In that circumstance, the tax is calculated on the total volume metered through the two or more separate measuring devices.

Monthly Volume of Therms Received	Rate Per Therm
First 200	$.047
201 to 15,000	.035
15,001 to 60,000	.024
60,001 to 500,000	.015
Over 500,000	.003

(c) **(Effective until July 1, 2010 — see notes)** Gas City Exemption. — The tax imposed by this section does not apply to piped natural gas received by a gas city for consumption by that city or to piped natural gas delivered by a gas city to a sales or transportation customer of the gas city.

(c) **(Effective July 1, 2010 — see notes)** Exemptions. — The tax imposed by this section does not apply to any of the following:

G.S. 105-187.41(c) and (d) are set out multiple times. See notes.

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(1) Piped natural gas received by a gas city for consumption by that city.
(2) Piped natural gas delivered by a gas city to a sales or transportation customer of the gas city.
(3) Piped natural gas received by a manufacturer for use in connection with the operation of the manufacturing facility. To be eligible for the exemption, a person must have a manufacturer's certificate issued under G.S. 105-164.28A. A person who uses piped natural gas for an unauthorized purpose is liable for any tax due on the gas.
(4) Piped natural gas received by a farmer to be used for any farming purpose other than preparing food, heating dwellings, and other household purposes. To be eligible for the exemption, a person must have a farmer's certificate issued under G.S. 105-164.28A. A person who uses piped natural gas for an unauthorized purpose is liable for any tax due on the gas.

(d) **(Effective until July 1, 2008 — see notes)** Reduced Rate. — Piped natural gas received by a manufacturer for use in connection with the operation of a manufacturing facility or by a farmer to be used for any farming purpose other than preparing food, heating dwellings, and other household purposes is taxable at a reduced rate as provided in this subsection. To be eligible for the reduced tax rate, a person must have a manufacturer's certificate or a farmer's certificate issued under G.S. 105-164.28A. A person who uses piped natural gas for an unauthorized purpose is liable for any tax due on the gas.

Monthly Volume of Therms Received	Rate Per Therm
First 200	$.032
201 to 15,000	.024
15,001 to 60,000	.016
60,001 to 500,000	.010
Over 500,000	.002

(d) **(Effective July 1, 2008 until July 1, 2009 — see notes)** Reduced Rate. — Piped natural gas received by a manufacturer for use in connection with the operation of a manufacturing facility and by a farmer to be used for any farming purpose other than preparing food, heating dwellings, and other household purposes is taxable as provided in this subsection. To be eligible for the reduced tax rate, a person must have a manufacturer's certificate or a farmer's certificate issued under G.S. 105-164.28A. A person who uses piped natural gas for an unauthorized purpose is liable for any tax due on the gas.

Monthly Volume of Therms Received	Rate Per Therm
First 200	$.025
201 to 15,000	.019
15,001 to 60,000	.013
60,001 to 500,000	.008
Over 500,000	.002

(d) **(Effective July 1, 2009 until July 1, 2010 — see notes)** Reduced Rate. — Piped natural gas received by a manufacturer for use in connection with the operation of a manufacturing facility and by a farmer to be used for any farming purpose other than preparing food, heating dwellings, and other household purposes is taxable as provided in this subsection. To be eligible for the reduced tax rate, a person must have a manufacturer's certificate or a farmer's certificate issued under G.S. 105-164.28A. A person who uses piped natural gas for an unauthorized purpose is liable for any tax due on the gas.

G.S. 105-187.41(c) and (d) are set out multiple times. See notes.

Monthly Volume of Therms Received	Rate Per Therm
First 200	$.014
201 to 15,000	.010
15,001 to 60,000	.007
60,001 to 500,000	.004
Over 500,000	.001

(1998-22, s. 1; 2007-397, ss. 11(a)-(e).)

Subsection (c) Set Out Twice. — The first version of subsection (c) set out above is effective until July 1, 2010. The second version of subsection (c) set out above is effective July 1, 2010.

Subsection (d) Set Out Three Times. — The first version of subsection (d) set out above is effective until July 1, 2008. The second version of subsection (d) set out above is effective from July 1, 2008 until July 1, 2009. The third version of subsection (d) set out above is effective from July 1, 2009 until July 1, 2010. Subsection (d) is repealed effective July 1, 2010.

Editor's Note. — Session Laws 2007-397, s. 15, contains a severability clause.

Effect of Amendments. — Session Laws 2007-397, s. 11(a), effective October 1, 2007, and applicable to bills issued on or after that date, added subsection (d).

Session Laws 2007-397, s. 11(b), effective July 1, 2008, and applicable to bills issued on or after that date, decreased the Rate Per Therm in subsection (d) by substituting "$.025" for "$.032", ".019" for ".024", ".013" for ".016", and ".008" for ".010".

Session Laws 2007-397, s. 11(c), effective July 1, 2009 and applicable to bills issued on or after that date, decreased the Rate by Therm in subsection (d) by substituting "$.014" for "$.025", ".010" for ".019", ".007" for ".013", ".004" for ".008", and ".001" for ".002".

Session Laws 2007-397, s. 11(d), (e), effective July 1, 2010 and applicable to bills issued on or after that date, rewrote subsection (c); and repealed subsection (d).

§ 105-187.42. Liability for the tax.

The excise tax imposed by this section on piped natural gas is payable as follows:

(1) For piped natural gas delivered by a local distribution company to a sales or transportation customer, the tax is payable by the local distribution company.

(2) For piped natural gas delivered by a person who is not a local distribution company to a sales or transportation customer, the tax is payable by that person.

(3) For piped natural gas received by a person by means of direct access to an interstate gas pipeline for consumption by that person, the tax is payable by that person. (1998-22, s. 1.)

§ 105-187.43. Payment of the tax.

(a) Payment. — The tax imposed by this Article is payable monthly. A monthly payment is due by the 20th day of the month following the calendar month in which liability for the tax accrues. The tax imposed by this Article on piped natural gas delivered to a sales or transportation customer accrues when the gas is delivered. The tax payable on piped natural gas received by a person who has direct access to an interstate pipeline for consumption by that person accrues when the gas is received.

(b) Prepayment. — A taxpayer who is consistently liable for at least ten thousand dollars ($10,000) of tax a month must make a monthly prepayment of the next month's tax liability. This requirement applies when the taxpayer meets the threshold and the Secretary notifies the taxpayer to make prepayments. A prepayment is due on the date a monthly payment is due. The prepayment must equal at least sixty-five percent (65%) of any of the following:

(1) The amount of tax due for the current month.
(2) The amount of tax due for the same month in the preceding year.
(3) The average monthly amount of tax due in the preceding calendar year.

(c) Return. — A return is due quarterly. A quarterly return covers a calendar quarter and is due by the last day of the month that follows the quarter covered by the return. (1998-22, s. 1; 1999-337, s. 32(a); 2001-427, s. 6(f); 2006-33, s. 13.)

Effect of Amendments. — Session Laws 2006-33, s. 13, effective October 1, 2007, rewrote subsections (a) and (b).

§ 105-187.44. Distribution of part of tax proceeds to cities.

(a) City Information. — A quarterly return filed under this Article must indicate the amount of tax attributable to the following:
(1) Piped natural gas delivered during the quarter to sales or transportation customers in each city in the State.
(2) Piped natural gas received during the quarter in each city in the State by persons who have direct access to an interstate gas pipeline and who receive the gas for their own consumption.

If a tax return does not state this information, the Secretary must determine how much of the tax proceeds are to be attributed to each city.

(b) Distribution. — Within 75 days after the end of each calendar quarter, the Secretary must distribute to the cities part of the tax proceeds collected under this Article during that quarter. The amount to be distributed to a city is one-half of the amount of tax attributable to that city for that quarter under subsection (a) of this section. The General Assembly finds that the revenue distributed under this section is local revenue, not a State expenditure, for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold the distribution. (1998-22, s. 1; 1998-217, s. 32(b); 1999-337, s. 32(b); 2002-120, s. 3.)

Editor's Note. — Session Laws 1998-22, s. 1 made this Article effective July 1, 1999, and applicable to piped natural gas delivered on or after that date.

Session Laws 1998-22, s. 14, as amended by Session Laws 2000-140, s. 85, provides that notwithstanding G.S. 105-187.44(b), as enacted by this act, the amount distributed to a city under G.S. 105-187.44(b) for taxes collected for each of the quarters in 1999-2000 and 2000-2001 fiscal years may not exceed its benchmark amount until each city receives an amount equal to its benchmark amount. Each quarter, the Secretary of Revenue shall determine a city's benchmark amount and the amount it would receive under G.S. 105-187.44(b) if not for the redistribution required by this section. The Secretary shall identify those cities whose distribution amounts under G.S. 105-187.44(b) are less than their benchmark amounts and shall determine the total dollar amount of the shortfall. The Secretary shall reduce the amount to be distributed to those cities whose distribution amount under G.S. 105-187.44(b) exceeds their benchmark amount by the total dollar amount of the shortfall determined for that quarter in proportion to each city's excess. However, in no event may a city's distribution amount be reduced below its benchmark amount. The Secretary will redistribute these monies to the cities whose distribution amounts under G.S. 105-187.44(b) are less than their benchmark amounts in proportion to each city's shortfall. In any quarter that a city does not have a prior year's distribution for the corresponding quarter in fiscal year 1998-99, that city is excluded from the redistribution required under this section for that quarter. In that case, the city will receive the amount it is entitled to receive under G.S. 105-187.44(b). For the purposes of this provision, the term "benchmark amount" means the amount a city received under G.S. 105-116.1 attributable to piped natural gas for the corresponding quarter during the fiscal year 1998-99. Section 14 also provides for a study by the Revenue Laws Study Committee of the impact of this act and a report of its findings.

Session Laws 1998-22, s. 16 contains a severability clause.

Session Laws 1999-337, s. 46, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before the effective date of its amendment or repeal; nor does it affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

§ 105-187.45. Information exchange and information returns.

(a) Utilities Information. — The North Carolina Utilities Commission or the Public Staff of that Commission must give the Secretary a list of the entities that receive piped natural gas from an interstate pipeline and any other information available to the Commission that the Secretary asks for in administering the tax imposed by this Article.

(b) Information Return. — The Secretary may require the operator of an interstate pipeline to report the amount of piped natural gas taken from the pipeline in this State, the persons that received the gas, and the volume received by each person. (1998-22, s. 1.)

§ 105-187.46. Records and audits.

(a) Records. — A person who is required to file a return under this Article must keep a record of all documents used to determine information provided in the return. The records must be kept for three years after the due date of the return to which the records apply.

(b) Audits. — The Secretary may audit a person who is required to file a return under this Article. (1998-22, s. 1.)

§§ 105-187.47 through 105-187.49: Reserved for future codification purposes.

ARTICLE 5F.

Manufacturing Fuel and Certain Machinery and Equipment.

§ 105-187.50. Definitions.

The definitions in G.S 105-164.3 apply in this Article. In addition, the following definitions apply in this Article:

(1) Concurrently maintainable. — Capable of having any capacity component or distribution element serviced or repaired on a planned basis without interrupting or impeding the performance of the computer equipment.

(2) Eligible datacenter. — A facility that provides infrastructure for hosting or data processing services and satisfies each of the following conditions:

  a. The facility's power and cooling systems are created and maintained to be concurrently maintainable and include redundant capacity components and multiple distribution paths serving the computer equipment at the facility. The facility must have multiple distribution paths serving the computer equipment; however, a single distribution path may serve the computer equipment at any one time.

  b. The Secretary of Commerce has made a written determination of the following:

1. For facilities that are located in a development tier one area at the time of application for the written determination, that at least one hundred fifty million dollars ($150,000,000) in private funds has been or will be invested in improvements to real property or installed datacenter machinery and equipment, or a combination thereof, within five years of the date on which the first qualifying improvement is made, regardless of any subsequent change in county development tier status.
2. For facilities that are not located in a development tier one area at the time of application for the written determination, that at least three hundred million dollars ($300,000,000) in private funds has been or will be invested in improvements to real property or installed datacenter machinery and equipment, or a combination thereof, within five years of the date on which the first qualifying improvement is made, regardless of any subsequent change in county development tier status.

c. The facility satisfies the wage standard and health insurance requirements of G.S. 105-129.83.

(3) Multiple distribution paths. — A series of distribution paths configured to ensure that failure on one distribution path does not interrupt or impede other distribution paths.

(4) Redundant capacity components. — Components beyond those required to support the computer equipment. (2001-347, s. 2.17; 2007-323, s. 31.22(a).)

Editor's Note. — Session Laws 2005-276, s. 33.20, effective January 1, 2006, substituted "Manufacturing Fuel and Certain Machinery and Equipment" for "Mill Machinery" in the Article 5F heading.

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 31.22(a), effective October 1, 2007, and applicable to sales made on or after October 1, 2007, added "In addition, the following definitions apply in this Article:" at the end of the introductory paragraph; and added subdivisions (1) through (4).

§ 105-187.51. Tax imposed on mill machinery.

(a) Scope. — A privilege tax is imposed on the following persons:

(1) A manufacturing industry or plant that purchases mill machinery or mill machinery parts or accessories for storage, use, or consumption in this State. A manufacturing industry or plant does not include a delicatessen, cafe, cafeteria, restaurant, or another similar retailer that is principally engaged in the retail sale of foods prepared by it for consumption on or off its premises.

(2) A contractor or subcontractor that purchases mill machinery or mill machinery parts or accessories for use in the performance of a contract with a manufacturing industry or plant.

(3) A subcontractor that purchases mill machinery or mill machinery parts or accessories for use in the performance of a contract with a general contractor that has a contract with a manufacturing industry or plant.

(b) Rate. — The tax is one percent (1%) of the sales price of the machinery, part, or accessory purchased. The maximum tax is eighty dollars ($80.00) per article. As used in this section, the term "accessories" does not include electricity. (2001-347, s. 2.17; 2005-435, s. 56(a).)

Effect of Amendments. — Session Laws 2005-435, s. 56.(a), effective January 1, 2006, added the last sentence in subsection (b).

§ 105-187.51A. (Effective until July 1, 2008 — See notes) Tax imposed on manufacturing fuel.

A privilege tax is imposed on a manufacturing industry or plant that purchases fuel to operate the industry or plant. The tax is seven-tenths percent (0.7%) of the sales price of the fuel. The tax does not apply to electricity or piped natural gas. (2005-276, s. 33.21; 2007-397, s. 12.)

Section Set Out Three Times. — The section above is effective until July, 1, 2008. For the sections as amended July 1, 2008 and as amended July 1, 2009, see the following sections, also numbered G.S. 105-187.51A.

Editor's Note. — Session Laws 2005-276, s. 33.34, made this section effective January 1, 2006.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-397, s. 15, contains a severability clause.

Effect of Amendments. — Session Laws 2007-397, s. 12(a), effective October 1, 2007, and applicable to fuel purchased on or after that date, substituted "seven-tenths percent (0.7%)" for "one percent (1%)" in the second sentence.

Session Laws 2007-397, s. 12(b), effective July 1, 2008, and applicable to fuel purchased on or after that date, substituted "five-tenths percent (0.5%)" for "seven-tenths percent (0.7%)" in the second sentence.

Session Laws 2007-397, s. 12(c), effective July 1, 2009, and applicable to fuel purchased on or after that date, substituted "three-tenths percent (0.3%)" for "five-tenths percent (0.5%)" in the second sentence.

Session Laws 2007-397, s. 12(d), effective July 1, 2010, repealed the section.

§ 105-187.51A. (Effective July 1, 2008 until July 1, 2009 — See notes) Tax imposed on manufacturing fuel.

A privilege tax is imposed on a manufacturing industry or plant that purchases fuel to operate the industry or plant. The tax is five-tenths percent (0.5%) of the sales price of the fuel. The tax does not apply to electricity or piped natural gas. (2005-276, s. 33.21; 2007-397, ss. 12(a), (b).)

Section Set Out Three Times. — The section above is effective July 1, 2008 until July, 1, 2009. For the section as in effect until July 1, 2008, see the preceding section, also numbered G.S. 105-187.51A. For the section as amended July 1, 2009, see the following section, also numbered G.S. 105-187.51A.

Editor's Note. — Session Laws 2005-276, s. 33.34, made this section effective January 1, 2006.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

G.S. 105-187.51A is set out three times. See notes.

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-397, s. 15, contains a severability clause.

Effect of Amendments. — Session Laws 2007-397, s. 12(a), effective October 1, 2007, and applicable to fuel purchased on or after that date, substituted "seven-tenths percent (0.7%)" for "one percent (1%)" in the second sentence.

Session Laws 2007-397, s. 12(b), effective July 1, 2008, and applicable to fuel purchased on or after that date, substituted "five-tenths percent (0.5%)" for "seven-tenths percent (0.7%)" in the second sentence.

Session Laws 2007-397, s. 12(c), effective July 1, 2009, and applicable to fuel purchased on or after that date, substituted "three-tenths percent (0.3%)" for "five-tenths percent (0.5%)" in the second sentence.

Session Laws 2007-397, s. 12(d), effective July 1, 2010, repealed the section.

§ 105-187.51A. (Effective July 1, 2009 until July 1, 2010 — See notes) Tax imposed on manufacturing fuel.

A privilege tax is imposed on a manufacturing industry or plant that purchases fuel to operate the industry or plant. The tax is three-tenths percent (0.3%) of the sales price of the fuel. The tax does not apply to electricity or piped natural gas. (2005-276, s. 33.21; 2007-397, ss. 12(a)-(c).)

Section Set Out Three Times. — The section above is effective July, 1, 2009 until July 1, 2010. For the sections as in effect until July 1, 2008 and July 1, 2009, see the preceding sections, also numbered G.S. 105-187.51A. This section is repealed effective July 1, 2010.

Editor's Note. — Session Laws 2005-276, s. 33.34, made this section effective January 1, 2006.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-397, s. 15, contains a severability clause.

Effect of Amendments. — Session Laws 2007-397, s. 12(a), effective October 1, 2007, and applicable to fuel purchased on or after that date, substituted "seven-tenths percent (0.7%)" for "one percent (1%)" in the second sentence.

Session Laws 2007-397, s. 12(b), effective July 1, 2008, and applicable to fuel purchased on or after that date, substituted "five-tenths percent (0.5%)" for "seven-tenths percent (0.7%)" in the second sentence.

Session Laws 2007-397, s. 12(c), effective July 1, 2009, and applicable to fuel purchased on or after that date, substituted "three-tenths percent (0.3%)" for "five-tenths percent (0.5%)" in the second sentence.

Session Laws 2007-397, s. 12(d), effective July 1, 2010, repealed the section.

§ 105-187.51B. Tax imposed on certain recyclers and research and development companies.

(a) Tax. — A privilege tax is imposed on the following:

(1) A major recycling facility that purchases any of the following tangible personal property for use in connection with the facility:

a. Cranes, structural steel crane support systems, and foundations related to the cranes and support systems.

b. Port and dock facilities.

c. Rail equipment.

d. Material handling equipment.

(2) A research and development company in the physical, engineering, and life sciences that is included in industry 54171 of NAICS and that purchases equipment or an attachment or repair part for equipment that meets all of the following requirements:
  a. Is capitalized by the company for tax purposes under the Code.
  b. Is used by the company in the research and development of tangible personal property.
  c. Would be considered mill machinery or mill machinery parts or accessories under G.S. 105-187.51 if it were purchased by a manufacturing industry or plant and used in the research and development of tangible personal property manufactured by the industry or plant.

(3) A software publishing company that is included in the industry group 5112 of NAICS and that purchases equipment or an attachment or repair part for equipment that meets all of the following requirements:
  a. Is capitalized by the company for tax purposes under the Code.
  b. Is used by the company in the research and development of tangible personal property.
  c. Would be considered mill machinery under G.S. 105-187.51 if it were purchased by a manufacturing industry or plant and used in the research and development of tangible personal property manufactured by the industry or plant.

(b) Rate. — The tax is one percent (1%) of the sales price of the equipment or other tangible personal property. The maximum tax is eighty dollars ($80.00) per article. (2005-276, s. 33.21; 2006-66, s. 24.9(a); 2006-196, s. 12; 2007-323, s. 31.7(a); 2007-527, s. 13(a).)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, made this section effective January 1, 2006.

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-196, s. 13, provides: "The Revenue Laws Study Committee shall study the following issues:

"(1) The simplification of the additional tax imposed on insurance contracts on property coverage, as enacted in Section 3 of this act, and the distribution of the revenue generated by the tax. The study of this issue may include a recommendation on the percentage of revenue to be distributed to the firemen's local relief funds and the formula for making this distribution. The study may also consider the increasing difference between the amount of revenue available in the Volunteer Fire Department Fund for matching grants to purchase equipment and make capital improvements and the amount of grant requests received.

"(2) The authority of the Secretary of Revenue to require taxpayers to file consolidated returns. The study of this issue may include consideration of whether the State should require some corporations or all corporations to file a consolidated return.

"(3) The feasibility of replacing the State's current corporate income and franchise tax laws with a commercial activity tax based upon business gross receipts.

"(4) The administrative process for the review of disputed tax matters."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2006-66, s. 24.9(a), as amended by Session

Laws 2006-196, s. 12, effective July 1, 2007, amended the catchline; redesignated subdivisions (a)(1) through (a)(4) as (a)(1)a through (a)(1)d; added subdivision (a)(2); and inserted "equipment or other" in the first sentence in subsection (b).

Session Laws 2007-323, s. 31.7(a), effective October 1, 2007, and applicable to sales occurring on or after October 1, 2007, added subdivision (a)(3).

Session Laws 2007-527, s. 13, effective July 1, 2007, inserted "or mill machinery parts or accessories" in sub-subdivision (a)(2)c.

§ 105-187.51C. (Expiring for sales occurring on or after July 1, 2013) Tax imposed on datacenter machinery and equipment.

(a) Tax. — A privilege tax is imposed on an eligible datacenter, other than one as defined in G.S. 105-164.3(8e), that purchases machinery or equipment to be located and used at the datacenter that is capitalized for tax purposes under the Code and is used either:

(1) For the provision of datacenter services, including equipment cooling systems for managing the performance of the datacenter property; hardware and software for distributed and mainframe computers and servers; data storage devices; network connectivity equipment and peripheral components and systems.

(2) For the generation, transformation, transmission, distribution, or management of electricity, including exterior substations and other business personal property used for these purposes.

(b) Rate. — The tax is one percent (1%) of the sales price of the eligible equipment and machinery. The maximum tax is eighty dollars ($80.00) per article.

(c) Forfeiture. — If the required level of investment to qualify as an eligible datacenter is not timely made, then the rate provided under this section is forfeited. If the required level of investment is timely made but any eligible machinery and equipment is not located and used at an eligible datacenter, then the rate provided for that machinery and equipment under this subdivision is forfeited. A taxpayer that forfeits a rate under this subdivision is liable for all past sales and use taxes avoided as a result of the forfeiture, computed at the combined general rate from the date the taxes would otherwise have been due, plus interest at the rate established under G.S. 105-241.1(i). If the forfeiture is triggered due to the lack of a timely investment required by this section, then interest is computed from the date the sales or use tax would otherwise have been due. For all other forfeitures, interest is computed at the combined general rate from the time as of which the machinery or equipment was put to a disqualifying use. A credit is allowed against the sales or use tax owed as a result of the forfeiture provisions of this subsection for privilege taxes paid pursuant to this section. For purposes of applying this credit, the fact that payment of the privilege tax occurred in a period outside the statute of limitations provided under G.S. 105-266 shall not be considered. Interest shall not be computed against the amount of taxes offset by this credit. The past taxes and interest are due 30 days after the date of forfeiture. A taxpayer that fails to pay the past taxes and interest by the due date is subject to the provisions of G.S. 105-236.

(d) Sunset. — This section expires for sales occurring on or after July 1, 2013. (2007-323, s. 31.22(b).)

Editor's Note. — G.S. 105-241.1(i), referred to in subsection (c), was repealed by Session Laws 2007-491, s. 2. For present similar provision, see G.S. 105-241.21.

G.S. 105-266, referred to in this section, was repealed by Session Laws 2007-491, s. 2.

Session Laws 2007-323, s. 31.22(c), made this section effective October 1, 2007, and applicable to sales made on or after October 1, 2007.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 105-187.52. Administration.

(a) Administration. — The privilege taxes imposed by this Article are in addition to the State use tax. Except as otherwise provided in this Article, the collection and administration of these taxes is the same as the State use tax imposed by Article 5 of this Chapter.

(b) Credit. — A credit is allowed against the tax imposed by this Article for the amount of a sales or use tax, privilege or excise tax, or substantially equivalent tax paid to another state. The credit allowed by this subsection does not apply to tax paid to another state that does not grant a similar credit for the privilege tax paid in North Carolina.

(c) Exemption. — State agencies are exempted from the privilege taxes imposed by this Article. (2001-347, s. 2.17; 2005-276, s. 33.22; 2006-162, s. 11; 2007-527, s. 14.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 33.22, effective January 1, 2006, substituted "taxes imposed by this Article are in addition to the" for "tax this Article imposes on a person listed in G.S 105-187.51 is an additional" and "these taxes" for "this tax."

Session Laws 2006-162, s. 11, effective July 24, 2006, designated the existing provisions as subsection (a), added the subsection (a) catchline, and added subsection (b).

Session Laws 2007-527, s. 14, effective August 31, 2007, added subsection (c).

§ 105-187.53. Commercial logging items.

This Article does not apply to an item that is exempt from sales and use tax under G.S. 105-164.13(4f). (2006-19, s. 2.)

Editor's Note. — Session Laws 2006-19, s. 4, made this section effective July 1, 2006, and applicable to items purchased on or after that date.

Session Laws 2006-19, s. 3, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended by this act before the effective date of this act, nor does it affect the right to any refund of a tax that accrued under the amended statute before the effective date of its amendment."

§§ 105-187.54 through 105-187.59: Reserved for future codification purposes.

ARTICLE 5G.

Solid Waste Disposal Tax.

(Effective July 1, 2008)

§ 105-187.60. (Effective July 1, 2008) Definitions.

The definitions set out in G.S. 105-164.3 and G.S. 130A-290 apply to this Article. (2007-550, s. 14(a).)

Cross References. — As to solid waste management, generally, see G.S. 130A-290 et seq. As to use of proceeds from solid waste disposal tax, see G.S. 130A-295.9.

Editor's Note. — Session Laws 2007-550, s. 14(e), made this Article effective July 1, 2008.

Session Laws 2007-550, s. 19, is a severability clause.

§ 105-187.61. (Effective July 1, 2008) Tax imposed.

(a) Tax Rate. — An excise tax is imposed on the disposal of municipal solid waste and construction and demolition debris in any landfill permitted pursuant to Article 9 of Chapter 130A of the General Statutes at a rate of two dollars ($2.00) per ton of waste. An excise tax is imposed on the transfer of municipal solid waste and construction and demolition debris to a transfer station permitted pursuant to Article 9 of Chapter 130A of the General Statutes for disposal outside the State at a rate of two dollars ($2.00) per ton of waste.

(b) Tax Liability. — The excise tax imposed by this section is due on municipal solid waste and construction and demolition debris received from third parties and on municipal solid waste and construction and demolition debris disposed of by the owner or operator. The tax is payable by the owner or operator of each landfill and transfer station permitted under Article 9 of Chapter 130A of the General Statutes. (2007-550, s. 14(a).)

§ 105-187.62. (Effective July 1, 2008) Administration.

The owner or operator of each landfill and transfer station permitted pursuant to Article 9 of Chapter 130A of the General Statutes shall maintain scales designed to determine waste tonnage that are approved by the Department of Agriculture and Consumer Services. Each owner or operator shall record waste tonnage at the time the waste is received and maintain other records as required by the Secretary of Revenue. An owner or operator may add the amount of the solid waste disposal tax due to the charges made to a third party for disposal of municipal solid waste or construction and demolition debris. The tax imposed by this Article is payable and a return is due to be filed in the same manner as required under G.S. 105-164.16 for sales and use tax. (2007-550, s. 14(a).)

§ 105-187.63. (Effective July 1, 2008) Use of tax proceeds.

From the taxes received pursuant to this Article, the Secretary may retain the costs of collection, not to exceed two hundred twenty-five thousand dollars ($225,000) a year, as reimbursement to the Department. The Secretary shall credit or distribute taxes received pursuant to this Article, less the cost of collection, as follows:

(1) Fifty percent (50%) to the Inactive Hazardous Sites Cleanup Fund established by G.S. 130A-310.11.

(2) Eighteen and seventy-five one hundredths percent (18.75%) to cities in the State on a per capita basis and eighteen and seventy-five one hundredths percent (18.75%) to counties in the State on a per capita basis. For purposes of this subdivision, persons who reside within a city shall not be counted in the population of the county or counties in which the city is located. Funds distributed under this subdivision shall be used by a unit of local government solely for solid waste management programs and services.

(3) Twelve and one-half percent (12.5%) to the Solid Waste Management Trust Fund established by G.S. 130A-309.12. (2007-543, s. 2; 2007-550, s. 14(a).)

Editor's Note. — Session Laws 2007-543, s. 4, is a severability clause.

Effect of Amendments. — Session Laws 2007-543, s. 2, effective July 1, 2008, rewrote subdivision (2), which formerly read: " Thirty-seven and one-half percent (37.5%) to units of local government that provide solid waste management services directly to residents within the political boundaries of the unit of local government as determined by the Department of Environment and Natural Resources, distributed on a per capita basis as described in G.S. 105-472(b)(1). Funds distributed under this subdivision shall be used by a unit of local government solely for solid waste management programs and services. As used in this subdivision, 'unit of local government' includes a regional solid waste management authority established under Article 22 of Chapter 153A of the General Statutes."

ARTICLE 6.

Gift Taxes.

§ 105-188. Gift taxes; classification of beneficiaries; exemptions; rates of tax.

(a) State gift taxes, as hereinafter prescribed, are hereby levied upon the shares of the respective beneficiaries in all property within the jurisdiction of this State, real, personal and mixed, and any interest therein which shall in any one calendar year pass by gift made after March 24, 1939.

(b) The taxes shall apply whether the gift is in trust or otherwise and whether the gift is direct or indirect. In the case of a gift made by a nonresident, the taxes shall apply only if the property is within the jurisdiction of this State. The taxes shall not apply to gifts made prior to March 24, 1939.

(c) The tax shall not apply to the passage of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a passage from the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a passage by donor of such income by gift.

(d) Annual Exclusion. — The annual exclusion amount is equal to the federal inflation-adjusted exclusion amount provided in section 2503(b) of the Code. Gifts not exceeding a total value equal to the annual exclusion amount made to any one donee in a calendar year are not taxable under this Article. When gifts exceeding a total value equal to the annual exclusion amount are made to any one donee in a calendar year, only the portion of the gifts exceeding the annual exclusion amount in value is taxable under this Article. This exclusion does not apply to gifts of future interests in property. For the purposes of determining the annual exclusion, no part of a gift to an individual, or in trust for an individual, who has not attained the age of 21 years on the date of the transfer is considered a gift of a future interest in property if the property and the income therefrom meet all of the following conditions: (i) they may be expended by, or for the benefit of, the donee before the donee reaches the age of 21 years; (ii) they will to the extent not so expended pass to the donee when the donee reaches the age of 21 years; and (iii) they will, in the event the donee dies before reaching that age, be payable to the estate of the donee or as the donee may appoint under a general power of appointment.

When a gift is made by one spouse to a person other than the donor's spouse, the donor may claim both the donor's annual exclusion and the spouse's annual exclusion if both spouses consent and both spouses are residents of this State when the gift is made. Consent to share annual gift tax exclusions must be made in writing on a timely filed gift tax return. Once given, consent to share annual exclusions is irrevocable.

(e) The tax shall be based on the aggregate sum of the net gifts made by the donor to the same donee, and shall be computed as follows:

(1) Determine the aggregate sum of the net gifts to the donee for the calendar year and the net gifts to the same donee for each of the preceding calendar years since January 1, 1948.

(2) Compute the tax upon said aggregate sum by applying the rates hereinafter set out.

(3) From the tax thus computed, deduct the total gift tax, if any, computed with respect to gifts to the same donee in any prior year or years since January 1, 1948. The sum thus ascertained shall be the gift tax due.

The term "net gifts" shall mean the sum of the gifts made by a donor to the same donee during any stated period of time in excess of the annual exclusion and the applicable specific exemption.

(f) The rates of tax, which are based on the relationship between the donor and the donee, shall be as follows:

(1) Where the donee is the lineal issue, lineal ancestor, adopted child, or stepchild of the donor (for each one hundred dollars ($100.00) or fraction thereof):

First $ 10,000 above exemption	1 percent
Over $ 10,000 and to $ 25,000	2 percent
Over $ 25,000 and to $ 50,000	3 percent
Over $ 50,000 and to $ 100,000	4 percent
Over $ 100,000 and to $ 200,000	5 percent
Over $ 200,000 and to $ 500,000	6 percent
Over $ 500,000 and to $1,000,000	7 percent
Over $1,000,000 and to $1,500,000	8 percent
Over $1,500,000 and to $2,000,000	9 percent
Over $2,000,000 and to $2,500,000	10 percent
Over $2,500,000 and to $3,000,000	11 percent
Over $3,000,000	12 percent

(2) Where the donee is the brother or sister, or descendant of the brother or sister, or is the uncle or aunt by blood of the donor (for each one hundred dollars ($100.00) or fraction thereof):

First $ 5,000	4 percent
Over $ 5,000 and to $ 10,000	5 percent
Over $ 10,000 and to $ 25,000	6 percent
Over $ 25,000 and to $ 50,000	7 percent
Over $ 50,000 and to $ 100,000	8 percent
Over $ 100,000 and to $ 250,000	10 percent
Over $ 250,000 and to $ 500,000	11 percent
Over $ 500,000 and to $1,000,000	12 percent
Over $1,000,000 and to $1,500,000	13 percent

Over $1,500,000 and to $2,000,000	14 percent
Over $2,000,000 and to $3,000,000	15 percent
Over $3,000,000	16 percent

(3) Where the donee is in any other degree of relationship than is hereinbefore stated, or shall be a stranger in blood to the donor, or shall be a body politic or corporate (for each one hundred dollars ($100.00) or fraction thereof):

First $ 10,000	8 percent
Over $ 10,000 and to $ 25,000	9 percent
Over $ 25,000 and to $ 50,000	10 percent
Over $ 50,000 and to $ 100,000	11 percent
Over $ 100,000 and to $ 250,000	12 percent
Over $ 250,000 and to $ 500,000	13 percent
Over $ 500,000 and to $1,000,000	14 percent
Over $1,000,000 and to $1,500,000	15 percent
Over $1,500,000 and to $2,500,000	16 percent
Over $2,500,000	17 percent

(g) A donor is entitled to a total exemption of one hundred thousand dollars ($100,000) to be deducted from gifts made to donees named in subdivision (f)(1), less the sum of amounts claimed and allowed as an exemption in prior calendar years. The exemption, at the option of the donor, may be taken in its entirety in a single year or may be spread over a period of years. When this exemption has been exhausted, no further exemption is allowable. When the exemption or any part of the exemption is applied to gifts to more than one donee in any one calendar year, the exemption shall be apportioned against the gifts in the same ratio as the gross value of the gifts to each donee is to the total value of all the gifts made in the calendar year. No exemption is allowed a donor for gifts made to donees named in subdivision (f)(2) or (f)(3).

(h) It is expressly provided, however, that the tax levied in this Article shall not apply to so much of said property as shall so pass exclusively:

(1) For state, county or municipal purposes within this State;

(2) To or for the exclusive benefit of charitable, educational, or religious organizations located within this State, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(3) To or for the exclusive benefit of charitable, religious and educational corporations, foundations and trusts, not conducted for profit, incorporated or created or administered under the laws of any other state, when such other state levies no gift taxes upon property similarly passing from residents of such state to charitable, educational or religious corporations, foundations and trusts incorporated or created or administered under the laws of this State, or when such corporation, foundation or trust receives and disburses funds donated in this State for religious, charitable and educational purposes; or

(4) To one spouse from the other spouse.

(i) The tax does not apply to tuition payments made on behalf of an individual to an educational institution or to medical payments made on behalf of an individual to a provider of medical care, as defined in the Code for the care of that individual. The term “educational institution” includes only those institutions that normally maintain a regular faculty and curriculum and normally have a regularly organized body of students in attendance where the educational activities are conducted.

(j) The tax does not apply to property transferred to a spouse when the transfer of the property is exempt from federal estate and gift taxes under section 2523(f) of the Code because it is considered qualified terminable interest property.

(k) Qualified Tuition Programs. — The provisions of section 529(c)(2) and (5) of the Code apply to this Article. If a donor elects to take a contribution into account ratably over a five-year period as provided in section 529(c)(2) of the Code, that election applies for the purposes of this Article. (1939, c. 158, s. 600; 1943, c. 400, s. 7; 1945, c. 708, s. 7; 1947, c. 501, s. 6; 1957, c. 1340, s. 6; 1973, c. 505; c. 1287, s. 9; 1983, c. 685, s. 1; 1983 (Reg. Sess., 1984), c. 1023, s. 1; c. 1024; 1985, c. 86; c. 656, ss. 4-6; 1989 (Reg. Sess., 1990), c. 814, s. 24; 1991 (Reg. Sess., 1992), c. 1007, s. 5; 1996, 2nd Ex. Sess., c. 13, s. 6.3; 1998-98, s. 63; 1998-171, s. 4; 2002-126, s. 30C.5(a).)

Legal Periodicals. — For article on gift taxes, see 16 N.C.L. Rev. 194 (1938).

For comment on enactment, see 17 N.C.L. Rev. 389 (1939).

For comment on the 1947 amendment which rewrote subsection (e), see 25 N.C.L. Rev. 467 (1947).

For article on planning for North Carolina death and gift taxes, see 27 N.C.L. Rev. 114 (1949).

For comment discussing state adoption of federal taxing concepts, see 51 N.C.L. Rev. 834 (1973).

For article entitled, "Estate Planning for Farmers after the Reform Act of 1976," see 14 Wake Forest L. Rev. 577 (1978).

For note comparing federal and North Carolina estate, inheritance, and gift taxation with respect to creation and termination of tenancies by the entirety, see 15 Wake Forest L. Rev. 307 (1979).

CASE NOTES

Payments by an employer to the widow of a deceased executive were authorized and allowable as deductions under former G.S. 105-147(23) in computing employer's net income, and were not taxable as gifts under this section. Boylan-Pearce, Inc. v. Johnson, 257 N.C. 582, 126 S.E.2d 492 (1962).

Transfer in Fee Simple Deemed Gift. — As a property owner's deed of property to his uncle was an unconditional transfer in fee simple, and the owner did not show any exception to the parol evidence rule, his claim that he transferred it in trust for his own benefit failed and the transfer was properly deemed a taxable gift. Joines v. Anderson, 161 N.C. App. 321, 587 S.E.2d 926, 2003 N.C. App. LEXIS 2053 (2003).

Applied in Stone v. Lynch, 312 N.C. 739, 325 S.E.2d 230 (1985).

§ 105-188.1. Powers of appointment.

(a) For purposes of this Article "general power of appointment" shall mean any power of appointment which is exercisable in favor of the individual possessing the power (hereinafter in this section referred to as the "possessor"), his estate, his creditors, or the creditors of his estate; except that:

(1) A power to consume, invade, or appropriate property for the benefit of the possessor which is limited by an ascertainable standard relating to the health, education, support or maintenance of the possessor shall not be deemed a general power of appointment.

(2) In the case of a power of appointment which is exercisable by the possessor only in conjunction with another person:

a. If the power is not exercisable by the possessor except in conjunction with the creator of the power, such power shall not be deemed a general power of appointment.

b. If the power is not exercisable by the possessor except in conjunction with a person having a substantial interest, in the property subject to the power, which is adverse to exercise of the power in favor of the possessor, such power shall not be deemed a general power of appointment. For the purposes of this clause a person who, after the death of the possessor, may be possessed of a power of appointment (with respect to the property subject to the possessor's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the possessor's power.

c. If (after the application of clauses a and b) the power is a general power of appointment and is exercisable in favor of such other person, such power shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power, such part to be determined by dividing the value of such property by the number of such persons (including the possessor) in favor of whom such power is exercisable.

d. For purposes of clauses b and c, a power shall be deemed exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

(b) Any person having a general power of appointment with respect to any interest in property shall for gift tax purposes be deemed to be the owner of such interest, and accordingly:

(1) If in connection with any gift of property the donor shall give to any person a general power of appointment with respect to any interest in such property, the donor shall be deemed to have given such person such interest in such property.

(2) If any person holding a general power of appointment with respect to any interest in property shall exercise such power in favor of any other person or persons, he shall be deemed to have made a gift of such interest to such person or persons.

(3) If any person holding a general power of appointment with respect to any interest in property shall relinquish such power, he shall be deemed to have made a gift of such interest to the person or persons who shall benefit by such relinquishment.

(4) The lapse of a general power of appointment during the life of the individual possessing the power shall be considered a relinquishment of the power. The rule of the preceding sentence shall apply with respect to the lapse of such powers during any calendar year only to the extent that the interest in property which could have been appointed by exercise of the lapsed power exceeds in value the greater of the following amounts:

a. Five thousand dollars ($5,000) or

b. Five percent (5%) of the aggregate value of the interest in property out of which, or the proceeds of which, the exercise of the lapsed power could be satisfied.

(c) Neither the exercise nor the relinquishment of a special power of appointment with respect to an interest in property shall be deemed to constitute a gift of such interest in such property.

(d) If in connection with any gift of property the donor shall give to any person a special power of appointment with respect to any interest in such property, the donor shall be deemed for gift tax purposes to have given such interest in equal shares to those persons, not more than two, among the possible appointees and takers in default of appointment whom the donor or his executor or administrator may designate in the gift tax return filed with respect to such gift. But the tax shall be computed according to the relationship of the donee of the power to the person designated if:

(1) The possible appointees and takers in default of appointment include any persons more closely related to the donee of the power than to the donor, and

(2) Such computation would produce a higher tax. (1963, c. 942; 1967, c. 1110, s. 7; 1987, c. 556.)

§ 105-189. Transfer for less than adequate and full consideration.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this Article, be deemed a gift and shall be included in computing the amount of gifts made during the calendar year. (1939, c. 158, s. 601.)

§ 105-190. Gifts made in property.

If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. (1939, c. 158, s. 602.)

§ 105-191: Repealed by Session Laws 1995 (Regular Session, 1996), c. 646, s. 7.

§ 105-192: Repealed by Session Laws 1959, c. 1259, s. 9.

§ 105-193. Lien for tax; collection of tax.

The tax imposed by this Article shall be a lien upon all gifts that constitute the basis for the tax for a period of 10 years from the time they are made. If the tax is not paid by the donor when due, each donee shall be personally liable, to the extent of their respective gifts, for so much of the tax as may have been assessed, or may be assessable thereon. Any part of the property comprised in the gift that may have been sold by the donee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien hereby imposed and the lien, to the extent of the value of such gift, shall attach to all the property of the donee (including after-acquired property) except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

If the tax is not paid within 30 days after it has become due, the Department of Revenue may use any of the methods authorized in this Subchapter for the collection of other taxes to enforce the payment of taxes assessed under this Article.

In any proceeding by warrant or otherwise to enforce the collection of said tax, the donor shall be liable for the full amount of the tax due by reason of all the gifts constituting the basis for such tax, and each donee shall be liable only for so much of said tax as may be due on account of his respective gift. (1939, c. 158, s. 605.)

§ 105-194. Death of donor within three years; time of assessment.

If a donor dies within three years after filing a return, gift taxes may be assessed at any time within those three years, or on or before the date of final settlement of the donor's State estate or inheritance taxes, whichever is later. (1939, c. 158, s. 606; 1947, c. 501, s. 6; 1959, c. 1259, s. 10; 1999-337, s. 33.)

§ 105-195. Tax to be assessed upon actual value of property; manner of determining value of annuities, life estates and interests less than absolute interest.

Said taxes shall be assessed upon the actual value of the property at the time of the transfer by gift. If the gift subject to said tax be given to a donee for life or for a term of years, or upon condition or contingency, with remainder to take effect upon the termination of the life estate or term of years or the happening of the condition or contingency, the tax on the whole amount shall be due and payable as in other cases, and said tax shall be apportioned between such life tenant or tenant for years and the remainderman, such apportionment to be made by computation based upon the mortuary and annuity tables set out in G.S. 8-46 and 8-47 of the General Statutes, and upon the basis of six per centum (6%) of the gross value of the property for the period of expectancy of the life tenant or for the term of years in determining the value of the respective interests. When property is transferred or limited in trust or otherwise, and the rights or interests of the transferees or beneficiaries are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon said transfer at the highest rate, within the discretion of the Secretary of Revenue, which on the happening of any of the said contingencies or conditions would be possible under the provisions of this section, and such tax so imposed shall be due and payable forthwith by the donor, and the Secretary of Revenue shall assess the tax on such transfers. (1939, c. 158, s. 607; 1943, c. 400, s. 7; 1955, c. 1353, s. 1; 1973, c. 476, s. 193; 1985, c. 44.)

CASE NOTES

Gift Tax Assessments. — Summary judgment was improperly granted in favor of taxpayers who sought refunds of gift taxes they paid under protest on their transfers of interests in their residences to irrevocable trusts, retaining the rights to occupy the residences for five years or their lifetimes, whichever was shorter, as the Secretary of Revenue had, under G.S. 105-195, discretion to determine how to value the interests retained by the taxpayers, and there was no showing that this discretion was abused, nor was it shown, under G.S. 105-267 [repealed] that the taxpayers were entitled to refunds because the taxes were assessed for improper purposes or were otherwise invalid or excessive. Downs v. State, 159 N.C. App. 220, 582 S.E.2d 638, 2003 N.C. App. LEXIS 1440 (2003), aff'd, 358 N.C. 213, 593 S.E.2d 763 (2004).

§ 105-196: Repealed by Session Laws 1995 (Regular Session, 1996), c. 646, s. 7.

§ 105-197. When return required; due date of tax and return.

(a) When Return Required. — Anyone who, during the calendar year, gives to a donee a gift of a future interest or one or more taxable gifts whose total value exceeds the amount of the annual exclusion set in G.S. 105-188(d) must file a gift tax return, under oath or affirmation, with the Secretary on a form prescribed by the Secretary. For the purpose of this section, a taxable gift is a gift that is not exempt under G.S. 105-188(h) or (i).

(b) Due Date. — The tax is due on April 15th following the end of the calendar year. A return must be filed on or before the due date of the tax. A taxpayer may ask the Secretary of Revenue for an extension of time for filing a return under G.S. 105-263. (1939, c. 158, s. 609; 1955, c. 22, s. 1; 1973, c. 1287, s. 9; 1985 (Reg. Sess., 1986), c. 821; 1991 (Reg. Sess., 1992), c. 930, s. 10; 1995 (Reg. Sess., 1996), c. 646, s. 8; 1998-98, s. 16.)

§ 105-197.1. Federal corrections.

If the amount of a taxpayer's net gifts is corrected or otherwise determined by the federal government, the taxpayer must, within six months after being notified of the correction or final determination by the federal government, file a gift tax return with the Secretary reflecting the corrected or determined net gifts. The Secretary must propose an assessment for any additional tax due from the taxpayer as provided in Article 9 of this Chapter. The Secretary must refund any overpayment of tax as provided in Article 9 of this Chapter. A taxpayer who fails to comply with this section is subject to the penalties in G.S. 105-236 and forfeits the right to any refund due by reason of the determination. (1973, c. 1287, s. 10; 1993 (Reg. Sess., 1994), c. 582, s. 6; 2006-18, s. 6; 2007-491, s. 22.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2006-18, s. 6, effective July 1, 2006, and applicable to federal determinations made on or after July 1, 2006, substituted "six months" for "two years" in the first sentence of the first paragraph.

Session Laws 2007-491, s. 22, effective for taxable years beginning on or after January 1, 2007, rewrote the second and third sentences of the former first paragraph and the first sentence of the former second paragraph as the present second sentence; and substituted "Secretary must either refund" for "Secretary shall either refund" in the present third sentence. For applicability, see Editor's note.

ARTICLE 7.

Schedule H. Intangible Personal Property.

§ **105-198:** Repealed by Session Laws 1995, c. 41, s. 1(b).

§§ **105-199, 105-200:** Repealed by Session Laws 1985, c. 656, s. 32.

§§ **105-201 through 105-204:** Repealed by Session Laws 1995, c. 41, s. 1(b).

§ **105-205:** Repealed by Session Laws 1985, c. 656, s. 32.

§§ **105-206, 105-207:** Repealed by Session Laws 1995, c. 41, s. 1(b).

§ **105-208:** Repealed by Session Laws 1959, c. 1259, s. 9.

§ **105-209:** Repealed by Session Laws 1995, c. 41, s. 1(b).

§ **105-210:** Repealed by Session Laws 1979, c. 179, s. 4.

§§ **105-211 through 105-213:** Repealed by Session Laws 1995, c. 41, s. 1(b).

§ **105-213.1:** Recodified as § 105-275.2 by Session Laws 1995.

§§ 105-214 through 105-217: Repealed by Session Laws 1995, c. 41, s. 1(b).

Article 8.

Schedule I. Compensating Use Tax.

§§ 105-218 through 105-228: Repealed by Session Laws 1957, c. 1340, s. 5.

Cross References. — For present statutes relating to use tax, see G.S. 105-164.1 et seq.

Article 8A.

Gross Earnings Taxes on Freight Line Companies in Lieu of Ad Valorem Taxes.

§ 105-228.1. Defining taxes levied and assessed in this Article.

The purpose of this Article is to levy a fair and equal tax under authority of Section 2(2) of Article V of the North Carolina Constitution and to provide a practical means for ascertaining and collecting it. The taxes levied and assessed in this Article are on gross earnings, as defined in the Article, and are in lieu of ad valorem taxes upon the properties of persons taxed in this Article. (1954, c. 400, s. 8; 1998-98, ss. 64, 109.)

Legal Periodicals. — For comment on this Article, see 21 N.C.L. Rev. 364 (1943).

§ 105-228.2. Tax upon freight car line companies.

(a) For purposes of taxation under this section the property of freight line companies as defined is declared to constitute a special class of property. In lieu of all ad valorem taxes by either or both the State government and the respective local taxing jurisdictions, a tax upon gross earnings in the State as elsewhere defined shall be imposed.

(b) Any person or persons, joint-stock association or corporation, wherever organized or incorporated, engaged in the business of operating cars or engaged in the business of furnishing or leasing cars not otherwise listed for taxation in this State, for the transportation of freight (whether such cars be owned by such company or any other person or company), over any railway or lines, in whole or in part, within this State, such line or lines not being owned, leased or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture, or refrigerator car or by some other name, shall be deemed a freight line company.

(c) For the purposes of taxation under this section all cars used exclusively within the State, or used partially within and without the State, and a proportionate part of the intangible values of the business as a going concern, are hereby declared to have situs in this State.

(d) Every freight line company, as hereinbefore defined, shall pay annually a sum in the nature of a tax at three per centum (3%) upon the total gross earnings received from all sources by such freight line companies within the

State, which shall be in lieu of all ad valorem taxes in this State of any freight company so paying the same.

(e) The term "gross earnings received from all sources by such freight line companies within the State" as used in this Article is hereby declared and shall be construed to mean all earnings from the operation of freight cars within the State for all car movements or business beginning and ending within the State and a proportion, based upon the proportion of car mileage within the State to the total car mileage, or earnings on all interstate car movements or business passing through, or into or out of the State.

(f) Every railroad company using or leasing the cars of any freight line company shall, upon making payment to such freight line company for the use or lease, after June 30, 1943, of such cars withhold so much thereof as is designated in this section. On or before March first of each year such railroad company shall make and file with the Secretary of Revenue a statement showing the amount of such payment for the next preceding 12-month period ending December 31, and of the amounts so withheld by it, and shall remit to the Secretary of Revenue the amounts so withheld. If any railroad company shall fail to make such report or fail to remit the amount of tax herein levied, or shall fail to withhold the part of such payment hereby required to be withheld, such railroad company shall become liable for the amount of the tax herein levied and shall not be entitled to deduct from its gross earnings for purposes of taxation the amounts so paid by it to freight line companies.

It is not the purpose of this subsection to impose an unreasonable burden of accounting on railroad companies operating in this State, and the Secretary of Revenue is hereby authorized, upon the application of any railroad company, to approve any method of accounting which he finds to be reasonably adequate for determining the amount of mileage earnings by any car line company whose equipment is operated within the State by or on the lines of such railroad company. Further, if in the opinion of the Secretary of Revenue the tax imposed by this section can be satisfactorily collected direct from the freight line companies, he is hereby authorized to fix rules and regulations for such direct collection, with the authority to return at any time to the method of collection at source above provided in this subsection.

(g) Every car line company shall file such additional reports annually, and in such form and as of such date as the Secretary of Revenue may deem necessary to determine the equitable amount of tax levied under this section.

(h) Upon the filing of such reports it shall be the duty of the Secretary of Revenue to inspect and verify the same and assess the amount of taxes due from freight line companies therein named. Any freight line company against which a tax is assessed under the provisions of this Article may at any time within 15 days after the last day for the filing of reports by railroad companies, appear before the Secretary of Revenue at a hearing to be granted by the Secretary and offer evidence and argument on any matter bearing upon the validity or correctness of the tax assessed against it, and the Secretary shall review his assessment of such tax and shall make his order confirming or modifying the same as he shall deem just and equitable, and if any overpayment is found to have been made it shall be refunded by the Secretary. Provided, however that such payment if in the amount of three dollars ($3.00) or more shall be refunded to the taxpayer within 60 days of the discovery thereof; if the amount of overpayment is less than three dollars ($3.00) then such overpayment shall be refunded only upon receipt by the Secretary of Revenue of a written demand for such refund from the taxpayer. Provided further, that no overpayment shall be refunded irrespective of whether upon discovery or receipt of written demand if such discovery is not made or such demand is not received within three years from the filing date of the return or within six months of the payment of the tax alleged to be an overpayment, whichever date is the later.

(i) The provisions of Article 9 of this Chapter apply to this Article.

(j) The provisions of this Article shall apply to all freight line gross earnings accruing from and after June 30, 1943. (1943, c. 400, s. 8; 1957, c. 1340, s. 14; 1973, c. 476, s. 193; 1998-212, s. 29A.14(j).)

ARTICLE 8B.

Taxes Upon Insurance Companies.

§ 105-228.3. Definitions.

The following definitions apply in this Article:

(1) Article 65 corporation. — A corporation subject to Article 65 of Chapter 58 of the General Statutes, regulating hospital, medical, and dental service corporations.

(2) Insurer. — An insurer as defined in G.S. 58-1-5 or a group of employers who have pooled their liabilities pursuant to G.S. 97-93 of the Workers' Compensation Act.

(3) Self-insurer. — An employer that carries its own risk pursuant to G.S. 97-93 of the Workers' Compensation Act. (1945, c. 752, s. 2; 1985 (Reg. Sess., 1986), c. 928, s. 12; 1995, c. 360, s. 1(b).)

Editor's Note. — Session Laws 1998-98, s. 65 deleted "Schedule I-B" from the article heading.

CASE NOTES

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 105-228.4: Recodified as § 58-6-7 by Session Laws 1995, c. 360, s. 1(c).

Editor's Note. — Session Laws 1995, c. 193, s. 65, amended this section effective June 7, 1995, by substituting "license" for "registration" in the catchline; in subsection (a), substituting "license" for "certificate of registration" in the first sentence, and in the second and third sentences substituting "license" for "certificate". The amendments have been implemented in G.S. 58-6-7.

§ 105-228.5. Taxes measured by gross premiums.

(a) Tax Levied. — A tax is levied in this section on insurers, Article 65 corporations, health maintenance organizations, and self-insurers. An insurer, health maintenance organization, or Article 65 corporation that is subject to the tax levied by this section is not subject to franchise or income taxes imposed by Articles 3 and 4, respectively, of this Chapter.

(b) Tax Base. —

(1) Insurers. — The tax imposed by this section on an insurer or a health maintenance organization shall be measured by gross premiums from business done in this State during the preceding calendar year.

(2) **(Repealed for taxable years beginning on or after January 1, 2008)** Additional Local Fire and Lightning Rate. — The additional tax imposed by subdivision (d) (4) of this section shall be measured by gross premiums from business done in fire districts in this State during the preceding calendar year. For the purpose of this section, the term "fire district" has the meaning provided in G.S. 58-84-5.

(3) Article 65 Corporations. — The tax imposed by this section on an Article 65 corporation shall be measured by gross collections from membership dues, exclusive of receipts from cost plus plans, received by the corporation during the preceding calendar year.

(4) Self-insurers. — The tax imposed by this section on a self-insurer shall be measured by the gross premiums that would be charged against the same or most similar industry or business, taken from the manual insurance rate then in force in this State, applied to the self-insurer's payroll for the previous calendar year as determined under Article 2 of Chapter 97 of the General Statutes modified by the self-insurer's approved experience modifier.

(b1) Calculation of Tax Base. — In determining the amount of gross premiums from business in this State, all gross premiums received in this State, credited to policies written or procured in this State, or derived from business written in this State shall be deemed to be for contracts covering persons, property, or risks resident or located in this State unless one of the following applies:

(1) The premiums are properly reported and properly allocated as being received from business done in some other nation, territory, state, or states.

(2) The premiums are from policies written in federal areas for persons in military service who pay premiums by assignment of service pay.

Gross premiums from business done in this State in the case of life insurance contracts, including supplemental contracts providing for disability benefits, accidental death benefits, or other special benefits that are not annuities, means all premiums collected in the calendar year, other than for contracts of reinsurance, for policies the premiums on which are paid by or credited to persons, firms, or corporations resident in this State, or in the case of group policies, for contracts of insurance covering persons resident within this State. The only deductions allowed shall be for premiums refunded on policies rescinded for fraud or other breach of contract and premiums that were paid in advance on life insurance contracts and subsequently refunded to the insured, premium payer, beneficiary or estate. Gross premiums shall be deemed to have been collected for the amounts as provided in the policy contracts for the time in force during the year, whether satisfied by cash payment, notes, loans, automatic premium loans, applied dividend, or by any other means except waiver of premiums by companies under a contract for waiver of premium in case of disability.

Gross premiums from business done in this State for all other health care plans and contracts of insurance, including contracts of insurance required to be carried by the Workers' Compensation Act, means all premiums written during the calendar year, or the equivalent thereof in the case of self-insurers under the Workers' Compensation Act, for contracts covering property or risks in this State, other than for contracts of reinsurance, whether the premiums are designated as premiums, deposits, premium deposits, policy fees, membership fees, or assessments. Gross premiums shall be deemed to have been written for the amounts as provided in the policy contracts, new and renewal, becoming effective during the year irrespective of the time or method of making payment or settlement for the premiums, and with no deduction for dividends whether returned in cash or allowed in payment or reduction of premiums or for additional insurance, and without any other deduction except for return of premiums, deposits, fees, or assessments for adjustment of policy rates or for cancellation or surrender of policies.

(c) Exclusions. — Every insurer, in computing the premium tax, shall exclude all of the following from the gross amount of premiums, and the gross amount of excluded premiums is exempt from the tax imposed by this section:

G.S. 105-228.5(d)(2), (d)(3), (e) and (f) set out twice. See notes.

(1) All premiums received on or after July 1, 1973, from policies or contracts issued in connection with the funding of a pension, annuity, or profit-sharing plan qualified or exempt under section 401, 403, 404, 408, 457 or 501 of the Code as defined in G.S. 105-228.90.

(2) Premiums or considerations received from annuities, as defined in G.S. 58-7-15.

(3) Funds or considerations received in connection with funding agreements, as defined in G.S. 58-7-16.

(4) The following premiums, to the extent federal law prohibits their taxation under this Article:
  a. Federal Employees Health Benefits Plan premiums.
  b. Medicaid or Medicare premiums.

(d) **(See Editor's note)** Tax Rates; Disposition. —

(1) Workers' Compensation. — The tax rate to be applied to gross premiums, or the equivalent thereof in the case of self-insurers, on contracts applicable to liabilities under the Workers' Compensation Act is two and five-tenths percent (2.5%). The net proceeds shall be credited to the General Fund.

(2) **(Effective for taxable years beginning before January 1, 2007)** Other Insurance Contracts. — The tax rate to be applied to gross premiums on all other taxable contracts issued by insurers and to be applied to gross premiums and gross collections from membership dues, exclusive of receipts from cost plus plans, received by Article 65 corporations is one and nine-tenths percent (1.9%). The net proceeds shall be credited to the General Fund.

(2) **(Effective for taxable years beginning on or after January 1, 2007)** Other Insurance Contracts. — The tax rate to be applied to gross premiums on all other taxable contracts issued by insurers or health maintenance organizations and to be applied to gross premiums and gross collections from membership dues, exclusive of receipts from cost plus plans, received by Article 65 corporations is one and nine-tenths percent (1.9%). The net proceeds shall be credited to the General Fund.

(3) **(Effective for taxable years beginning before January 1, 2008)** Additional Statewide Fire and Lightning Rate. — An additional tax at the rate of one and thirty-three hundredths percent (1.33%) applies to gross premiums on insurance contracts applicable to fire and lightning coverage, except marine and automobile contracts. The tax is a percentage of the gross premiums from the contracts, determined in accordance with the table in this subdivision. Twenty-five percent (25%) of the net proceeds of this additional tax shall be deposited in the Volunteer Fire Department Fund established in Article 87 of Chapter 58 of the General Statutes. The remaining net proceeds shall be credited to the General Fund.

Type of Insurance Contract	**Taxable Percentage**
Fire Loss	100%
Commercial Multiple Peril	
Nonliability portion	100%
Liability portion	0%
Homeowners	50%
Farm Owners	30%.

(3) (**Effective for taxable years beginning on or after January 1, 2008**) Additional Rate on Property Coverage Contracts. — An addi-

G.S. 105-228.5(d)(2), (d)(3), (e) and (f) set out twice. See notes.

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tional tax at the rate of seventy-four hundredths percent (0.74%) applies to gross premiums on insurance contracts for property coverage. The tax is imposed on ten percent (10%) of the gross premiums from insurance contracts for automobile physical damage coverage and on one hundred percent (100%) of the gross premiums from all other contracts for property coverage. Thirty percent (30%) of the net proceeds of this additional tax must be credited to the Volunteer Fire Department Fund established in Article 87 of Chapter 58 of the General Statutes. Twenty-five percent (25%) of the net proceeds must be credited to the Department of Insurance for disbursement pursuant to G.S. 58-84-25. The remaining net proceeds must be credited to the General Fund.

The following definitions apply in this subdivision:

a. Automobile physical damage. — The following lines of business identified by the NAIC: private passenger automobile physical damage and commercial automobile physical damage.

b. Property coverage. — The following lines of business identified by the NAIC: fire, farm owners multiple peril, homeowners multiple peril, nonliability portion of commercial multiple peril, ocean marine, inland marine, earthquake, private passenger automobile physical damage, commercial automobile physical damage, aircraft, and boiler and machinery. The term also includes insurance contracts for wind damage.

c. NAIC. — National Association of Insurance Commissioners.

(4) **(Repealed for taxable years beginning on or after January 1, 2008)** Additional Local Fire and Lightning Rate. — An additional tax shall be applied to gross premiums on contracts of insurance applicable to fire and lightning coverage within fire districts at the rate of one-half of one percent (½ of 1%). The net proceeds shall be credited to the Department of Insurance for disbursement pursuant to G.S. 58-84-25.

(5) Repealed by Session Laws 2003-284, s. 43.1, effective for taxable years beginning on or after January 1, 2004.

(6) **(Repealed for taxable years beginning on or after January 1, 2007)** Health Maintenance Organizations. — The tax rate to be applied to gross premiums on insurance contracts issued by health maintenance organizations, including directly operated health maintenance organizations authorized under G.S. 58-67-95, is one percent (1%). The net proceeds shall be credited to the General Fund.

(e) **(Effective for taxable years beginning before January 1, 2008)** Report and Payment. — Each taxpayer doing business in this State shall, within the first 15 days of March, file with the Secretary of Revenue a full and accurate report of the total gross premiums as defined in this section, the payroll and other information required by the Secretary in the case of a self-insurer, or the total gross collections from membership dues exclusive of receipts from cost plus plans collected in this State during the preceding calendar year. The taxes imposed by this section shall be remitted to the Secretary with the report.

In the case of an insurer liable for the additional local fire and lightning tax, the report shall include the information required under G.S. 58-84-1.

(e) **(Effective for taxable years beginning on or after January 1, 2008)** Report and Payment. — Each taxpayer doing business in this State shall, within the first 15 days of March, file with the Secretary of Revenue a full and accurate report of the total gross premiums as defined in this section, the payroll and other information required by the Secretary in the case of a self-insurer, or the total gross collections from membership dues exclusive of receipts from cost plus plans collected in this State during the preceding calendar year. The taxes imposed by this section shall be remitted to the Secretary with the report.

(f) **(Effective for taxable years beginning before January 1, 2008)** Installment Payments Required. — Taxpayers that are subject to the tax imposed by this section and have a premium tax liability, not including the additional local fire and lightning tax, of ten thousand dollars ($10,000) or more for business done in North Carolina during the immediately preceding year shall remit three equal quarterly installments with each installment equal to at least thirty-three and one-third percent (33 ⅓%) of the premium tax liability incurred in the immediately preceding taxable year. The quarterly installment payments shall be made on or before April 15, June 15, and October 15 of each taxable year. The company shall remit the balance by the following March 15 in the same manner provided in this section for annual returns.

The Secretary of Revenue may permit an insurance company to pay less than the required estimated payment when the insurer reasonably believes that the total estimated payments made for the current year will exceed the total anticipated tax liability for the year.

An underpayment of an installment payment required by this subsection shall bear interest at the rate established under G.S. 105-241.1(i). Any overpayment shall bear interest as provided in G.S. 105-266(b) and, together with the interest, shall be credited to the company and applied against the taxes imposed upon the company under this Article.

(f) **(Effective for taxable years beginning on or after January 1, 2008)** Installment Payments Required. — Taxpayers that are subject to the tax imposed by this section and have a premium tax liability of ten thousand dollars ($10,000) or more for business done in North Carolina during the immediately preceding year shall remit three equal quarterly installments with each installment equal to at least thirty-three and one-third percent (33 1/3%) of the premium tax liability incurred in the immediately preceding taxable year. The quarterly installment payments shall be made on or before April 15, June 15, and October 15 of each taxable year. The company shall remit the balance by the following March 15 in the same manner provided in this section for annual returns.

The Secretary may permit an insurance company to pay less than the required estimated payment when the insurer reasonably believes that the total estimated payments made for the current year will exceed the total anticipated tax liability for the year.

An underpayment or an overpayment of an installment payment required by this subsection accrues interest in accordance with G.S. 105-241.21. An overpayment of tax shall be credited to the company and applied against the taxes imposed upon the company under this Article.

(g) Exemptions. — This section does not apply to farmers' mutual assessment fire insurance companies or to fraternal orders or societies that do not operate for a profit and do not issue policies on any person except members. (1945, c. 752, s. 2; 1947, c. 501, s. 8; 1951, c. 643, s. 8; 1955, c. 1313, s. 5; 1957, c. 1340, s. 12; 1959, c. 1211; 1961, c. 783; 1963, c. 1096; 1969, c. 1221; 1973, cc. 142, 1019; 1975, c. 143; c. 559, s. 8; 1979, c. 714, s. 2; 1983, c. 713, s. 81; 1985, c. 119, s. 3; c. 719, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 1031, ss. 1-5; 1987, c. 709, s. 2; c. 814, s. 2; 1989 (Reg. Sess., 1990), c. 814, s. 27; 1991, c. 689, s. 297; 1993 (Reg. Sess., 1994), c. 600, s. 4; 1995, c. 360, s. 1(d); 1995 (Reg. Sess., 1996), c. 747, s. 2; 1998-98, s. 17; 2001-424, s. 34.22(a), (d), (e); 2001-487, s. 69(a); 2001-489, s. 2(a)-(d), (f), (g); 2003-284, s. 43.1; 2005-276, s. 38.4(a); 2005-435, s. 57(a); 2006-196, ss. 1-5; 2007-250, s. 1; 2007-491, s. 23.)

Subdivision (d)(2) Set Out Twice. — The first version of subsection (d)(2) set out above is effective for taxable years beginning before January 1, 2007. The second version of subdivision (d)(2) set out above is effective for taxable years beginning on or after January 1, 2007.

Subdivision (d)(3) and Subsections (e) and (f) Set Out Twice. — The first version of subdivision (d)(3) and subsections (e) and (f) set out above are effective for taxable years beginning before January 1, 2008. The second version of subdivision (d)(3) and subsections (e) and (f) set out above are effective for taxable years beginning on or after January 1, 2008.

Health Maintenance Organizations. — — Session Laws 2005-276, s. 38.4(c), provides: "Notwithstanding the provisions of G.S. 105-228.5(f), the following provisions apply to health maintenance organizations for the 2007 taxable year in lieu of the provisions of G.S. 105-228.5(f):

"Health maintenance organizations that are subject to the tax imposed by G.S. 105-228.5 and have an estimated premium tax liability for the taxable year, not including the additional local fire and lightning tax, of ten thousand dollars ($10,000) or more for business done in North Carolina shall remit two estimated tax payments with each payment equal to fifty percent (50%) of the taxpayer's estimated premium tax liability for the 2007 taxable year. The first estimated payment is due on or before April 15, 2007, and the second estimated payment is due on or before June 15, 2007. The taxpayer must remit the balance by the following March 15 in the same manner provided in G.S. 105-228.5(e) for annual returns.

"An underpayment of an estimated payment required by this subsection bears interest at the rate established under G.S. 105-241.1(i) [now G.S. 241.21]. Any overpayment bears interest as provided in G.S. 105-266(b) [repealed] and, together with the interest, must be credited to the taxpayer and applied against the taxes imposed upon the company under G.S. 105-228.5.

"The penalties provided in Article 9 of Chapter 105 of the General Statutes apply to the estimated tax payments required by this subsection."

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 747, s. 16, provides: "This act does not obligate the General Assembly to appropriate funds."

Session Laws 2003-284, s. 43.3, provides: "Notwithstanding the provisions of G.S 105-228.5(f), the following provisions apply to Article 65 Corporations, as defined in G.S. 105-228.3, for the 2004 and 2005 taxable years in lieu of the provisions of G.S. 105-228.5(f):

"Article 65 corporations that are subject to the tax imposed by G.S. 105-228.5 and have an estimated premium tax liability for the 2004 or 2005 taxable year, not including the additional local fire and lightning tax, of ten thousand dollars ($10,000) or more for business done in North Carolina shall remit two estimated tax payments with each payment equal to fifty percent (50%) of the taxpayer's estimated premium tax liability for the relevant taxable year. The first estimated payment is due on or before April 15 of the relevant year and the second estimated payment is due on or before June 15 of the relevant year. The taxpayer must remit the balance by the following March 15 in the same manner provided in G.S. 105-228.5(e) for annual returns.

"An underpayment of an estimated payment required by this section bears interest at the rate established under G.S. 105-241.1(i). Any overpayment bears interest as provided in G.S. 105-266(b) and, together with the interest, must be credited to the taxpayer and applied against the taxes imposed upon the company under G.S. 105-228.5.

"The penalties provided in Article 9 of Chapter 105 of the General Statutes apply to the estimated tax payments required by this section."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Law 2006-196, s. 13, provides: "The Revenue Laws Study Committee shall study the following issues:

"(1) The simplification of the additional tax imposed on insurance contracts on property coverage, as enacted in Section 3 of this act, and the distribution of the revenue generated by the tax. The study of this issue may include a recommendation on the percentage of revenue to be distributed to the firemen's local relief funds and the formula for making this distribution. The study may also consider the increasing difference between the amount of revenue available in the Volunteer Fire Department Fund for matching grants to purchase equipment and make capital improvements and the amount of grant requests received.

"(2) The authority of the Secretary of Revenue to require taxpayers to file consolidated returns. The study of this issue may include consideration of whether the State should require some corporations or all corporations to file a consolidated return.

"(3) The feasibility of replacing the State's current corporate income and franchise tax laws with a commercial activity tax based upon business gross receipts.

"(4) The administrative process for the review of disputed tax matters."

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2005-276, s. 38.4(a), effective for taxable years beginning on or after January 1, 2007, repealed subdivision (d)(6).

Session Laws 2005-435, s. 57.(a), effective January 1, 2007, inserted "or health maintenance organizations" following "issued by insurers" in subdivision (d)(2).

Session Laws 2006-196, s. 1, effective for taxable years beginning on or after January 1, 2006, rewrote paragraph (d)(3) which read: "Additional Statewide Fire and Lightning Rate. - An additional tax shall be applied to gross premiums on contracts of insurance applicable to fire and lightning coverage, except in the case of marine and automobile policies, at the rate of one and thirty-three hundredths percent (1.33%). Twenty-five percent (25%) of the net proceeds of this additional tax shall be deposited in the Volunteer Fire Department Fund established in Article 87 of Chapter 58 of the General Statutes. The remaining net proceeds shall be credited to the General Fund."; ss. 2 - 5, effective for taxable years beginning on or after January 1, 2008, deleted former paragraph (b)(2) which read: "Additional Local Fire and Lightning Rate. - The additional tax imposed by subdivision (d) (4) of this section shall be measured by gross premiums from business done in fire districts in this State during the preceding calendar year. For the purpose of this section, the term "fire district" has the meaning provided in G.S. 58-84-5"; in subsection (d), rewrote paragraph (d)(3); deleted paragraph (d)(4) which read: "Additional Local Fire and Lightning Rate. - An additional tax shall be applied to gross premiums on contracts of insurance applicable to fire and lightning coverage within fire districts at the rate of one-half of one percent (½ of 1%). The net proceeds shall be credited to the Department of Insurance for disbursement pursuant to G.S. 58-84-25"; deleted the second paragraph of subsection (e) which read: "In the case of an insurer liable for the additional local fire and lightning tax, the report shall include the information required under G.S. 58-84.1"; and deleted "not including the additional local fire and lightning tax," following "liability" in the middle of the first sentence of subsection (f).

Session Laws 2007-250, s. 1, effective for taxable years beginning on or after January 1, 2008, in subdivision (d)(3), in the introductory paragraph, substituted "seventy-four hundredths percent (0.74%)" for "eighty-five hundredths percent (.85%)" in the first sentence, and "Thirty percent (30%)" for "Twenty percent (20%)" in the third sentence; and added the last sentence in subdivision (d)(3)b.

Session Laws 2007-491, s. 23, effective January 1, 2008, in subsection (f), deleted "of Revenue" following "The Secretary" in the second paragraph, and rewrote the third paragraph. For applicability, see Editor's note.

Legal Periodicals. — For discussion of the 1947 amendment which added to the section, see 25 N.C.L. Rev. 471 (1947).

CASE NOTES

Constitutionality. — See Great Am. Ins. Co. v. High, 264 N.C. 752, 142 S.E.2d 681 (1965); Great Am. Ins. Co. v. Johnson, 257 N.C. 367, 126 S.E.2d 92 (1962).

The license tax imposed by a former statute upon the gross receipts of insurance companies on business written within the borders of our State was held not in contravention of U.S. Const., Amend. XIV, as to due process and equal protection of the law, nor a burden upon interstate commerce, being restricted to intrastate commerce, and not extending beyond the boundaries of the State. Pittsburg Life & Trust Co. v. Young, 172 N.C. 470, 90 S.E. 568 (1916).

Legislative History of Section. — See Great Am. Ins. Co. v. Johnson, 257 N.C. 367, 126 S.E.2d 92 (1962).

Nature of Tax. — A tax imposed by a former statute upon the gross earnings of foreign life insurance companies doing business within this State, derived within this State, was a license or occupation tax. Pittsburg Life & Trust Co. v. Young, 172 N.C. 470, 90 S.E. 568 (1916).

A tax on the gross receipts of an insurance company is a privilege tax. Wilmington Underwriters Ins. Co. v. Stedman, 130 N.C. 221, 41 S.E. 279 (1902).

Gross Receipts from Business Done in State. — The former tax on gross receipts applied to all receipts from business done in the State, whether the money was paid here or forwarded to the main office. Pittsburg Life & Trust Co. v. Young, 172 N.C. 470, 90 S.E. 568 (1916).

Validity of Section Tested by § 105-267. — The validity of provisions of this section can be tested only by the exclusive procedure set out in G.S. 105-267 [repealed]. Great Am. Ins. Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792 (1961).

Insurance Companies Liable for Local Use Taxes. — Recent amendments to G.S. 105-228.10 make it clear that insurance companies are currently responsible for local use taxes, and the changes were made to clarify the law that existed prior to the amendments; thus, a trial court properly found an insurance company liable for such taxes and rejected its claim that it had an exemption from such taxes under G.S. 105-228.5. Proposed Assessments of Additional Sales & Use Tax v. Jefferson-Pilot Ins. Co., 161 N.C. App. 558, 589 S.E.2d 179, 2003 N.C. App. LEXIS 2274 (2003).

§ 105-228.5A. Credit against gross premium tax for assessments paid to the Insurance Guaranty Association and the Life and Health Insurance Guaranty Association.

(a) The following definitions apply in this section:
(1) Assessment. — An assessment as described in G.S. 58-48-35 or an assessment as described in G.S. 58-62-41.
(2) Association. — The North Carolina Insurance Guaranty Association created under G.S. 58-48-25 or the North Carolina Life and Health Insurance Guaranty Association created under G.S. 58-62-26.
(3) Repealed by Session Laws 1995, c. 360, s. 1(e).
(4) Member insurer. — A member insurer as defined in G.S. 58-48-20 or a member insurer as defined in G.S. 58-62-16.

(b) A member insurer who pays an assessment is allowed as a credit against the tax imposed under G.S. 105-228.5 an amount equal to twenty percent (20%) of the amount of the assessment in each of the five taxable years following the year in which the assessment was paid. In the event a member insurer ceases doing business, all assessments for which it has not taken a credit under this section may be credited against its premium tax liability for the year in which it ceases doing business. The amount of the credit allowed by this section may not exceed the member insurer's premium tax liability for the taxable year.

(c) Any sums that are acquired by refund, under either G.S. 58-48-35 or G.S. 58-62-41, from the Association by member insurers, and that have previously been offset against premium taxes as provided in subsection (b) of this section, shall be paid by the member insurers to this State in the manner required by the Secretary of Revenue. The Association shall notify the Secretary that the refunds have been made. (1991, c. 689, s. 298; 1991 (Reg. Sess., 1992), c. 1007, s. 8; 1995, c. 360, s. 1(e).)

§ 105-228.5B. (Effective until June 30, 2010) Proceeds credited to High Risk Pool.

Within 75 days after the end of each fiscal year, the State Treasurer must transfer from the General Fund to the North Carolina Health Insurance Risk Pool Special Fund established in G.S. 58-50-225 an amount equal to the growth in net revenue from the tax applied to gross premiums under G.S. 105-228.5(d)(2). The growth in revenue from this tax is the difference between the amount of revenue collected during the preceding fiscal year on premiums taxed under that subdivision less $475,545,413, which is the amount of revenue collected during fiscal year 2006-2007 on premiums taxed under that subdivision. The Treasurer must draw the amount required under this section from revenue collected on premiums taxed under that subdivision. (2007-532, s. 4(a).)

Section Set Out Twice. — The section above is effective until June 30, 2010. For the section as amended June 30, 2010, see the following section, also numbered G.S. 105-228.5B.

Editor's Note. — Session Laws 2007-532, s. 4(c), made this section effective August 31, 2007, and applicable to transfers for fiscal years ending on or after June 30, 2008.

Session Laws 2007-532, s. 7, is a severability clause.

§ 105-228.5B. (Effective June 30, 2010) Proceeds credited to High Risk Pool.

Within 75 days after the end of each fiscal year, the State Treasurer must transfer from the General Fund to the North Carolina Health Insurance Risk Pool Special Fund established in G.S. 58-50-225 an amount equal to thirty percent (30%) of the growth in revenue from the tax applied to gross premiums under G.S. 105-228.5(d)(2). The growth in revenue from this tax is the difference between the amount of revenue collected during the preceding fiscal year on premiums taxed under that subdivision less $475,545,413, which is the amount of revenue collected during fiscal year 2006-2007 on premiums taxed under that subdivision. The Treasurer must draw the amount required under this section from revenue collected on premiums taxed under that subdivision. (2007-532, s. 4(a), (b).)

Section Set Out Twice. — The section above is effective June 30, 2010. For the section as in effect until June 30, 2010, see the preceding section also numbered G.S. 105-228.5B.

Effect of Amendments. — Session Laws 2007-532, s. 4(b), effective June 30, 2010, inserted "thirty percent (30%) of" preceding "the growth in revenue from the tax applied to gross premiums under G.S. 105-228.5(d)(2)" in the first sentence.

§ 105-228.6. Taxes in case of withdrawal from State.

Any insurance company which for any cause withdraws from this State or ceases to register and transact new business in this State shall be liable for the taxes specified in G.S. 105-228.5 with respect to gross premiums collected in the calendar year in which such withdrawal may occur. In case any company which was formerly licensed or registered in this State and which subsequently ceased to do business therein, may apply to reenter this State, application for reentry or renewal of registration shall be denied unless and until said company shall have paid all taxes, together with any penalties and interest, due as to premiums collected in the year of withdrawal and also taxes as specified in G.S. 105-228.5 for gross premiums collected in the calendar year next preceding the year in which such application for renewal of registration is made. (1945, c. 752, s. 2; 1985 (Reg. Sess., 1986), c. 1031, s. 5.1; 1987, c. 814, s. 4; 1989, c. 346, s. 1.)

§ 105-228.7: Repealed by Session Laws 1987, c. 629, s. 21.

§ 105-228.8. Retaliatory premium taxes.

(a) When the laws of any other state impose, or would impose, any premium taxes, upon North Carolina companies doing business in the other state that are, on an aggregate basis, in excess of the premium taxes directly imposed upon similar companies by the statutes of this State, the Secretary of Revenue shall impose the same premium taxes, on an aggregate basis, upon the companies chartered in the other state doing business or seeking to do business in North Carolina. Any company subject to the retaliatory tax imposed by this section shall report and pay the tax with the annual premium tax return required by G.S. 105-228.5. The retaliatory tax imposed by this section shall be included in the quarterly prepayment rules for premium taxes.

(b) For purposes of this section, the following definitions shall be applied:

(1) "State" includes the District of Columbia and other states, territories, and possessions of the United States, the provinces of Canada, and other nations.

(2) "Companies" includes all entities subject to tax under G.S. 105-228.5.

(c) For purposes of this section, any premium taxes that are, or would be, imposed upon North Carolina companies by any city, county, or other political subdivision or agency of another state shall be deemed to be imposed directly by that state.

(d) In computing the premium taxes that another state imposes, or would impose, upon a North Carolina company doing business in the state, it shall be assumed that North Carolina companies pay the highest rates of premium tax that are generally imposed by the other state on similar companies chartered outside of the state.

(e) This section shall not apply to special purpose obligations or assessments based on premiums imposed in connection with particular kinds of insurance, to the special purpose regulatory charge imposed under G.S. 58-6-25, or to dedicated special purpose taxes based on premiums. For purposes of this section, seventy-five percent (75%) of the one and thirty-three hundredths percent (1.33%) tax on amounts collected on contracts of insurance applicable to fire and lightning coverage shall not be a special purpose obligation or assessment or a dedicated special purpose tax within the meaning of this subsection.

(f) If the laws of another state retaliate against North Carolina companies on other than an aggregate basis, the Secretary of Revenue shall retaliate against companies chartered in that state on the same basis. (1945, c. 752, s. 2; 1987, c. 814, s. 1; 1989 (Reg. Sess., 1990), c. 1069, s. 21; 1991, c. 689, s. 291; 1995, c. 360, s. 1(f).)

CASE NOTES

Cited in State Farm Mut. Auto. Ins. Co. v. Long, 129 N.C. App. 164, 497 S.E.2d 451 (1998), aff'd, 350 N.C. 84, 511 S.E.2d 303 (1999).

§ 105-228.9. Commissioner of Insurance to administer portions of Article.

The following taxes relating to insurance are collected by the Commissioner of Insurance:

(1) Surplus lines tax, G.S. 58-21-85.
(2) Tax on risk retention groups not chartered in this State, G.S. 58-22-20(3).
(3) Tax on person procuring insurance directly with an unlicensed insurer, G.S. 58-28-5(b).

The Commissioner of Insurance has the same authority and responsibility in administering those taxes as the Secretary of Revenue has in administering this Article. (1945, c. 752, s. 2; 1955, c. 1350, s. 22; 1973, c. 476, s. 193; 1987, c. 804, s. 9; 1995, c. 360, s. 1(a); 1995 (Reg. Sess., 1996), c. 747, s. 1.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 747, s. 16, provides: "This act does not obligate the General Assembly to appropriate funds."

CASE NOTES

Applied in Great Am. Ins. Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792 (1961).

§ 105-228.10. No additional local taxes.

No city or county may levy on a person subject to the tax levied in this Article a privilege tax or a tax computed on the basis of gross premiums. (1945, c. 752, s. 2; 1998-98, s. 18.)

CASE NOTES

Insurance Companies Liable for Local Use Taxes. — Recent amendments to G.S. 105-228.10 make it clear that insurance companies are currently responsible for local use taxes, and the changes were made to clarify the law that existed prior to the amendments; thus, a trial court properly found an insurance company liable for such taxes and rejected its claim that it had an exemption from such taxes under G.S. 105-228.5. Proposed Assessments of Additional Sales & Use Tax v. Jefferson-Pilot Ins. Co., 161 N.C. App. 558, 589 S.E.2d 179, 2003 N.C. App. LEXIS 2274 (2003).

ARTICLE 8C.

Schedule I-C. Excise Tax on Banks.

§§ 105-228.11 through 105-228.20: Repealed by Session Laws 1973, c. 1053, s. 1.

§ 105-228.21: Omitted.

Article 8D.

Taxation of Savings and Loan Associations.

§§ 105-228.22 through 105-228.24: Repealed by Session Laws 1998-98, s. 1(a), effective August 14, 1998.

Cross References. — For provisions as to savings and loan associations, see Chapter 54B.

Editor's Note. — Session Laws 1998-98, s. 66, deleted "Schedule I-D" from the article heading.

Session Laws 1998-98, s. 1(i) provides: "This section repeals any law that would otherwise exempt savings and loan associations, as defined in G.S. 54B-4, from the franchise tax imposed in Article 3 of Chapter 105 of the General Statutes."

§ 105-228.24A: Recodified as § 105-130.43 by Session Laws 1998-98, s. 1(d), effective for taxable years beginning on or after January 1, 1998.

§§ 105-228.25 through 105-228.27: Repealed by Session Laws 1983, c. 26, s. 1.

Article 8E.

Excise Stamp Tax on Conveyances.

§ 105-228.28. Scope.

This Article applies to every person conveying an interest in real estate located in North Carolina other than a governmental unit or an instrumentality of a governmental unit. (1967, c. 986, s. 1; 1999-28, s. 1.)

Local Modification. — Pasquotank, Perquimans, and Washington: 1989, c. 393, s. 1.

Editor's Note. — Session Laws 1999-28, s. 2, provides that prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

Legal Periodicals. — For article, "Transferring North Carolina Real Estate, Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

CASE NOTES

Cited in Patterson v. Wachovia Bank & Trust Co., 68 N.C. App. 609, 315 S.E.2d 781 (1984).

OPINIONS OF ATTORNEY GENERAL

Excise Stamp Tax Not Applicable in Foreclosure Sale When Purchaser Is Federal Government Instrumentality. — See opinion of Attorney General to Mr. Austin C. Williams, 41 N.C.A.G. 714 (1972).

§ 105-228.29. Exemptions.

This Article does not apply to any of the following transfers of an interest in real property:

(1) By operation of law.

(2) By lease for a term of years.
(3) By or pursuant to the provisions of a will.
(4) By intestacy.
(5) By gift.
(6) If no consideration in property or money is due or paid by the transferee to the transferor.
(7) By merger, conversion, or consolidation.
(8) By an instrument securing indebtedness. (1967, c. 986, s. 1; 1999-28, s. 1; 1999-369, s. 5.10(a)-(c).)

OPINIONS OF ATTORNEY GENERAL

"Consideration" Includes Exchange of Real Property. — See opinion of Attorney General to Mr. W.G. Massey, 41 N.C.A.G. 480 (1971).

Secretary's Deed Not by Operation of Law. — See opinion of Attorney General to Patsy Thomas, Caldwell County Register of Deeds, 41 N.C.A.G. 204 (1971).

Husband-Wife Conveyances upon Separation Subject to Excise Stamp Tax. — See opinion of Attorney General to Mr. Mark Stuart, Guilford County Register of Deeds, 41 N.C.A.G. 237 (1971).

Sale of real property by the trustee of a deed of trust to the creditor of the deed of trust for the amount owed by the debtor is a sale for consideration and is subject to tax. See opinion of Attorney General to Mrs. Julia E. Manning, 41 N.C.A.G. 837 (1972).

Excise Stamp Tax Not Applicable in Foreclosure Sale When Seller Is Federal Government Instrumentality. — See opinion of Attorney General to Mr. Austin C. Williams, 41 N.C.A.G. 714 (1972).

Conveyance by an individual to his wholly-owned corporation for "business convenience" and "without consideration" is not subject to the excise stamp tax on conveyances. See opinion of Attorney General to Mrs. Lois C. LeRay, 43 N.C.A.G. 79 (1973).

Conveyance of interest in lease for term of years is not subject to real estate excise stamp tax on conveyances. See opinion of Attorney General to Mr. Lucius M. Cheshire, County Attorney, Orange County, 43 N.C.A.G. 364 (1974).

§ 105-228.30. Imposition of excise tax; distribution of proceeds.

(a) An excise tax is levied on each instrument by which any interest in real property is conveyed to another person. The tax rate is one dollar ($1.00) on each five hundred dollars ($500.00) or fractional part thereof of the consideration or value of the interest conveyed. The transferor must pay the tax to the register of deeds of the county in which the real estate is located before recording the instrument of conveyance. If the instrument transfers a parcel of real estate lying in two or more counties, however, the tax must be paid to the register of deeds of the county in which the greater part of the real estate with respect to value lies.

The excise tax on instruments imposed by this Article applies to timber deeds and contracts for the sale of standing timber to the same extent as if these deeds and contracts conveyed an interest in real property.

(b) The register of deeds of each county must remit the proceeds of the tax levied by this section to the county finance officer. The finance officer of each county must credit one-half of the proceeds to the county's general fund and remit the remaining one-half of the proceeds, less the county's allowance for administrative expenses, to the Department of Revenue on a monthly basis. A county may retain two percent (2%) of the amount of tax proceeds allocated for remittance to the Department of Revenue as compensation for the county's cost in collecting and remitting the State's share of the tax. Of the funds remitted to it pursuant to this section, the Department of Revenue must credit seventy-five percent (75%) to the Parks and Recreation Trust Fund established under G.S. 113-44.15 and twenty-five percent (25%) to the Natural Heritage Trust Fund established under G.S. 113-77.7. (1967, c. 986, s. 1; 1991, c. 689, s.

338; 1991 (Reg. Sess., 1992), c. 1019, s. 1; 1993 (Reg. Sess., 1994), c. 772, s. 2; 1995, c. 456, s. 3; 1999-28, s. 1; 2000-16, s. 1; 2001-427, s. 14(a).)

CASE NOTES

Standing to Sue. — Timber companies that paid excise tax on timber in behalf of landowners who sold timber were not taxpayers under G.S. 105-228.30, and the trial court properly dismissed the companies' lawsuit against the State of North Carolina seeking reimbursement of the tax because the companies did not have standing to sue. Am. Woodland Indus. v. Tolson, 155 N.C. App. 624, 574 S.E.2d 55, 2002 N.C. App. LEXIS 1584 (2002), cert. denied, 357 N.C. 61, 579 S.E.2d 283 (2003), cert. dismissed, 357 N.C. 61, 579 S.E.2d 282 (2003).

OPINIONS OF ATTORNEY GENERAL

Lessee's Conveyance of Leasehold Improvements to Purchaser. — An instrument conveying ownership of leasehold improvements, owned by a lessee, from the lessee to a purchaser is not subject to the excise stamp tax on conveyances. See opinion of Attorney General to Mr. Thomas Russell Odom, Durham County Attorney, 55 N.C.A.G. 109 (1986).

§ 105-228.31: Repealed by Session Laws 1999-28, s. 1, effective July 1, 2000.

§ 105-228.32. Instrument must be marked to reflect tax paid.

A person who presents an instrument for registration must report to the Register of Deeds the amount of tax due. Before the instrument may be recorded, the Register of Deeds must collect the tax due and mark the instrument to indicate that the tax has been paid and the amount of the tax paid. (1967, c. 986, s. 1; 1969, c. 599, s. 1; 1973, c. 476, s. 193; 1999-28, s. 1.)

OPINIONS OF ATTORNEY GENERAL

Since 1969 Amendment, Register of Deeds May Not Refuse Tender of Deed for Recording If Stamp Tax Not Paid. — See opinion of Attorney General to Mrs. Lois C. LeRay, Register of Deeds, New Hanover County, 40 N.C.A.G. 876 (1970).

§ 105-228.33. Taxes recoverable by action.

A county may recover unpaid taxes under this Article in an action in the name of the county brought in the superior court of the county. The action may be filed if the taxes remain unpaid more than 30 days after the register of deeds has demanded payment. In such actions, costs of court shall include a fee to the county of twenty-five dollars ($25.00) for expense of collection. (1967, c. 986, s. 1; 1999-28, s. 1.)

§ 105-228.34: Repealed by Session Laws 1999-28, s. 1, effective July 1, 2000.

§ 105-228.35. Administrative provisions.

Except as otherwise provided in this Article, the provisions of Article 9 of this Chapter apply to this Article. (1967, c. 986, s. 1; 1999-28, s. 1; 2000-170, s. 1.)

§ 105-228.36: Repealed by Session Laws 1999-28, s. 1, effective July 1, 2000.

§ 105-228.37. Refund of overpayment of tax.

(a) Refund Request. — A taxpayer who pays more tax than is due under this Article may request a refund of the overpayment by filing a written request for a refund with the board of county commissioners of the county where the tax was paid. The request must be filed within six months after the date the tax was paid and must explain why the taxpayer believes a refund is due.

(b) Hearing by County. — A board of county commissioners must conduct a hearing on a request for refund in accordance with the procedures that apply to a hearing held by a board of equalization and review on an appeal concerning the listing or appraisal of property. If the board decides that a refund is due, it must refund the county's portion of the overpayment, together with any applicable interest, to the taxpayer. If the board finds that no refund is due, the written decision of the board must inform the taxpayer that the taxpayer may appeal the decision to the Property Tax Commission.

(c) Review by Commission. — The procedure in G.S. 105-290 for the appeal to the Property Tax Commission of a decision of a board of equalization and review concerning the listing or appraisal of property applies to the appeal of a denial by a board of county commissioners of a request for a refund of tax paid under this Article. If the Commission determines that a refund is due, the board of county commissioners must refund the county's portion of the overpayment, together with any applicable interest, to the taxpayer. A decision of the Commission is binding on the Secretary and on a board of county commissioners.

(d) Judicial Review. — A decision of the Property Tax Commission is subject to judicial review in accordance with G.S. 7A-29.

(e) Recording Correct Deed. — Before a tax is refunded, the taxpayer must record a new instrument reflecting the correct amount of tax due. If no tax is due because an instrument was recorded in the wrong county, then the taxpayer must record a document stating that no tax was owed because the instrument being corrected was recorded in the wrong county. The taxpayer must include in the document the names of the grantors and grantees and the deed book and page number of the instrument being corrected.

When a taxpayer records a corrected instrument, the taxpayer must inform the register of deeds that the instrument being recorded is a correcting instrument. The taxpayer must give the register of deeds a copy of the decision granting the refund that shows the correct amount of tax due. The correcting instrument must include the deed book and page number of the instrument being corrected. The register of deeds must notify the county finance officer and the Secretary when the correcting instrument has been recorded.

(f) Interest. — An overpayment of tax bears interest at the rate established in G.S. 105-241.21 from the date that interest begins to accrue. Interest begins to accrue on an overpayment 30 days after the request for a refund is filed by the taxpayer with the board of county commissioners. (2000-170, s. 2; 2007-491, s. 24.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 24, effective January 1, 2008, rewrote the first and last sentences of subsection (b); rewrote subsections (c) and (d); and substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in subsection (f). For applicability, see Editor's note.

§§ 105-228.38 through 105-228.89: Reserved for future codification purposes.

ARTICLE 9.

General Administration; Penalties and Remedies.

§ 105-228.90. Scope and definitions.

(a) Scope. — This Article applies to Subchapters I, V, and VIII of this Chapter, to the annual report filing requirements of G.S. 55-16-22, to the primary forest product assessment levied under Article 12 of Chapter 113A of the General Statutes, and to inspection taxes levied under Article 3 of Chapter 119 of the General Statutes.

(b) Definitions. — The following definitions apply in this Article:

(1) Charter school. — A nonprofit corporation that has a charter under G.S. 115C-238.29D to operate a charter school.

(1a) City. — A city as defined by G.S. 160A-1(2). The term also includes an urban service district defined by the governing board of a consolidated city-county, as defined by G.S. 160B-2(1).

(1b) Code. — The Internal Revenue Code as enacted as of January 1, 2007, including any provisions enacted as of that date which become effective either before or after that date.

(1c) County. — Any one of the counties listed in G.S. 153A-10. The term also includes a consolidated city-county as defined by G.S. 160B-2(1).

(2) Department. — The Department of Revenue.

(3) Electronic Funds Transfer. — A transfer of funds initiated by using an electronic terminal, a telephone, a computer, or magnetic tape to instruct or authorize a financial institution or its agent to credit or debit an account.

(4) Income tax return preparer. — Any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by Article 4 of this Chapter or any claim for refund of tax imposed by Article 4 of this Chapter. For purposes of this definition, the completion of a substantial portion of a return or claim for refund is treated as the preparation of the return or claim for refund. The term does not include a person merely because the person (i) furnishes typing, reproducing, or other mechanical assistance, (ii) prepares a return or claim for refund of the employer, or an officer or employee of the employer, by whom the person is regularly and continuously employed, (iii) prepares as a fiduciary a return or claim for refund for any person, or (iv) represents a taxpayer in a hearing regarding a proposed assessment.

(4d) Pass-through entity. — An entity or business, including a limited partnership, a general partnership, a joint venture, a Subchapter S Corporation, or a limited liability company, all of which is treated as owned by individuals or other entities under the federal tax laws, in which the owners report their share of the income, losses, and credits from the entity or business on their income tax returns filed with this State. For the purpose of this section, an owner of a pass-through entity is an individual or entity who is treated as an owner under the federal tax laws.

(5) Person. — An individual, a fiduciary, a firm, an association, a partnership, a limited liability company, a corporation, a unit of government, or another group acting as a unit. The term includes an officer or employee of a corporation, a member, a manager, or an employee of a limited liability company, and a member or employee of a partnership who, as officer, employee, member, or manager, is under a duty to perform an act in meeting the requirements of Subchapter I, V, or VIII of this Chapter, of G.S. 55-16-22, of Article 12 of Chapter 113A of the General Statutes, or of Article 3 of Chapter 119 of the General Statutes.

(6) Secretary. — The Secretary of Revenue.

(7) Tax. — A tax levied under Subchapter I, V, or VIII of this Chapter, the primary forest product assessment levied under Article 12 of Chapter 113A of the General Statutes, or an inspection tax levied under Article 3 of Chapter 119 of the General Statutes. Unless the context clearly requires otherwise, the term "tax" includes penalties and interest as well as the principal amount.

(8) Taxpayer. — A person subject to the tax or reporting requirements of Subchapter I, V, or VIII of this Chapter, of Article 12 of Chapter 113A of the General Statutes, or of Article 3 of Chapter 119 of the General Statutes. (1991 (Reg. Sess., 1992), c. 930, s. 13; 1993, c. 12, s. 1; c. 354, s. 18; c. 450, s. 1; 1993 (Reg. Sess., 1994), c. 662, s. 1; c. 745, s. 13; 1995, c. 17, s. 9; c. 461, s. 14; 1995 (Reg. Sess., 1996), c. 664, s. 1; 1997-55, s. 1; 1997-475, s. 6.9; 1998-171, s. 1; 1999-415, s. 1; 2000-72, s. 1; 2000-126, s. 1; 2000-140, s. 69; 2001-414, s. 23; 2001-427, s. 4(a); 2002-106, s. 1; 2002-126, s. 30C.1(a); 2003-25, s. 1; 2003-284, s. 37A.1; 2003-416, s. 4(d); 2004-110, s. 1.1; 2005-276, ss. 35.1(a), (d); 2006-18, s. 1; 2007-323, s. 31.1(a); 2007-491, s. 25.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-323, s. 31.1(b), provides that notwithstanding the amendment of this section by that act, any amendments to the Internal Revenue Code enacted after January 1, 2006, that increase North Carolina taxable income for the 2006 taxable year become effective for taxable years beginning on or after January 1, 2007.

For prior similar provisions, see Session Laws 2006-18, s. 2; 2005-276, s. 35.1(c); 2004-110, s. 1.2; 2003-25, s. 2; 2002-126, s. 30C.1(b), 2001-427, s. 4 (c), 2000-126, s. 7, 1998-171, s. 5, and 1997-55, s. 2.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2005-276, s. 35.1(a), effective August 13, 2005, in subdivision (b)(1b), substituted "January 1, 2005" for "May 1, 2004," and added "but not including the amendments made to section 164 of the Code by section 501 of P.L. 108-537."

Session Laws 2005-276, s. 35.1(d), effective for taxable years beginning or or after January 1, in subdivision (b)(1b), deleted "but not including the amendments made to section 164 of the Code by section 501 of P.L. 108-537," as added by s. 35.1(a).

Session Laws 2006-18, s. 1, effective June 21, 2006, substituted "2006" for "2005" in subdivision (b)(1b).

Session Laws 2007-323, s. 31.1(a), effective July 1, 2007, substituted "January 1, 2007," for "January 1, 2006," in subdivision (b)(1b).

Session Laws 2007-491, s. 25, effective January 1, 2008, substituted "the term 'tax' includes" for "the terms 'tax' and 'additional tax' includes" in subdivision (b)(7). For applicability, see Editor's note.

CASE NOTES

Penalties Collected for Failing to Comply with Statutory or Regulatory Tax Provisions. — Monetary payments for a taxpayer's noncompliance with a mandate of Chapter 105 are penalties and, therefore, subject to N.C. Const. art. IX, § 7; thus, monies collected by the North Carolina Department of Revenue for late filings, underpayments, and for failing to comply with statutory or regulatory tax provisions are payable to public schools. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

Applied in N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

§ 105-229: Repealed by Session Laws 1995 (Regular Session, 1996), c. 646, s. 9.

§ 105-230. Charter suspended for failure to report.

(a) If a corporation or a limited liability company fails to file any report or return or to pay any tax or fee required by this Subchapter for 90 days after it is due, the Secretary shall inform the Secretary of State of this failure. The Secretary of State shall suspend the articles of incorporation, articles of organization, or certificate of authority, as appropriate, of the corporation or limited liability company. The Secretary of State shall immediately notify by mail every domestic or foreign corporation or limited liability company so suspended of its suspension. The powers, privileges, and franchises conferred upon the corporation or limited liability company by the articles of incorporation, the articles of organization, or the certificate of authority terminate upon suspension.

(b) Any act performed or attempted to be performed during the period of suspension is invalid and of no effect, unless the Secretary of State reinstates the corporation or limited liability company pursuant to G.S. 105-232. (1939, c. 158, ss. 901, 902; 1957, c. 498; 1967, c. 823, s. 31; 1969, c. 965, s. 2; 1973, c. 476, s. 193; 1987, c. 644, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 19(a); 1993, c. 354, ss. 19, 20; 1998-212, s. 29A.14(l); 2001-387, s. 152.)

Editor's Note. — Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

CASE NOTES

Constitutionality. — The court declined to address the plaintiff's allegation that this section argue is unconstitutional because it does not require the corporation, whose certificate of authority has been suspended, be notified of the suspension prior to the suspension taking effect because this argument was not asserted at trial. Ben Johnson Homes, Inc. v. Watkins, 142 N.C. App. 162, 541 S.E.2d 769, 2001 N.C. App. LEXIS 32 (2001), aff'd, 354 N.C. 563, 555 S.E.2d 608 (2001).

Reinstatement of Charter. — When a corporation's charter is suspended pursuant to this section, the same may be reinstated within five years upon payment of fees and taxes due the Revenue Department. Raleigh Swimming Pool Co. v. Wake Forest Country Club, 11 N.C. App. 715, 182 S.E.2d 273 (1971).

Liquidation of Corporation If Charter Not Reinstated. — If a suspended charter is not reinstated within five years, then liquidation of corporate assets is as provided in G.S. 105-232 rather than in G.S. 55-114 et seq. (see now G.S. 55-14-05 et seq.). Raleigh Swimming Pool Co. v. Wake Forest Country Club, 11 N.C. App. 715, 182 S.E.2d 273 (1971).

This section was not intended to deprive a corporation of its properties nor to penalize innocent parties. Page v. Miller, 252 N.C. 23, 113 S.E.2d 52 (1960); Parker v. Life Homes, Inc., 22 N.C. App. 297, 206 S.E.2d 344 (1974).

Effect of Suspension of Charter on Corporation's Capacity to Sue. — Allegations in the complaint to the effect that plaintiff corporation's charter was temporarily suspended under this section less than a year prior to the institution of the action do not disclose that the corporation did not have legal capacity to institute the action. Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

A corporation whose articles of incorporation were suspended under this section for failure to pay taxes had standing under G.S. 55-114 (see now G.S. 55-14-05 et seq.) to maintain an action to recover the amount due on a contract. Raleigh Swimming Pool Co. v. Wake Forest Country Club, 11 N.C. App. 715, 182 S.E.2d 273 (1971).

A corporation whose charter has been suspended is not required to remain completely dormant for five years. Such a corporation may bring an action in court or defend an action brought against it. Parker v. Life Homes, Inc., 22 N.C. App. 297, 206 S.E.2d 344 (1974).

A corporation could not bring suit to enforce contract entered into during a period of revenue suspension. South Mecklenburg Painting Contractors v. Cunnane Group, Inc., 134 N.C. App. 307, 517 S.E.2d 167 (1999).

Effect of Suspension of Certificate of Authority on Corporation's Capacity to Sue. — Construction company which entered into a contract with defendant-homeowner and performed that contract at a time when its certificate of authority was in a state of suspension could not assert or enforce its rights under the contract, including claims based in equity (i.e., claims based on quantum meruit). Ben Johnson Homes, Inc. v. Watkins, 142 N.C. App. 162, 541 S.E.2d 769, 2001 N.C. App. LEXIS 32 (2001), aff'd, 354 N.C. 563, 555 S.E.2d 608 (2001).

And on Ability to Take Property Under Will. — A corporation whose charter has been suspended may take property under a will. Parker v. Life Homes, Inc., 22 N.C. App. 297, 206 S.E.2d 344 (1974).

And on Power to Assign Bid Made at Foreclosure Sale. — When the rights of third parties are involved, a corporation whose charter has been suspended has the power to assign a bid made at a foreclosure sale, regardless of whether the exercise of that power subjects the corporation to a penalty under G.S. 105-231. Parker v. Life Homes, Inc., 22 N.C. App. 297, 206 S.E.2d 344 (1974).

And on Power to Purchase Property at Foreclosure Sale. — A corporation whose charter has been suspended has the power to purchase property at a foreclosure sale and to convey it validly to an innocent third party. Parker v. Life Homes, Inc., 22 N.C. App. 297, 206 S.E.2d 344 (1974).

Duty of Officers to Corporation. — While corporate officers in North Carolina are not trustees, their fiduciary duty to the corporation is a high one; this includes a duty not to continue to incur ordinary business obligations on behalf of the corporation when they have knowledge that the corporation's charter has been suspended. Pierce Concrete, Inc. v. Cannon Realty & Constr. Co., 77 N.C. App. 411, 335 S.E.2d 30 (1985).

Where plaintiff corporation had no legal existence on date of conveyance of certain real property, the deed could not operate to convey title to plaintiff corporation. Piedmont & W. Inv. Corp. v. Carnes-Miller Gear Co., 96 N.C. App. 105, 384 S.E.2d 687 (1989), cert. denied, 326 N.C. 49, 389 S.E.2d 93 (1990), decided prior to 1987 amendment.

Use of Corporate Name as Shield. — The law will not permit a corporate officer to create obligations in the name of the corporation, knowing the acts are without authority and invalid, and then be permitted to use the corporate name as a shield against creditors. Pierce Concrete, Inc. v. Cannon Realty & Constr. Co., 77 N.C. App. 411, 335 S.E.2d 30 (1985).

Cited in Guilford Bldrs. Supply Co. v. Reynolds, 249 N.C. 612, 107 S.E.2d 80 (1959); Raleigh Swimming Pool Co. v. Wake Forest Country Club, 11 N.C. App. 715, 182 S.E.2d 273 (1971); Philbin Invs., Inc. v. Orb. Enters., Ltd., 35 N.C. App. 622, 242 S.E.2d 176 (1978); Charles A. Torrence Co. v. Clary, 121 N.C. App. 211, 464 S.E.2d 502 (1995).

§ 105-231: Recodified as the second paragraph of § 105-230 by Session Laws 1998-212, s. 29A.14(k).

§ 105-232. Rights restored; receivership and liquidation.

(a) Any corporation or limited liability company whose articles of incorporation, articles of organization, or certificate of authority to do business in this State has been suspended by the Secretary of State under G.S. 105-230, that complies with all the requirements of this Subchapter and pays all State taxes, fees, or penalties due from it (which total amount due may be computed, for years prior and subsequent to the suspension, in the same manner as if the suspension had not taken place), and pays to the Secretary of Revenue a fee of twenty-five dollars ($25.00) to cover the cost of reinstatement, is entitled to exercise again its rights, privileges, and franchises in this State. The Secretary of Revenue shall notify the Secretary of State of this compliance and the Secretary of State shall reinstate the corporation or limited liability company by appropriate entry upon the records of the office of the Secretary of State. Upon entry of reinstatement, it relates back to and takes effect as of the date of the suspension by the Secretary of State and the corporation or limited liability company resumes carrying on its business as if the suspension had never occurred, subject to the rights of any person who reasonably relied, to that person's prejudice, upon the suspension. The Secretary of State shall immediately notify by mail the corporation or limited liability company of the reinstatement.

(b) When the articles of incorporation, articles of organization, or certificate of authority to do business in this State has been suspended by the Secretary of State under G.S. 105-230, and the corporation or limited liability company has ceased to operate as a going concern, if there remains property held in the name of the corporation or limited liability company or undisposed of at the time of the suspension, or there remain future interests that may accrue to the corporation, the limited liability company, or its successors, members, or stockholders, any interested party may apply to the superior court for the appointment of a receiver. Application for the receiver may be made in a civil action to which all stockholders, members, or their representatives or next of kin shall be made parties. Stockholders or members whose whereabouts are unknown, unknown stockholders or members, unknown heirs and next of kin of deceased stockholders, members, creditors, dealers, and other interested persons may be served by publication. A guardian ad litem may be appointed for any stockholders, members, or their representatives who are infants or incompetent. The receiver shall enter into a bond if the court requires one and shall give notice to creditors by publication or otherwise as the court may prescribe. Any creditor who fails to file a claim with the receiver within the time set shall be barred of the right to participate in the distribution of the assets. The receiver may (i) sell the property interests of the corporation or limited liability company upon such terms and in such manner as the court may order, (ii) apply the proceeds to the payment of any debts of the corporation or limited liability company, and (iii) distribute the remainder among the stockholders, the members, or their representatives in proportion to their interests in the property interests. Shares due to any stockholder or member who is unknown or whose whereabouts are unknown shall be paid into the office of the clerk of the superior court, to be disbursed according to law. In the event the records of the corporation or limited liability company are lost or do not reflect the owners of the property interests, the court shall determine the owners from the best evidence available, and the receiver shall be protected in acting in accordance with the court's finding. This proceeding is authorized for the sole purpose of providing a procedure for disposing of the assets of the corporation or limited liability company by the payment of its debts and by the transfer to its stockholders, its members, or their representatives their proportionate shares of its assets. (1939, c. 158, s. 903; c. 370, s. 1; 1943, c. 400, s. 9; 1947, c. 501, s. 9; 1951, c. 29; 1969, c. 541, s. 10; 1973, c. 476, s. 193; c. 1065; 1987, c. 644, s. 2; 1989 (Reg. Sess., 1990), c. 1024, s. 19(b); 1991, c. 645, s. 21; 1993, c. 354, s. 21; 2001-387, s. 153; 2001-487, s. 62(dd).)

Editor's Note. — Session Laws 2001-387, s. 154(b), provides that nothing in this act shall supersede the provisions of Article 10 or 65 of Chapter 58 of the General Statutes, and this act does not create an alternate means for an entity governed by Article 65 of Chapter 58 of the General Statutes to convert to a different business form.

Session Laws 2001-387, s. 175(b), as amended by Session Laws 2001-487, s. 62(ff), provides: "The amendment to G.S. 105-232 set forth in Section 153 of this act is intended to be retroactive. Accordingly, any act performed or attempted to be performed during the period of suspension of any corporation or limited liability company reinstated pursuant to G.S. 105-232(a) prior to January 1, 2002, shall not be deemed to be invalid and of no effect under G.S. 105-230, subject to the rights of any person who reasonably relied, to that person's prejudice, on the suspension."

CASE NOTES

Liquidation of Corporation if Suspended Charter Not Reinstated. — When a corporation's charter is suspended pursuant to G.S. 105-230, the same may be reinstated within five years upon payment of fees and taxes due the Revenue Department; and if the charter is not so reinstated within five years, then liquidation of corporate assets is as provided in this section rather than in G.S. 55-114 et seq. (see now G.S. 55-14-05 et seq.). Raleigh Swimming Pool Co. v. Wake Forest Country Club, 11 N.C. App. 715, 182 S.E.2d 273 (1971).

Applied in Stegall Milling Co. v. Hettiger, 27 N.C. App. 76, 217 S.E.2d 767 (1975).

Cited in Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959); Guilford Bldrs. Supply Co. v. Reynolds, 249 N.C. 612, 107 S.E.2d 80 (1959); Piedmont & W. Inv. Corp. v. Carnes-Miller Gear Co., 96 N.C. App. 105, 384 S.E.2d 687 (1989).

§§ 105-233, 105-234: Repealed by Session Laws 2006-162, s. 12(a), effective July 24, 2006.

§ 105-235. Every day's failure a separate offense.

The willful failure, refusal, or neglect to observe and comply with any order, direction, or mandate of the Secretary of Revenue, or to perform any duty enjoined by this Subchapter, by any person, firm, or corporation subject to the provisions of this Subchapter, or any officer, agent, or employee thereof, shall, for each day such failure, refusal, or neglect continues, constitute a separate and distinct offense. (1939, c. 158, s. 906; 1973, c. 476, s. 193.)

§ 105-236. Penalties; situs of violations; penalty disposition.

(a) Penalties. — The following civil penalties and criminal offenses apply:

(1) Penalty for Bad Checks. — When the bank upon which any uncertified check tendered to the Department of Revenue in payment of any obligation due to the Department returns the check because of insufficient funds or the nonexistence of an account of the drawer, the Secretary shall assess a penalty equal to ten percent (10%) of the

check, subject to a minimum of one dollar ($1.00) and a maximum of one thousand dollars ($1,000). This penalty does not apply if the Secretary finds that, when the check was presented for payment, the drawer of the check had sufficient funds in an account at a financial institution to pay the check and, by inadvertence, the drawer of the check failed to draw the check on the account that had sufficient funds.

(1a) Penalty for Bad Electronic Funds Transfer. — When an electronic funds transfer cannot be completed due to insufficient funds or the nonexistence of an account of the transferor, the Secretary shall assess a penalty equal to ten percent (10%) of the amount of the transfer, subject to a minimum of one dollar ($1.00) and a maximum of one thousand dollars ($1,000). This penalty may be waived by the Secretary in accordance with G.S. 105-237.

(1b) Making Payment in Wrong Form. — For making a payment of tax in a form other than the form required by the Secretary pursuant to G.S. 105-241(a), the Secretary shall assess a penalty equal to five percent (5%) of the amount of the tax, subject to a minimum of one dollar ($1.00) and a maximum of one thousand dollars ($1,000). This penalty may be waived by the Secretary in accordance with G.S. 105-237.

(2) Failure to Obtain a License. — For failure to obtain a license before engaging in a business, trade or profession for which a license is required, the Secretary shall assess a penalty equal to five percent (5%) of the amount prescribed for the license per month or fraction thereof until paid, not to exceed twenty-five percent (25%) of the amount so prescribed, but in any event shall not be less than five dollars ($5.00). In cases in which the taxpayer fails to obtain a license as required under G.S. 105-449.65 or G.S. 105-449.131, the Secretary may assess a penalty of one thousand dollars ($1,000).

(3) Failure to File Return. — In case of failure to file any return on the date it is due, determined with regard to any extension of time for filing, the Secretary shall assess a penalty equal to five percent (5%) of the amount of the tax if the failure is for not more than one month, with an additional five percent (5%) for each additional month, or fraction thereof, during which the failure continues, not exceeding twenty-five percent (25%) in the aggregate, or five dollars ($5.00), whichever is the greater.

(4) Failure to Pay Tax When Due. — In the case of failure to pay any tax when due, without intent to evade the tax, the Secretary shall assess a penalty equal to ten percent (10%) of the tax, subject to a minimum of five dollars ($5.00). This penalty does not apply in any of the following circumstances:

  a. When the amount of tax shown as due on an amended return is paid when the return is filed.
  b. When the Secretary proposes an assessment for tax due but not shown on a return and the tax due is paid within 45 days after the date of the notice of proposed assessment of the tax.

(5) Negligence. —

  a. Finding of negligence. — For negligent failure to comply with any of the provisions to which this Article applies, or rules issued pursuant thereto, without intent to defraud, the Secretary shall assess a penalty equal to ten percent (10%) of the deficiency due to the negligence.
  b. Large individual income tax deficiency. — In the case of individual income tax, if a taxpayer understates taxable income, by any means, by an amount equal to twenty-five percent (25%) or more

of gross income, the Secretary shall assess a penalty equal to twenty-five percent (25%) of the deficiency. For purposes of this subdivision, "gross income" means gross income as defined in section 61 of the Code.

c. Other large tax deficiency. — In the case of a tax other than individual income tax, if a taxpayer understates tax liability by twenty-five percent (25%) or more, the Secretary shall assess a penalty equal to twenty-five percent (25%) of the deficiency.

d. No double penalty. — If a penalty is assessed under subdivision (6) of this section, no additional penalty for negligence shall be assessed with respect to the same deficiency.

e. Inheritance and gift tax deficiencies. — This subdivision does not apply to inheritance, estate, and gift tax deficiencies that are the result of valuation understatements.

(5a) Misuse of Exemption Certificate. — For misuse of an exemption certificate by a purchaser, the Secretary shall assess a penalty equal to two hundred fifty dollars ($250.00). An exemption certificate is a certificate issued by the Secretary that authorizes a retailer to sell tangible personal property to the holder of the certificate and either collect tax at a preferential rate or not collect tax on the sale. Examples of an exemption certificate include a certificate of resale, a direct pay certificate, and a farmer's certificate.

(5b) Road Tax Understatement. — If a motor carrier understates its liability for the road tax imposed by Article 36B of this Chapter by twenty-five percent (25%) or more, the Secretary shall assess the motor carrier a penalty in an amount equal to two times the amount of the deficiency.

(6) Fraud. — If there is a deficiency or delinquency in payment of any tax because of fraud with intent to evade the tax, the Secretary shall assess a penalty equal to fifty percent (50%) of the total deficiency.

(7) Attempt to Evade or Defeat Tax. — Any person who willfully attempts, or any person who aids or abets any person to attempt in any manner to evade or defeat a tax or its payment, shall, in addition to other penalties provided by law, be guilty of a Class H felony.

(8) Willful Failure to Collect, Withhold, or Pay Over Tax. — Any person required to collect, withhold, account for, and pay over any tax who willfully fails to collect or truthfully account for and pay over the tax shall, in addition to other penalties provided by law, be guilty of a Class 1 misdemeanor. Notwithstanding any other provision of law, no prosecution for a violation brought under this subdivision shall be barred before the expiration of six years after the date of the violation.

(9) Willful Failure to File Return, Supply Information, or Pay Tax. — Any person required to pay any tax, to make a return, to keep any records, or to supply any information, who willfully fails to pay the tax, make the return, keep the records, or supply the information, at the time or times required by law, or rules issued pursuant thereto, shall, in addition to other penalties provided by law, be guilty of a Class 1 misdemeanor. Notwithstanding any other provision of law, no prosecution for a violation brought under this subdivision shall be barred before the expiration of six years after the date of the violation.

(9a) Aid or Assistance. — Any person, pursuant to or in connection with the revenue laws, who willfully aids, assists in, procures, counsels, or advises the preparation, presentation, or filing of a return, affidavit, claim, or any other document that the person knows is fraudulent or false as to any material matter, whether or not the falsity or fraud is with the knowledge or consent of the person authorized or required to present or file the return, affidavit, claim, or other document, is guilty of a felony as follows:

a. If the person who commits an offense under this subdivision is an income tax return preparer and the amount of all taxes fraudulently evaded on returns filed in one taxable year is one hundred thousand dollars ($100,000) or more, the person is guilty of a Class C felony.

b. If the person who commits an offense under this subdivision is an income tax return preparer and the amount of all taxes fraudulently evaded on returns filed in one taxable year is less than one hundred thousand dollars ($100,000), the person is guilty of a Class F felony.

c. If the person who commits an offense under this subdivision is not covered under sub-subdivision a. or b. of this subdivision, the person is guilty of a Class H felony.

(10) Failure to File Informational Returns. —

a. Repealed by Session Laws 1998-212, s. 29A.14(m), effective January 1, 1999.

b. The Secretary may request a person who fails to file timely statements of payment to another person with respect to wages, dividends, rents, or interest paid to that person to file the statements by a certain date. If the payer fails to file the statements by that date, the amounts claimed on the payer's income tax return as deductions for salaries and wages, or rents or interest shall be disallowed to the extent that the payer failed to comply with the Secretary's request with respect to the statements.

c. For failure to file an informational return required by Article 36C or 36D of this Chapter by the date the return is due, there shall be assessed a penalty of fifty dollars ($50.00).

(10a) Filing a Frivolous Return. — If a taxpayer files a frivolous return under Part 2 of Article 4 of this Chapter, the Secretary shall assess a penalty in the amount of up to five hundred dollars ($500.00). A frivolous return is a return that meets both of the following requirements:

a. It fails to provide sufficient information to permit a determination that the return is correct or contains information which positively indicates the return is incorrect, and

b. It evidences an intention to delay, impede or negate the revenue laws of this State or purports to adopt a position that is lacking in seriousness.

(10b) Misrepresentation Concerning Payment. — A person who receives money from a taxpayer with the understanding that the money is to be remitted to the Secretary for application to the taxpayer's tax liability and who willfully fails to remit the money to the Secretary is guilty of a Class F felony.

(11) Repealed by Session Laws 2006-162, s. 12(b), effective July 24, 2006.

(12) Repealed by Session Laws 1991, c. 45, s. 27.

(b) Situs. — Violation of a tax law is considered an act committed in part at the office of the Secretary in Raleigh. The certificate of the Secretary that a tax has not been paid, a return has not been filed, or information has not been supplied, as required by law, is prima facie evidence that the tax has not been paid, the return has not been filed, or the information has not been supplied.

(c) Penalty Disposition. — Civil penalties assessed by the Secretary are assessed as an additional tax. The clear proceeds of civil penalties assessed by the Secretary must be credited to the Civil Penalty and Forfeiture Fund

established in G.S. 115C-457.1. (1939, c. 158, s. 907; 1953, c. 1302, s. 7; 1959, c. 1259, s. 8; 1963, c. 1169, s. 6; 1967, c. 1110, s. 9; 1973, c. 476, s. 193; c. 1287, s. 13; 1979, c. 156, s. 2; 1985, c. 114, s. 11; 1985 (Reg. Sess., 1986), c. 983; 1987 (Reg. Sess., 1988), c. 1076; 1989, c. 557, ss. 7 to 10; 1989 (Reg. Sess., 1990), c. 1005, s. 9; 1991, c. 45, s. 27; 1991 (Reg. Sess., 1992), c. 914, s. 2; c. 1007, s. 10; 1993, c. 354, s. 22; c. 450, s. 10; c. 539, ss. 709, 710, 1292, 1293; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 390, s. 36; 1995 (Reg. Sess., 1996), c. 646, s. 10; c. 647, s. 51; c. 696, s. 1; 1997-6, s. 8; 1997-109, s. 3; 1998-178, ss. 1, 2; 1998-212, s. 29A.14(m); 1999-415, ss. 2, 3; 1999-438, ss. 15, 16; 2000-119, s. 2; 2000-120, s. 7; 2000-140, s. 70; 2002-106, ss. 2, 4; 2005-276, s. 6.37(n); 2005-435, s. 1; 2006-162, s. 12(b); 2007-491, s. 26.)

Cross References. — As to exception under subdivisions (a)(2), (3) and (4) of this section when time period is extended because of a presidentially declared disaster, see G.S. 105-249.2.

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 6.37(w), provides: "The Office of State Budget and Management shall develop a methodology for computing the actual costs of collection of civil penalties by State departments and agencies. This methodology shall apply to all State departments and agencies, effective July 1, 2006."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2005-276, s. 6.37(n), effective July 1, 2005, added the present second sentence to the introductory paragraph.

Session Laws 2005-435, s. 1, effective January 1, 2006, added the last sentence in subdivision (2).

Session Laws 2006-162, s. 12(b), effective July 24, 2006, added "situs of violations; penalty disposition" at the end of the section catchline; designated the existing provisions as subsection (a); rewrote the introductory paragraph of (a) which read: "Penalties assessed by the Secretary under this Subchapter are assessed as an additional tax. The clear proceeds of any civil penalties levied pursuant to subdivisions (3), (4), (5)a., and (6) of this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Except as otherwise provided by law, and subject to the provisions of G.S. 105-237, the following penalties shall be applicable:"; deleted "in this State" preceding "to pay" near the middle of the last sentence in subdivision (a)(1); deleted former (11) which read: "Any violation of Subchapter I, V, or VIII of this Chapter or of Article 3 of Chapter 119 of the General Statutes is considered an act committed in part at the office of the Secretary in Raleigh. The certificate of the Secretary that a tax has not been paid, a return has not been filed, or information has not been supplied, as required by law, is prima facie evidence that the tax has not been paid, the return has not been filed, or the information has not been supplied."; and added subsections (b) and (c).

Session Laws 2007-491, s. 26, effective January 1, 2008, substituted "subject to a minimum of" for "except that the penalty shall in no event be less than" in the introductory paragraph of subdivision (a)(4); and rewrote subsubdivision (a)(4)b. For applicability, see Editor's note.

Legal Periodicals. — For brief comment on the 1953 amendment which rewrote the section, see 31 N.C.L. Rev. 440 (1953).

For article, "Foreign Corporations in North

Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

For 1997 legislative survey, see 20 Campbell L. Rev. 481.

CASE NOTES

Constitutionality. — G.S. 105-236 withstood defendants' vagueness challenge and was held to be constitutional. State v. Sinnott, 163 N.C. App. 268, 593 S.E.2d 439, 2004 N.C. App. LEXIS 370 (2004).

Penalties. — The criminal and civil penalties of the Tax Code did not provide an exclusive remedy, where a retailer allegedly did not pay sales and use taxes collected from a purchaser, and thus, the retailer could be prosecuted under the embezzlement statutes. State v. Kennedy, 130 N.C. App. 399, 503 S.E.2d 133 (1998), aff'd, 350 N.C. 87, 511 S.E.2d 305 (1999).

Monetary payments for a taxpayer's noncompliance with a mandate of Chapter 105 are penalties and, therefore, subject to N.C. Const. art. IX, § 7; thus, monies collected by the North Carolina Department of Revenue for late filings, underpayments, and for failing to comply with statutory or regulatory tax provisions are payable to public schools. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

Taxes Are Not Debt Within Meaning of Constitution. — Taxes which are imposed are not contractual obligations of the taxpayer to the State, and do not constitute a debt within the meaning of the Constitution. State v. Locklear, 21 N.C. App. 48, 203 S.E.2d 63 (1974).

Designating Failure to Pay Tax Misdemeanor Is Within Police Power. — In the enactment of this section, the General Assembly has determined that any person required by the State Revenue Act to pay any tax who willfully fails to pay such tax shall be guilty of a misdemeanor. The legislature had full authority to make this decision. It is a valid exercise of legislative power. State v. Locklear, 21 N.C. App. 48, 203 S.E.2d 63 (1974).

Selective Prosecution of Tax Evaders. — The prosecution of individuals who publicly assert privileges not to pay taxes does not necessarily constitute selection for prosecution upon an impermissible basis. Such prosecutions, predicated in part upon a potential deterrent effect, serve a legitimate interest in promoting more general tax compliance. State v. Davis, 96 N.C. App. 545, 386 S.E.2d 743 (1989).

Penalty for Failure to File New Return. — The taxpayer whose net income for any year is corrected by the Commissioner of Internal Revenue or other authorized federal officer must file a new return reflecting his corrected net income within two years after receipt of the federal agent's report. Failure to make such a new return within the time specified under G.S. 105-159 subjects the taxpayer to all penalties provided by this section including, when applicable, the criminal penalty provided by subdivision (7) of this section. State v. Patton, 57 N.C. App. 702, 292 S.E.2d 172 (1982).

Failure to file an income tax return upon correction of income for three years by a federal tax audit and placing income in wife's bank account committed in a willful attempt to evade or defeat income taxes, would constitute the offense defined by subdivision (7) of this section. State v. Patton, 57 N.C. App. 702, 292 S.E.2d 172 (1982).

What Must Be Shown Under Subdivision (7). — Where a defendant is charged with attempting to evade or defeat the ascertainment of a tax, and that person also fails to file a return, the State must only show that defendant was subject to being taxed under the law, and that he willfully attempted to evade or defeat imposition of the tax. State v. Davis, 96 N.C. App. 545, 386 S.E.2d 743 (1989).

What Constitutes New Offense Under Subdivision (7). — An attempt to evade or defeat taxes on April 29, 1979, by failing to file a return for an earlier year within the time required by G.S. 105-159 and by placing assets in the account of another would constitute a new offense, and the statute of limitations applicable to subdivision (7) of this section would begin to run anew as of that date. State v. Patton, 57 N.C. App. 702, 292 S.E.2d 172 (1982).

Section 105-241.1 addresses only the civil assessment of taxes and is fully independent of the criminal offenses set forth in subdivisions (7) and (9) of this section. State v. Davis, 96 N.C. App. 545, 386 S.E.2d 743 (1989).

And Its Procedural Protections Are Not Applicable to Individual Charged Under This Section. — Individual charged with violation of subdivisions (7) and (9) of this section was entitled to all the due process protections of a person charged under a criminal statute. However, he was not entitled to any procedural protections offered under the civil assessment statute, G.S. 105-241.1 [repealed]. State v. Davis, 96 N.C. App. 545, 386 S.E.2d 743 (1989).

Willfulness Shown. — Defendant's admission that he considered it unconstitutional to pay taxes, along with evidence that on at least four occasions during the period in question (1984 to 1986) he claimed on his employee withholding certificates personal and dependent exemptions totaling at least $16,800 to which he was not entitled, and that he did not file a state personal income tax return between 1980 and 1986, taken together, was adequate to show a willfull attempt to evade a tax. State v. Davis, 96 N.C. App. 545, 386 S.E.2d 743 (1989).

Defendants' Belief No Defense to Willfulness. — Belief of defendant charged with failure to pay state income taxes that he was not liable to pay income taxes on his wages because his wages were not "income," but rather compensation for services rendered, was not a defense to willfulness. Essentially, the trial court was required to inform the jury that while a good-faith misunderstanding of the law may negate willfulness, a good-faith disagreement with the law does not. State v. Davis, 96 N.C. App. 545, 386 S.E.2d 743 (1989).

Penalties assessed as an additional tax under G.S. 105-236 and other provisions of the North Carolina Revenue Act for failure to comply with the tax code are remedial, not punitive, and are thus not subject to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003) aff'd in part, rev'd in part, 359 N.C. 474, 614 S.E.2d 504 (2005) (see notes under catchline "Penalties" above).

Evidence Sufficient to Support Conviction. — Evidence was sufficient to establish that that defendants willfully attempted to evade or defeat a tax or its payment in violation of the state tax laws; in addition, the evidence tended to show that one defendant failed to file an income tax return for four years despite the fact that his gross income exceeded his federal and state exemption allowances and necessitated that he file a return in each of those years, thus supporting conviction under § 105-236(9). State v. Sinnott, 163 N.C. App. 268, 593 S.E.2d 439, 2004 N.C. App. LEXIS 370 (2004).

Applied in State v. Hundley, 272 N.C. 491, 158 S.E.2d 582 (1968).

Cited in State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004).

OPINIONS OF ATTORNEY GENERAL

Available Only to Secretary of Revenue and Not Cities or Counties in Enforcing Payment of License Taxes. — See opinion of Attorney General to Mr. Henry W. Underhill, Jr., Charlotte City Attorney, 40 N.C.A.G. 866 (1970).

§ 105-236.1. Enforcement of revenue laws by revenue law enforcement agents.

(a) General. — The Secretary may appoint employees of the Unauthorized Substances Tax Division to serve as revenue law enforcement officers having the responsibility and subject-matter jurisdiction to enforce the excise tax on unauthorized substances imposed by Article 2D of this Chapter.

The Secretary may appoint up to 11 employees of the Motor Fuels Tax Division to serve as revenue law enforcement officers having the responsibility and subject-matter jurisdiction to enforce the taxes on motor fuels imposed by Articles 36B, 36C, and 36D of this Chapter and by Chapter 119 of the General Statutes.

The Secretary may appoint employees of the Criminal Investigations Division to serve as revenue law enforcement officers having the responsibility and subject-matter jurisdiction to enforce the following tax violations and criminal offenses:

(1) The felony and misdemeanor tax violations in G.S. 105-236.
(2) The misdemeanor tax violations in G.S. 105-449.117 and G.S. 105-449.120.
(3) The following criminal offenses when they involve a tax imposed under Chapter 105 of the General Statutes:
  a. G.S. 14-91 (Embezzlement of State Property).
  b. G.S. 14-92 (Embezzlement of Funds).
  c. G.S. 14-100 (Obtaining Property By False Pretenses).
  d. G.S. 14-119 (Forgery).
  e. G.S. 14-120 (Uttering Forged Paper).
  f. G.S. 14-401.18 (Sale of Certain Packages of Cigarettes).

(b) Authority. — A revenue law enforcement officer is a State officer with jurisdiction throughout the State within the officer's subject-matter jurisdiction. A revenue law enforcement officer may serve and execute notices, orders, warrants, or demands issued by the Secretary or the General Court of Justice in connection with the enforcement of the officer's subject-matter jurisdiction. A revenue law enforcement officer has the full powers of arrest as provided by G.S. 15A-401 while executing the notices, orders, warrants, or demands.

(c) Qualifications. — To serve as a revenue law enforcement officer, an employee must be certified as a criminal justice officer under Chapter 17C of the General Statutes. The Secretary may administer the oath of office to revenue law enforcement officers appointed pursuant to this section. (1997-503, s. 1; 2000-119, s. 1; 2004-124, s. 23.4.)

CASE NOTES

Penalties. — The criminal and civil penalties of the Tax Code did not provide an exclusive remedy, where a retailer allegedly did not pay sales and use taxes collected from a purchaser, and thus, the retailer could be prosecuted under the embezzlement statutes. State v. Kennedy, 130 N.C. App. 399, 503 S.E.2d 133 (1998), aff'd, 350 N.C. 87, 511 S.E.2d 305 (1999).

§ 105-237. Waiver of penalties; installment payments.

(a) Waiver. — The Secretary may, upon making a record of the reasons therefor, reduce or waive any penalties provided for in this Subchapter.

(b) Installment Payments. — After a proposed assessment of a tax becomes final, the Secretary may enter into an agreement with the taxpayer for payment of the tax in installments if the Secretary determines that the agreement will facilitate collection of the tax. The agreement may include a waiver of penalties but may not include a waiver of liability for tax or interest due. The Secretary may modify or terminate the agreement if one or more of the following findings is made:

(1) Information provided by the taxpayer in support of the agreement was inaccurate or incomplete.
(2) Collection of tax to which the agreement applies is in jeopardy.
(3) The taxpayer's financial condition has changed.
(4) The taxpayer has failed to pay an installment when due or to pay another tax when due.
(5) The taxpayer has failed to provide information requested by the Secretary.

The Secretary must give a taxpayer who has entered into an installment agreement at least 30 days' written notice before modifying or terminating the agreement on the grounds that the taxpayer's financial condition has changed unless the taxpayer failed to disclose or concealed assets or income when the agreement was made or the taxpayer has acquired assets since the agreement was made that can satisfy all or part of the tax liability. A notice must specify the basis for the Secretary's finding of a change in the taxpayer's financial condition. (1939, c. 158, s. 908; c. 370, s. 1; 1973, c. 476, s. 193; 1993, c. 532, s. 1; 1999-438, s. 17.)

CASE NOTES

Cited in Commissioner of Labor v. House of Raeford Farms, Inc., 124 N.C. App. 349, 477 S.E.2d 230 (1996).

§ 105-237.1. Compromise of liability.

(a) The Secretary of Revenue, with the approval of the Attorney General, is authorized to compromise the amount of liability of any taxpayer for taxes due under Subchapter I, V, or VIII of this Chapter or under Article 3 of Chapter 119 of the General Statutes and to accept in full settlement of the liability a lesser amount than that asserted to be due when in the opinion of the Secretary and the Attorney General the compromise settlement is in the best interest of the State. When made other than in the course of litigation in the courts of the State on an appeal from an administrative determination or in a civil action brought to recover from the Secretary, the basis for the compromise must also conform to the conditions set out in this section. The compromise settlement may be made only after a final administrative or judicial determination of the liability of the taxpayer.

A compromise settlement may be made only if one or more of the following findings is made:

(1) There is a reasonable doubt as to the amount of the liability of the taxpayer under the law and the facts.
(2) The taxpayer is insolvent and the Secretary probably could not otherwise collect an amount equal to or in excess of the amount offered in compromise.
(3) Collection of a greater amount than that offered in compromise is improbable, and the funds or a substantial portion of the funds offered in the settlement come from sources from which the Secretary could not otherwise collect.
(4) A federal tax assessment arising out of the same facts has been compromised with the federal government on the same or a similar basis as that proposed to the State and the Secretary could probably not collect an amount equal to or in excess of that offered in compromise.

For the purposes of this section a taxpayer may be considered insolvent only if (i) there is an established status of insolvency by either a judicial declaration of a status necessarily or ordinarily involving insolvency or by a legal proceeding in which the insolvency of the taxpayer would ordinarily be determined or made evident or (ii) it is plain and indisputable that the taxpayer is clearly insolvent and will remain so in the reasonable future. Whenever a compromise is made by the Secretary pursuant to this section and the unpaid amount of the tax assessed is one hundred dollars ($100.00) or more, the Secretary shall place on file in the office of the Secretary a written opinion, signed by the Secretary and the Attorney General, setting forth the amount of tax or additional tax assessed, the amount actually paid in accordance with the terms of the compromise, and a summary of the facts and reasons upon which acceptance of the compromise is based.

(b) Whenever an assessment of taxes or additional taxes is based upon an action of the federal government in making an assessment of taxes and the federal assessment is subsequently settled, compromised or adjusted, the Secretary may, in his discretion, settle, compromise or adjust the State's tax assessment upon the same basis as the federal settlement, compromise or adjustment. (1957, c. 1340, s. 10; 1959, c. 1259, s. 8; 1973, c. 476, s. 193; 1985, c. 114, s. 11; 1991 (Reg. Sess., 1992), c. 1007, s. 11.)

§ 105-238. Tax a debt.

Every tax imposed by this Subchapter, and all increases, interest, and penalties thereon, shall become, from the time it is due and payable, a debt from the person, firm, or corporation liable to pay the same to the State of North Carolina. (1939, c. 158, s. 909.)

CASE NOTES

For prior law see Gatling v. Commissioners of Carteret County, 92 N.C. 536 (1885); Worth v. Wright, 122 N.C. 335, 29 S.E. 361 (1898); Commissioners of Yancey County v. Hall, 177 N.C. 490, 99 S.E. 372 (1919).

§ 105-239: Repealed by Session Laws 2007-491, s. 2, effective January 1, 2008.

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-239.1. Transferee liability.

(a) Lien and Liability. — Property transferred for an inadequate consideration to a donee, heir, legatee, devisee, distributee, stockholder of a liquidated corporation, or any other person at a time when the transferor is insolvent or is rendered insolvent by reason of the transfer is subject to a lien for any taxes owing by the transferor to the State of North Carolina at the time of the transfer whether or not the amount of the taxes has been ascertained or assessed at the time of the transfer. G.S. 105-241 applies to this tax lien. In the event the transferee has disposed of the property so that it cannot be subjected to the State's tax lien, the transferee is personally liable for the difference between the fair market value of the property at the time of the transfer and the actual consideration, if any, paid to the transferor by the transferee.

(b) Procedure. — The Department may proceed to enforce a lien that arises under this section against property transferred by a taxpayer to another person or to hold that person liable for the tax due by sending the person a notice of proposed assessment in accordance with G.S. 105-241.9. The Department has the burden of establishing that a person to whom property was transferred is liable. The period of limitations for assessment of any liability against a transferee or enforcing the lien against the transferred property expires one year after the expiration of the period of limitations for assessment against the transferor.

(c) Proceeds. — When property transferred by a taxpayer to another person is sold to satisfy the lien that arises under this section, the person is entitled to receive from the proceeds of the sale the amount of consideration, if any, the person paid for the property. The proceeds must be applied for this purpose before they are applied to satisfy the lien.

(d) Repealed by Session Laws 2007-491, s. 27, effective January 1, 2008. (1957, c. 1340, s. 10; 1973, c. 476, s. 193; 1993, c. 450, s. 11; 2007-491, s. 27.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 27, effective January 1, 2008, rewrote the section. For applicability, see Editor's note.

§ 105-240. Tax upon settlement of fiduciary's account.

No final account of a fiduciary shall be allowed by the probate court unless such account shows, and the judge of said court finds, that all taxes imposed by the provisions of this Subchapter upon said fiduciary, which have become payable, have been paid, and that all taxes which may become due are secured by bond, deposit, or otherwise. The certificate of the Secretary of Revenue and the receipt for the amount of tax herein certified shall be conclusive as to the payment of the tax to the extent of said certificate.

For the purpose of facilitating the settlement and distribution of estates held by fiduciaries, the Secretary of Revenue, with the approval of the Attorney General, may, on behalf of the State, agree upon the amount of taxes at any time due or to become due from such fiduciaries under the provisions of this Subchapter, and the payment in accordance with such agreement shall be full satisfaction of the taxes to which the agreement relates. (1939, c. 158, s. 911; 1973, c. 476, s. 193.)

§ 105-240.1. Agreements with respect to domicile.

Whenever reasonably necessary in order to facilitate the collection of any tax, the Secretary of Revenue with the consent and approval of the Attorney General, is authorized to make agreements with the taxing officials of other states of the United States or with taxpayers in cases of disputes as to the domicile of a decedent. (1957, c. 1340, s. 10; 1973, c. 476, s. 193.)

§ 105-241. Where and how taxes payable; tax period; liens.

(a) Form of Payment. — Taxes are payable in the national currency. The Secretary shall prescribe where taxes are to be paid and whether taxes must be paid in cash, by check, by electronic funds transfer, or by another method.

(b) Electronic Funds Transfer. — Payment by electronic funds transfer is required as provided in this subsection.

(1) Corporate estimated taxes. — A corporation that is required under the Code to pay its federal-estimated corporate income tax by electronic funds transfer must pay its State-estimated corporate income tax by electronic funds transfer as provided in G.S. 105-163.40.

(2) Prepayment taxes. — A taxpayer that is required to prepay tax under G.S. 105-116 or G.S. 105-164.16 must pay the tax by electronic funds transfer.

(2a) Motor fuel taxes. — A taxpayer that is required to file an electronic return under Article 36C or Article 36D of this Chapter must pay the tax by electronic funds transfer.

(3) Large tax payments. — Except as otherwise provided in this subsection, the Secretary shall not require a taxpayer to pay a tax by electronic funds transfer unless, during the applicable period for that

tax, the average amount of the taxpayer's required payments of the tax was at least twenty thousand dollars ($20,000) a month. The twenty thousand dollar ($20,000) threshold applies separately to each tax. The applicable period for a tax is a 12-month period, designated by the Secretary, preceding the imposition or review of the payment requirement. The requirement that a taxpayer pay a tax by electronic funds transfer remains in effect until suspended by the Secretary. Every 12 months after requiring a taxpayer to pay a tax by electronic funds transfer, the Secretary must determine whether, during the applicable period for that tax, the average amount of the taxpayer's required payments of the tax was at least twenty thousand dollars ($20,000) a month. If it was not, the Secretary must suspend the requirement that the taxpayer pay the tax by electronic funds transfer and must notify the taxpayer in writing that the requirement has been suspended.

(c) Tax Period. — Except as otherwise provided in this Chapter, taxes are levied for the fiscal year of the state in which they became due.

(d) Lien. — This subsection applies except when another Article of this Chapter contains contrary provisions with respect to a lien for a tax levied in that Article. The lien of a tax attaches to all real and personal property of a taxpayer on the date a tax owed by the taxpayer becomes due. The lien continues until the tax and any interest, penalty, and costs associated with the tax are paid. A tax lien is not extinguished by the sale of the taxpayer's property. A tax lien, however, is not enforceable against a bona fide purchaser for value or the holder of a duly recorded lien unless:

(1) In the case of real property, a certificate of tax liability or a judgment was first docketed in the office of the clerk of superior court of the county in which the real property is located.

(2) In the case of personal property, there has already been a levy on the property under an execution or a tax warrant.

The priority of these claims and liens is determined by the date and time of recording, docketing, levy, or bona fide purchase.

If a taxpayer executes an assignment for the benefit of creditors or if insolvency proceedings are instituted against a taxpayer who owes a tax, the tax lien attaches to all real and personal property of the taxpayer as of the date and time the taxpayer executes the assignment for the benefit of creditors or the date and time the insolvency proceedings are instituted. In these cases, the tax lien is subject only to a prior recorded specific lien and the reasonable costs of administering the assignment or the insolvency proceedings. (1939, c. 158, s. 912; 1949, c. 392, s. 6; 1957, c. 1340, s. 5; 1993, c. 450, s. 2; 1999-389, s. 8; 2001-427, s. 6(b); 2005-435, s. 2; 2007-527, s. 31.)

Effect of Amendments. — Session Laws 2005-435, s. 2, effective January 1, 2006, added subdivision (b)(2a).

Session Laws 2007-527, s. 31, effective August 31, 2007, in subdivision (b)(2), substituted "Prepayment taxes" for "Semimonthly taxes," and substituted "prepay tax under G.S. 105-116 or G.S. 105-164.16" for "pay tax on a semimonthly schedule."

Legal Periodicals. — For brief comment on the 1949 amendment which rewrote the section, see 27 N.C.L. Rev. 485 (1949).

For article, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

CASE NOTES

Purchase of Warehouse Receipt Without Knowledge of Lien Senior in Time. — Under this section a lien for State taxes on personal property is not enforceable against a bona fide purchaser for value, except upon a levy upon such property under an execution or a tax warrant; but when a tax lien is perfected, it is, by G.S. 105-356(b), superior to all other liens or rights prior or subsequent in time. By G.S. 25-7-502(1)(c) a bona fide purchaser of a warehouse receipt acquires good title against a lien senior in time of which the purchaser had no notice. Thus, an enforceable lien on oil stored in North Carolina would not arise until it was executed on; but it could not be attached when a warehouse receipt therefor was in the hands of one who purchased it not knowing of the lien. Davenport v. Ralph N. Peters & Co., 386 F.2d 199 (4th Cir. 1967).

Local ad valorem tax liens do not fall within the scope of "other recorded specific liens". County of Lenoir v. Moore, 114 N.C. App. 110, 441 S.E.2d 589 (1994), aff'd, 340 N.C. 104, 455 S.E.2d 158 (1995).

Seizure by Filing Certificate of Tax Liability. — Filing a certificate of tax liability following assessment of a controlled substance tax constituted a meaningful interference with possessory interests and thus was a fourth amendment seizure. Andrews v. Crump, 984 F. Supp. 393 (W.D.N.C. 1996).

Illustrative Case. — A jury could find by a preponderance that plaintiff was directly injured by defendants' acts; the plaintiff could not receive income from harvesting trees on property owned jointly with a co-plaintiff, upon whom certificates of tax liability were filed, and consequently the plaintiff was unable to meet his obligations and was forced into bankruptcy. Andrews v. Crump, 984 F. Supp. 393 (W.D.N.C. 1996).

Applied in City of Winston-Salem v. Powell Paving Co., 7 F. Supp. 424 (M.D.N.C. 1934).

Cited in Lynn v. West, 134 F.3d 582, 1998 U.S. App. LEXIS 403 (4th Cir.), cert. denied, 525 U.S. 813, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998) (But see Milligan v. State, 135 N.C. App. 781, 522 S.E.2d 330 (1999)); County of Carteret v. Long, 128 N.C. App. 477, 495 S.E.2d 391 (1998).

§§ 105-241.1 through 105-241.5: Repealed by Session Laws 2007-491, s. 2, effective January 1, 2008.

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-241.6. Statute of limitations for refunds.

(a) General. — The general statute of limitations for obtaining a refund of an overpayment applies unless a different period applies under subsection (b) of this section. The general statute of limitations for obtaining a refund of an overpayment is the later of the following:

(1) Three years after the due date of the return.
(2) Two years after payment of the tax.

(b) Exceptions. — The exceptions to the general statute of limitations for obtaining a refund of an overpayment are as follows:

(1) Federal Determination. — If a taxpayer files a return reflecting a federal determination and the return is filed within the time required by this Subchapter, the period for requesting a refund is one year after the return reflecting the federal determination is filed or three years after the original return was filed or due to be filed, whichever is later.
(2) Waiver. — A taxpayer's waiver of the statute of limitations for making a proposed assessment extends the period in which the taxpayer can obtain a refund to the end of the period extended by the waiver.

(3) Worthless Debts or Securities. — Section 6511(d)(1) of the Code applies to an overpayment of the tax levied in Part 2 or 3 of Article 4 of this Chapter to the extent the overpayment is attributable to either of the following:
   a. The deductibility by the taxpayer under section 166 of the Code of a debt that becomes worthless, or under section 165(g) of the Code of a loss from a security that becomes worthless.
   b. The effect of the deductibility of a debt or loss described in subpart a. of this subdivision on the application of a carryover to the taxpayer.

(4) Capital Loss and Net Operating Loss Carrybacks. — Section 6511(d)(2) of the Code applies to an overpayment of the tax levied in Part 2 or 3 of Article 4 of this Chapter to the extent the overpayment is attributable to a capital loss carryback under section 1212(c) of the Code or to a net operating loss carryback under section 172 of the Code. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective January 1, 2008.

Session Laws 2007-491, s. 45, provides: "The Revenue Laws Study Committee is directed to study whether any legislative changes should be made regarding the use and scope of class actions to challenge the constitutionality of a tax in light of the decision reached by the North Carolina Supreme Court in Dunn v. State of North Carolina. The Committee must report its findings, along with any legislative recommendations, to the 2007 General Assembly, 2008 Regular Session."

Session Laws 2007-491, s. 46, provides: "This act does not require the establishment of new positions or the appropriation of funds for those positions. The Office of the Attorney General must report on or before January 1, 2009 to the Revenue Laws Study Committee and to the Fiscal Research Division of the North Carolina General Assembly concerning the staffing needs of the Revenue Section as the result of tax hearings being conducted at the Office of Administrative Hearings."

Session Laws 2007-491, s. 47, further provides: "The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-241.7. Procedure for obtaining a refund.

(a) Initiated by Department. — The Department must refund an overpayment made by a taxpayer when the Department processes a return and finds all of the following:

(1) The statute of limitations for obtaining a refund has not expired.
(2) The amount shown due on the return is not correct.
(3) The correction of the amount due shows that the taxpayer has overpaid the tax.

(b) Initiated by Taxpayer. — A taxpayer may request a refund of an overpayment made by the taxpayer by taking one of the following actions within the statute of limitations for obtaining a refund:

(1) Filing an amended return reflecting an overpayment due the taxpayer.
(2) Filing a claim for refund. The claim must identify the taxpayer, the type and amount of tax overpaid, the filing period to which the overpayment applies, and the basis for the claim. The taxpayer's statement of the basis of the claim does not limit the taxpayer from changing the basis.

(c) Action on Request. — When a taxpayer files an amended return or a claim for refund, the Department must take one of the actions listed in this subsection within six months after the date the amended return or claim for refund is filed. If the Department does not take one of these actions within this time limit, the inaction is considered a proposed denial of the requested refund.

(1) Send the taxpayer a refund of the amount shown due on the amended return or claim for refund.

(2) Adjust the amount of the requested refund by increasing or decreasing the amount shown due on the amended return or claim for refund and send the taxpayer a refund of the adjusted amount. If the adjusted amount is less than the amount shown due on the amended return or claim for refund, the adjusted refund must include a reason for the adjustment. The adjusted refund is considered a notice of proposed denial for the amount of the requested refund that is not included in the adjusted refund.

(3) Deny the refund and send the taxpayer a notice of proposed denial.

(4) Send the taxpayer a letter requesting additional information concerning the requested refund. If a taxpayer does not respond to a request for information, the Department may deny the refund and send the taxpayer a notice of proposed denial. If a taxpayer provides the requested information, the Department must take one of the actions listed in this subsection within the later of the following:

a. The remainder of the six-month period.

b. 30 days after receiving the information.

c. A time period mutually agreed upon by the Department and the taxpayer.

(d) Notice. — A notice of a proposed denial of a request for refund must contain the following information:

(1) The basis for the proposed denial. The statement of the basis of the denial does not limit the Department from changing the basis.

(2) The circumstances under which the proposed denial will become final.

(e) Restrictions. — The Department may not refund any of the following:

(1) Until a taxpayer files a final return for a tax period, an amount paid before the final return is filed.

(2) An overpayment setoff under Chapter 105A, the Setoff Debt Collection Act, or under another setoff debt collection program authorized by law.

(3) An income tax overpayment the taxpayer has elected to apply to another purpose as provided in this Article.

(4) An individual income tax overpayment of less than one dollar ($1.00) or another tax overpayment of less than three dollars ($3.00), unless the taxpayer files a written claim for the refund.

(f) Effect of Denial or Refund. — A proposed denial of a refund by the Secretary is presumed to be correct. A refund does not absolve a taxpayer of a tax liability that may in fact exist. The Secretary may propose an assessment for any deficiency as provided in this Article. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective January 1, 2008.

Session Laws 2007-491, s. 47, further provides: "The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-241.8. Statute of limitations for assessments.

(a) General. — The general statute of limitations for proposing an assessment applies unless a different period applies under subsection (b) of this section. The general statute of limitations for proposing an assessment is the later of the following:

(1) Three years after the due date of the return.
(2) Three years after the taxpayer filed the return.

(b) Exceptions. — The exceptions to the general statute of limitations for proposing an assessment are as follows:

(1) Federal determination. — If a taxpayer files a return reflecting a federal determination and the return is filed within the time required by this Subchapter, the period for proposing an assessment of any tax due is one year after the return is filed or three years after the original return was filed or due to be filed, whichever is later. If there is a federal determination and the taxpayer does not file the return within the required time, the period for proposing an assessment of any tax due is three years after the date the Secretary received the final report of the federal determination.

(2) Failure to file or filing false return. — There is no statute of limitations and the Secretary may propose an assessment of tax due from a taxpayer at any time if any of the following applies:
   a. The taxpayer did not file a return.
   b. The taxpayer filed a fraudulent return.
   c. The taxpayer attempted in any manner to fraudulently evade or defeat the tax.

(3) Tax forfeiture. — If a taxpayer forfeits a tax credit or tax benefit pursuant to forfeiture provisions of this Chapter, the period for proposing an assessment of any tax due as a result of the forfeiture is three years after the date of the forfeiture.

(4) Nonrecognition of gain. — If a taxpayer elects under section 1033(a)(2)(A) of the Code not to recognize gain from involuntary conversion of property into money, the period for proposing an assessment of any tax due as a result of the conversion or election is the applicable period provided under section 1033(a)(2)(C) or section 1033(a)(2)(D) of the Code. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective January 1, 2008.

Session Laws 2007-491, s. 47, further provides: "The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-241.9. Procedure for proposing an assessment.

(a) Authority. — The Secretary may propose an assessment against a taxpayer for tax due from the taxpayer. The Secretary must base a proposed assessment on the best information available. A proposed assessment of the Secretary is presumed to be correct.

(b) Time Limit. — The Secretary must propose an assessment within the statute of limitations for proposed assessments unless the taxpayer waives the limitations period in writing. A taxpayer may waive the limitations period for either a definite or an indefinite time. If the taxpayer waives the limitations period, the Secretary may propose an assessment at any time within the time extended by the waiver.

(c) Notice. — The Secretary must give a taxpayer written notice of a proposed assessment. The notice of a proposed assessment must contain the following information:

(1) The basis for the proposed assessment. The statement of the basis for the proposed assessment does not limit the Department from changing the basis.

(2) The amount of tax, interest, and penalties included in the proposed assessment. The amount for each of these must be stated separately.

(3) The circumstances under which the proposed assessment will become final and collectible. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective January 1, 2008.

Session Laws 2007-491, s. 47, further provides: "The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-241.10. Limit on refunds and assessments after a federal determination.

The limitations in this section apply when a taxpayer files a timely return reflecting a federal determination that affects the amount of State tax payable and the general statute of limitations for requesting a refund or proposing an assessment of the State tax has expired. A federal determination is a correction or final determination by the federal government of the amount of a federal tax due. A return reflecting a federal determination is timely if it is filed within the time required by G.S. 105-32.8, 105-130.20, 105-159, 105-160.8, 105-163.6A, or 105-197.1, as appropriate. The limitations are:

(1) Refund. — A taxpayer is allowed a refund only if the refund is the result of adjustments related to the federal determination.

(2) Assessment. — A taxpayer is liable for additional tax only if the additional tax is the result of adjustments related to the federal determination. A proposed assessment may not include an amount that is outside the scope of this liability. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective for taxable years beginning on or after January 1, 2007.

Session Laws 2007-491, s. 47, further provides: "The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-241.11. Requesting review of proposed denial of refund or proposed assessment.

(a) Procedure. — A taxpayer who objects to a proposed denial of a refund or a proposed assessment of tax may request a Departmental review of the proposed action by filing a request for review. The request must be filed with the Department within 45 days after the following:

(1) The date the notice of the proposed denial of the refund or proposed assessment was mailed to the taxpayer, if the notice was delivered by mail.

(2) The date the notice of the proposed denial of the refund or proposed assessment was delivered to the taxpayer, if the notice was delivered in person.

(3) The date that inaction by the Department on a request for refund was considered a proposed denial of the refund.

(b) Filing. — A request for a Departmental review of a proposed denial of a refund or a proposed assessment is considered filed on the following dates:

(1) For a request that is delivered in person, the date it is delivered.

(2) For a request that is not delivered in person, the date the Department receives it. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective January 1, 2008.

Session Laws 2007-491, s. 47, further provides: "The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-241.12. Result when taxpayer does not request a review.

(a) Refund. — If a taxpayer does not file a timely request for a Departmental review of a proposed denial of a refund, the proposed denial is final and is not subject to further administrative or judicial review. A taxpayer whose proposed denial becomes final may not file another amended return or claim for refund to obtain the denied refund.

(b) Assessment. — If a taxpayer does not file a timely request for a Departmental review of a proposed assessment, the proposed assessment is final and is not subject to further administrative or judicial review. Upon payment of the tax, the taxpayer may request a refund of the tax.

Before the Department collects a proposed assessment that becomes final when the taxpayer does not file a timely request for a Departmental review, the Department must send the taxpayer a notice of collection. A notice of collection must contain the following information:

(1) A statement that the proposed assessment is final and collectible.

(2) The amount of tax, interest, and penalties payable by the taxpayer.

(3) An explanation of the collection options available to the Department if the taxpayer does not pay the amount shown due on the notice and any remedies available to the taxpayer concerning these collection options. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective January 1, 2008.

Session Laws 2007-491, s. 47, further provides: "The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-241.13. Action on request for review.

(a) Action on Request. — If a taxpayer files a timely request for a Departmental review of a proposed denial of a refund or a proposed assessment, the Department must conduct a review of the proposed denial or proposed assessment and take one of the following actions:

(1) Grant the refund or remove the assessment.
(2) Schedule a conference with the taxpayer.
(3) Request additional information from the taxpayer concerning the requested refund or proposed assessment.

(b) Conference. — When the Department reviews a proposed denial of a refund or a proposed assessment and does not grant the refund or remove the assessment, the Department must schedule a conference with the taxpayer. The Department must set the time and place for the conference, which may include a conference by telephone, and must send the taxpayer notice of the designated time and place. The Department must send the notice at least 30 days before the date of the conference or, if the Department and the taxpayer agree, within a shorter period.

The conference is an informal proceeding at which the taxpayer and the Department must attempt to resolve the case. Testimony under oath is not taken, and the rules of evidence do not apply. A taxpayer may designate a representative to act on the taxpayer's behalf. The taxpayer may present any objections to the proposed denial of refund or proposed assessment at the conference.

(c) After Conference. — One of the following must occur after the Department conducts a conference on a proposed denial of a refund or a proposed assessment:

(1) The Department and the taxpayer agree on a settlement.
(2) The Department and the taxpayer agree that additional time is needed to resolve the taxpayer's objection to the proposed denial of the refund or proposed assessment.
(3) The Department and the taxpayer are unable to resolve the taxpayer's objection to the proposed denial of the refund or proposed assessment. If a taxpayer fails to attend a scheduled conference on the proposed denial of a refund or a proposed assessment without prior notice to the Department, the Department and the taxpayer are considered to be unable to resolve the taxpayer's objection. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective January 1, 2008.

Session Laws 2007-491, s. 47, further provides: "The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-241.14. Final determination after Departmental review.

(a) Refund. — If a taxpayer files a timely request for a Departmental review of a proposed denial of a refund and the Department and the taxpayer are unable to resolve the taxpayer's objection to the proposed denial, the Department must send the taxpayer a notice of final determination concerning the refund. The notice of final determination must state the basis for the determination and inform the taxpayer of the procedure for contesting the determination. The statement of the basis for the determination does not limit the Department from changing the basis.

(b) Assessment. — If a taxpayer files a timely request for a Departmental review of a proposed assessment and the Department and the taxpayer are unable to resolve the taxpayer's objection to the proposed assessment, the Department must send the taxpayer a notice of final determination concerning the assessment. A notice of final determination concerning an assessment must contain the following information:

(1) The basis for the determination. This information may be stated on the notice or be set out in a separate document. The statement of the basis for the determination does not limit the Department from changing the basis.

(2) The amount of tax, interest, and penalties payable by the taxpayer.

(3) The procedure the taxpayer must follow to contest the final determination.

(4) A statement that the amount payable stated on the notice is collectible by the Department unless the taxpayer contests the final determination.

(5) An explanation of the collection options available to the Department if the taxpayer does not pay the amount shown due on the notice and any remedies available to the taxpayer concerning these collection options.

(c) Time Limit. — The process set out in G.S. 105-241.13 for reviewing and attempting to resolve a proposed denial of a refund or a proposed assessment must conclude, and a final determination must be issued within nine months after the date the taxpayer files a request for review. The Department and the taxpayer may extend this time limit by mutual agreement. Failure to issue a notice of final determination within the required time does not affect the validity of a proposed assessment. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective January 1, 2008.

Session Laws 2007-491, s. 47, further provides: "The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-241.15. Contested case hearing on final determination.

A taxpayer who disagrees with a notice of final determination issued by the Department may contest the determination by filing a petition for a contested case hearing at the Office of Administrative Hearings in accordance with Article 3 of Chapter 150B of the General Statutes. A taxpayer may file a petition for a contested case hearing only if the taxpayer has exhausted the prehearing remedy. A taxpayer's prehearing remedy is exhausted when the Department issues a final determination after conducting a review and a conference. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective January 1, 2008.

Session Laws 2007-491, s. 47, further provides: "The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-241.16. Judicial review of decision after contested case hearing.

A taxpayer aggrieved by the final decision in a contested case commenced at the Office of Administrative Hearings may seek judicial review of the decision in accordance with Article 4 of Chapter 150B of the General Statutes. Notwithstanding G.S. 150B-45, a petition for judicial review must be filed in the Superior Court of Wake County and in accordance with the procedures for a mandatory business case set forth in G.S. 7A-45.4(b) through (f). A taxpayer who files a petition for judicial review must pay the amount of tax, penalties, and interest the final decision states is due. A taxpayer may appeal a decision of the Business Court to the appellate division in accordance with G.S. 150B-52. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective January 1, 2008.

Session Laws 2007-491, s. 47, further provides: "The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-241.17. Civil action challenging statute as unconstitutional.

A taxpayer who claims that a tax statute is unconstitutional may bring a civil action in the Superior Court of Wake County to determine the taxpayer's liability under that statute if all of the conditions in this section are met. In filing an action under this section, a taxpayer must follow the procedures for a mandatory business case set forth in G.S. 7A-45.4(b) through (f). The conditions for filing a civil action are:

(1) The taxpayer exhausted the prehearing remedy by receiving a final determination after a review and a conference.

(2) The taxpayer commenced a contested case at the Office of Administrative Hearings.

(3) The Office of Administrative Hearings dismissed the contested case petition for lack of jurisdiction because the sole issue is the constitutionality of a statute and not the application of a statute.

(4) The taxpayer has paid the amount of tax, penalties, and interest the final determination states is due.

(5) The civil action is filed within two years of the dismissal. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective January 1, 2008.

Session Laws 2007-491, s. 47, further provides: “The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate.”

§ 105-241.18: Reserved for future codification purposes.

§ 105-241.19. Declaratory judgments, injunctions, and other actions prohibited.

The remedies in G.S. 105-241.11 through G.S. 105-241.17 set out the exclusive remedies for disputing the denial of a requested refund, a taxpayer's liability for a tax, or the constitutionality of a tax statute. Any other action is barred. Neither an action for declaratory judgment, an action for an injunction to prevent the collection of a tax, nor any other action is allowed. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective January 1, 2008.

Session Laws 2007-491, s. 47, further provides: “The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate.”

§ 105-241.20. Delivery of notice to the taxpayer.

(a) Scope. — This section applies to the following notices:

(1) A proposed denial of a refund.

(2) A proposed assessment.

(3) A notice of collection.

(4) A final determination.

(b) Method. — The Secretary must deliver a notice listed in subsection (a) of this section to a taxpayer either in person or by United States mail sent to the taxpayer's last known address. A notice mailed to a taxpayer is presumed to have been received by the taxpayer unless the taxpayer makes an affidavit to the contrary within 90 days after the notice was mailed. If the taxpayer makes this affidavit, the notice is considered to have been delivered on the date the taxpayer makes the affidavit, and any time limit affected by the notice is extended to the date the taxpayer makes the affidavit. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective January 1, 2008.

Session Laws 2007-491, s. 47, further provides: “The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-241.21. Interest on taxes.

(a) Rate. — The interest rate set by the Secretary applies to interest that accrues on overpayments and assessments of tax. On or before June 1 and December 1 of each year, the Secretary must establish the interest rate to be in effect during the six-month period beginning on the next succeeding July 1 and January 1, respectively. In determining the interest rate, the Secretary must give due consideration to current market conditions and to the rate that will be in effect on that date pursuant to the Code. If no new rate is established, the rate in effect during the preceding six-month period continues in effect. The rate established by the Secretary may not be less than five percent (5%) per year and may not exceed sixteen percent (16%) per year.

(b) Accrual on Underpayments. — Interest accrues on an underpayment of tax from the date set by statute for payment of the tax until the tax is paid. Interest accrues only on the principal of the tax and does not accrue on any penalty.

(c) Accrual on Refund. — Interest accrues on an overpayment of tax from the time set in the following subdivisions until the refund is paid.

(1) Franchise, income, and gross premiums. — Interest on an overpayment of a tax levied under Article 3 of this Chapter and payable on an annual basis or of a tax levied under Article 4 or 8B of this Chapter accrues from a date 45 days after the latest of the following dates:
   a. The date the final return was filed.
   b. The date the final return was due to be filed.
   c. The date of the overpayment. The date of an overpayment of a tax levied under Article 4 or Article 8B of this Chapter is determined in accordance with section 6611(d), (f), (g), and (h) of the Code.

(2) All other taxes. — Interest on an overpayment of a tax that is not included in subdivision (1) of this subsection accrues from a date that is 90 days after the date the tax was paid.

(d) When Refund Is Paid. — A refund sent to a taxpayer is considered paid on a date determined by the Secretary that is no sooner than five days after a refund check is mailed. A refund set off against a debt pursuant to Chapter 105A of the General Statutes is considered paid five days after the Department mails the taxpayer a notice of the setoff, unless G.S. 105A-5 or G.S. 105A-8 requires the agency that requested the setoff to return the refund to the taxpayer. In this circumstance, the refund that was set off is not considered paid until five days after the agency that requested the refund mails the taxpayer a check for the refund. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective January 1, 2008.

Session Laws 2007-491, s. 47, further provides: "The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-241.22. Collection of tax.

The Department may collect a tax in the following circumstances:

(1) When a taxpayer files a return showing tax due with the return and does not pay the amount shown due.

(2) When the Department sends a notice of collection after a taxpayer does not file a timely request for a Departmental review of a proposed assessment of tax.

(3) When a taxpayer and the Department agree on a settlement concerning the amount of tax due.

(4) When the Department sends a notice of final determination concerning an assessment of tax and the taxpayer does not file a timely petition for a contested case hearing on the assessment.

(5) When a final decision is issued on a proposed assessment of tax after a contested case hearing.

(6) When the Office of Administrative Hearings dismisses a petition for a contested case for lack of jurisdiction because the sole issue is the constitutionality of a statute and not the application of a statute. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective January 1, 2008.

Session Laws 2007-491, s. 47, further provides: "The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-241.23. Jeopardy assessment and collection.

(a) Action. — The Secretary may at any time within the statute of limitations immediately assess and collect any tax the Secretary finds is due from a taxpayer if the Secretary determines that collection of the tax is in jeopardy and immediate assessment and collection are necessary in order to protect the interest of the State. In making a jeopardy collection, the Secretary may use any of the collection remedies in G.S. 105-242 and is not required to wait any period of time before using these remedies. Within 30 days after initiating a jeopardy collection, the Secretary must give the taxpayer the notice of proposed assessment required by G.S. 105-241.9.

(b) Review by Department. — Within five days after initiating a jeopardy collection that is not the result of a criminal investigation or of a liability for a tax imposed under Article 2D of this Chapter, the Secretary must provide the taxpayer with a written statement of the information upon which the Secretary relied in initiating the jeopardy collection. Within 30 days after receipt of this written statement or, if no statement is received, within 30 days after the statement was due, the taxpayer may request the Secretary to review the action taken. After receipt of this request, the Secretary must determine whether initiating the jeopardy collection was reasonable under all the circumstances and whether the amount assessed and collected was reasonable under all the circumstances. The Secretary must give the taxpayer written notice of this determination within 30 days after the request.

(c) Judicial Review. — Within 90 days after the earlier of the date a taxpayer received or should have received a determination of the Secretary concerning a jeopardy collection under subsection (b) of this section, the taxpayer may bring a civil action seeking review of the jeopardy collection. The taxpayer may bring the action in the Superior Court of Wake County or in the county in North Carolina in which the taxpayer resides. Within 20 days after the action is filed, the court must determine whether the initiation of the jeopardy collection was reasonable under the circumstances. If the court determines that an action of the Secretary was unreasonable or inappropriate, the court may order the Secretary to take any action the court finds appropriate. If the taxpayer shows reasonable grounds why the 20-day limit on the court should be extended, the court may grant an extension of not more than 40 additional days. (2007-491, s. 1.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective January 1, 2008.

Session Laws 2007-491, s. 47, further provides: "The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-242. Warrants for collection of taxes; garnishment and attachment; certificate or judgment for taxes.

(a) Levy and Sale. — If a taxpayer does not pay a tax within 30 days after it is collectible under G.S. 105-241.22, the Secretary may take either of the following actions to collect the tax:

(1) Issue a warrant directing the sheriff of any county of the State to levy upon and sell the real and personal property of the taxpayer found within the county for the payment of the tax and the cost of executing the warrant and to return to the Secretary the money collected, within a time to be specified in the warrant but not less than 60 days from the date of the warrant. The procedure for executions issued against property upon judgments of a court apply to executions under a warrant.

(2) Issue a warrant to any revenue officer or other employee of the Department charged with the duty to collect taxes, commanding the officer or employee to levy upon and sell the taxpayer's personal property found within the State for the payment of the tax. Except as otherwise provided in this subdivision, the levy upon and sale of personal property by an officer or employee of the Department is subject to and must be conducted in accordance with the laws governing the sale of property levied upon under execution. The Secretary may sell the property levied upon in any county and may advertise the sale in any reasonable manner and for any reasonable period of time to produce an adequate bid for the property. Levy and sale fees, plus actual advertising costs, must be added to and collected in the same manner as taxes. The Secretary is not required to file a report of sale with the clerk of superior court, if the sale is otherwise publicly reported.

(b) Garnishment and Attachment. — Intangible property that belongs to a taxpayer, is owed to a taxpayer, or has been transferred by a taxpayer under circumstances that would permit it to be levied upon if it were tangible property is subject to attachment and garnishment in payment of a tax that is due from the taxpayer and is collectible under G.S. 105-241.22. Intangible personal property includes bank deposits, rent, salaries, wages, property held in the Escheat Fund, and any other property incapable of manual levy or delivery. A person who is in possession of intangible property that is subject to attachment and garnishment is the garnishee and is liable for the amount the taxpayer owes. The liability applies only to the amount of the taxpayer's property in the garnishee's possession, reduced by any amount the taxpayer owes the garnishee. G.S. 105-242.1 sets out the procedure for attachment and garnishment of intangible property.

No more than ten percent (10%) of a taxpayer's wages or salary is subject to attachment and garnishment. The wages or salary of an employee of the United States, the State, or a political subdivision of the State are subject to attachment and garnishment.

(c) Certificate of Tax Liability. — The Department may file a certificate of tax liability to collect a tax that is owed by a taxpayer and is collectible under G.S. 105-241.22. A certificate of tax liability must state the taxpayer's name and the type and amount of tax owed. If the taxpayer resides in this State or has property in this State, the Department must file the certificate of tax liability with the clerk of the superior court of a county in which the taxpayer resides or has property. If the taxpayer does not reside in this State or have property in this State, the Department must file the certificate of tax liability in Wake County.

The clerk of court must record a certificate of tax liability in the same manner as a judgment. A recorded certificate of tax liability is considered a judgment and is enforceable in the same manner as other judgments. The legal rate of interest set in G.S. 24-1 applies to the principal amount of tax stated on the certificate of tax liability. The tax stated on a certificate of tax liability is a lien on real and personal property from the date the certificate is recorded.

A certificate of tax liability is enforceable for a period of 10 years from the date it is recorded. If the certificate is not satisfied within this period, the remaining liability of the taxpayer is abated and the Department must cancel the certificate. An execution sale initiated before the end of the 10-year period may be completed after the end of this period, regardless of whether resales are required because of the posting of increased bids. The Secretary may accept tax payments made after a certificate has expired, regardless of whether any collection actions were taken before the certificate expired. A taxpayer may waive the 10-year period for enforcement of the certificate for either a definite or an indefinite time.

The 10-year period in which a certificate of tax liability is enforceable is tolled during the following periods:

(1) While the taxpayer is absent from the State. The period is tolled during the taxpayer's absence plus one year after the taxpayer returns.

(2) Upon the death of the taxpayer. The period is tolled while the taxpayer's estate is administered plus one year after the estate is closed.

(3) While an action is pending to set aside a conveyance made by the taxpayer as a fraudulent conveyance.

(4) While an insolvency proceeding against the taxpayer is pending.

(5) During the period of any statutory or judicial bar to the enforcement of the certificate.

(6) The period for which a taxpayer has waived the 10-year period.

(c1) Release of Lien. — The Secretary shall release the State tax lien on a taxpayer's property if the liability for which the lien attached has been satisfied. The Secretary may release the State tax lien on all or part of a taxpayer's property if one or more of the following findings is made:

(1) The liability for which the lien attached has become unenforceable due to lapse of time.

(2) The lien is creating an economic hardship due to the financial condition of the taxpayer.

(3) The fair market value of the property exceeds the tax liability and release of the lien on part of the property would not hinder collection of the liability.

(4) Release of the lien will probably facilitate, expedite, or enhance the State's chances for ultimately collecting a tax due the State.

If the Secretary of Revenue shall find that it will be for the best interest of the State in that it will probably facilitate, expedite or enhance the State's chances for ultimately collecting a tax due the State, he may authorize a deputy or agent to release the lien of a State tax judgment or certificate of tax liability upon a specified parcel or parcels of real estate by noting such release upon the judgment docket where such certificate of tax liability is recorded. Such release shall be signed by the deputy or agent and witnessed by the clerk of court or his deputy or assistant and shall be in substantially the following form: "The lien of this judgment upon (insert here a short description of the property to be released sufficient to identify it, such as reference to a particular tract described in a recorded instrument) is hereby released, but this judgment shall continue in full force and effect as to other real property to which it has heretofore attached or may hereafter attach. This ____ day of ______, ____

____

Revenue Officer, N.C. Department of Revenue

WITNESS:

______________________________________ 42 C.S.C."

The release shall be noted on the judgment docket only upon conditions prescribed by the Secretary and shall have effect only as to the real estate described therein and shall not affect any other rights of the State under said judgment.

(d) Remedies Cumulative. — The remedies herein given are cumulative and in addition to all other remedies provided by law for the collection of said taxes.

(e) Exempt Property. — Only the following property is exempt from levy, attachment, and garnishment under this Article:

(1) The taxpayer's principal residence, unless the Secretary approves of the levy in writing or the Secretary finds that collection of the tax is in jeopardy.

(2) Tangible personal property that is exempt from federal levy as provided in section 6334 of the Code.

(3) Intangible personal property that is exempt from federal levy under section 6334 of the Code.

(4) Ninety percent (90%) of the taxpayer's salary or wages per month.

(f) Uneconomical Levy. — The Secretary shall not levy against any property if the Secretary estimates before levy that the expenses the Department would incur in levying against the property would exceed the fair market value of the property.

(g) Erroneous Lien. — A taxpayer may appeal to the Secretary after a certificate is filed under subsection (c) of this section if the taxpayer alleges an error in the filing of the lien. The Secretary shall make a determination of such an appeal as quickly as possible. If the Secretary finds that the filing of the certificate was erroneous, the Secretary shall issue a certificate of release of the lien as quickly as possible. (1939, c. 158, s. 913; 1941, c. 50, s. 10; 1949, c.

392, s. 6; 1951, c. 643, s. 9; 1955, c. 1285; c. 1350, s. 23; 1957, c. 1340, s. 10; 1959, c. 368; 1963, c. 1169, s. 6; 1969, c. 1071, s. 1; 1973, c. 476, s. 193; c. 1287, s. 13; 1979, c. 103, ss. 1, 2; c. 179, s. 5; 1979, 2nd Sess., c. 1085, s. 1; 1989, c. 37, s. 6; c. 580; 1991, c. 228, s. 1; 1991 (Reg. Sess., 1992), c. 1007, ss. 12, 13; 1993, c. 532, s. 5; 1997-121, s. 1; 1999-456, s. 59; 2003-349, s. 2; 2007-491, ss. 28, 29, 31.)

Cross References. — As to interpleader in cases of attachment and garnishment, see G.S. 1-440.43.

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, ss. 28, 29, and 31, effective January 1, 2008, rewrote subsections (a) through (c). For applicability, see Editor's note.

Legal Periodicals. — For comment on the 1941 amendment which inserted subsection (b), see 19 N.C.L. Rev. 541 (1941); on the 1949 amendment which added the third paragraph to subsection (c), see 27 N.C.L. Rev. 485 (1949).

CASE NOTES

Federal Tax Lien Entitled to Priority Where Taxpayer Insolvent. — A tax lien filed by the State of North Carolina under subsection (c) of this section is no more than a general lien, and thus, under 31 U.S.C. § 191, where taxpayer was insolvent within the meaning of that statute, the federal government's lien for unpaid income tax was entitled to priority though State lien for unpaid taxes was filed prior to date of federal tax lien. United States v. Williams, 139 F. Supp. 94 (M.D.N.C. 1956).

No Showing That Property Rights Affected. — Relatives alleged nothing to show that they had any property rights under state law that were affected by revenue enforcement officer's seizing their property to satisfy a tax assessment for the purposes of a due process claim. Lynn v. West, 134 F.3d 582, 1998 U.S. App. LEXIS 403 (4th Cir.), cert. denied, 525 U.S. 813, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998) (But see Milligan v. State, 135 N.C. App. 781, 522 S.E.2d 330 (1999)).

Remedies of Taxpayer. — Where the Secretary of Revenue assesses additional income tax against a taxpayer in accordance with provisions of G.S. 105-160 et seq., and has the certificate filed in the county in which the taxpayer has property for the purpose of creating a lien under subsection (c) of this section, the taxpayer may not move in such county to vacate and set aside the certificate on the ground of irregularity or invalidity, no execution having been issued thereon nor any effort made to enforce the lien, but the taxpayer is remitted to the statutory remedies given him to contest the assessment or attack its validity. Gill v. Smith, 233 N.C. 50, 62 S.E.2d 544 (1950).

Execution on Judgment Under Subsection (c) Must Be Issued by Clerk. — Where the Secretary of Revenue has the clerk of a superior court to docket his certificate setting forth the tax due by a resident of the county pursuant to subsection (c) of this section, execution on such judgment directed to the sheriff of the county must be issued by the clerk of the superior court of the county, or in his name by a deputy or assistant clerk, and it cannot be issued by the Secretary of Revenue. A sale under execution issued by the Secretary is a nullity. Daniels v. Yelverton, 239 N.C. 54, 79 S.E.2d 311 (1953).

Garnishee Held Liable for Costs. — Where the Secretary of Revenue has garnished a bank deposit for taxes due by the depositor, and the garnishee bank, in refusing to comply with the order, asserts no defense or setoff against the taxpayer, the bank, in the Secretary's action to compel compliance, will be held liable also for the costs. Gill v. Bank of French Bd., 230 N.C. 118, 52 S.E.2d 4 (1949).

Garnishee Not Liable. — Because defendant payroll analyst simply complied with the facially valid notice of garnishment issued by North Carolina Department of Revenue, as required of him by North Carolina law, G.S. 105-242(b) specifically shielded the payroll analyst from liability. Gust v. Tolson, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 28994 (W.D.N.C. May 4, 2006).

Applied in State v. Bonds, 120 N.C. App. 546, 463 S.E.2d 298 (1995).

Cited in County of Lenoir v. Moore, 114 N.C. App. 110, 441 S.E.2d 589 (1994), aff'd, 340 N.C. 104, 455 S.E.2d 158 (1995); Andrews v. Crump, 984 F. Supp. 393 (W.D.N.C. 1996); Salas v. McGee, 125 N.C. App. 255, 480 S.E.2d 714 (1997); Andrews v. Crump, 144 N.C. App. 68, 547 S.E.2d 117, 2001 N.C. App. LEXIS 340 (2001).

§ 105-242.1. Procedure for attachment and garnishment.

(a) Notice. — G.S. 105-242 specifies when intangible property is subject to attachment and garnishment. Before the Department attaches and garnishes intangible property in payment of a tax, the Department must send the garnishee a notice of garnishment. The notice must be sent in accordance with the methods authorized in G.S. 105-241.20 or by registered or certified mail. The notice must contain all of the following information:

(1) The taxpayer's name, address, and social security number or federal identification number.
(2) The type of tax the taxpayer owes and the tax periods for which the tax is owed.
(3) The amount of tax, interest, and penalties the taxpayer owes.
(4) An explanation of the liability of a garnishee for tax owed by a taxpayer.
(5) An explanation of the garnishee's responsibility concerning the notice.

(b) Action. — Within 30 days after receiving a notice of garnishment, a garnishee must comply with the garnishment or file a written response to the notice. A written response must explain why the garnishee is not subject to garnishment and attachment. Upon receipt of the written response, the Department must contact the garnishee and schedule a conference to discuss the response or inform the garnishee of the Department's position concerning the response. If the Department does not agree with the garnishee on the garnishee's liability, the Department may proceed to enforce the garnishee's liability for the tax by sending the garnishee a notice of proposed assessment in accordance with G.S. 105-241.9.

(c) Release. — When the Department releases a garnishee from liability, the Department must send the garnishee a letter of release. The letter must identify the taxpayer to whom the release applies and contain the identifying information about the taxpayer that is required under subsection (a) on a notice of garnishment. (2007-491, s. 30.)

Editor's Note. — Session Laws 2007-491, s. 47, made this section effective on January 1, 2008.

Session Laws 2007-491, s. 47, further provides: "The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-243. Taxes recoverable by action.

When requested by the Secretary, the Attorney General must bring an action to recover the amount of tax that is due from a taxpayer and is collectible under G.S. 105-241.22. In the action, the taxpayer may not challenge the liability for the tax. A judgment in the action has the same priority as a tax lien. The judgment is not subject to a claim for a homestead exemption. The action must be brought in one of the following:

(1) The Superior Court of Wake County.
(2) The taxpayer's county of residence.
(3) A county where the taxpayer owns real property.
(4) The county in which the taxpayer has its principal place of business.
(5) A court of competent jurisdiction of another state. (1939, c. 158, s. 914; 1973, c. 476, s. 193; 2007-491, s. 32.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 32, effective January 1, 2008, rewrote the section. For applicability, see Editor's note.

§ 105-243.1. Collection of tax debts.

(a) Definitions.— The following definitions apply in this section:

(1) Overdue tax debt.— Any part of a tax debt that remains unpaid 90 days or more after it becomes collectible under G.S. 105-241.22. The term does not include a tax debt for which the taxpayer entered into an installment agreement for the tax debt under G.S. 105-237 within 90 days after the tax debt became collectible, if the taxpayer has not failed to make any payments due under the installment agreement.
(2) Tax debt.— The total amount of tax, penalty, and interest collectible under G.S. 105-241.22.

(b) Outsourcing.— The Secretary may contract for the collection of tax debts owed by nonresidents and foreign entities. At least 30 days before the Department submits a tax debt to a contractor for collection, the Department must notify the taxpayer by mail that the debt may be submitted for collection if payment is not received within 30 days after the notice was mailed.

(c) Secrecy.— A contract for the collection of tax debts is conditioned on compliance with G.S. 105-259. If a contractor violates G.S. 105-259, the contract is terminated, and the Secretary must notify the contractor of the termination. A contractor whose contract is terminated for violation of G.S. 105-259 is not eligible for an award of another contract under this section for a period of five years from the termination. These sanctions are in addition to the criminal penalties set out in G.S. 105-259.

(d) Fee. — A collection assistance fee is imposed on an overdue tax debt that remains unpaid 30 days or more after the fee notice required by this subsection is mailed to the taxpayer. In order to impose a collection assistance fee on a tax debt, the Department must notify the taxpayer that the fee will be imposed if the tax debt is not paid in full within 30 days after the date the fee notice was mailed to the taxpayer. The Department may not mail the fee notice earlier than 60 days after the tax debt becomes collectible under G.S. 105-241.22. The fee is collectible as part of the debt. The Secretary may waive the fee pursuant to G.S. 105-237 to the same extent as if it were a penalty.

The amount of the collection assistance fee is twenty percent (20%) of the amount of the overdue tax debt. If a taxpayer pays only part of an overdue tax debt, the payment is credited proportionally to fee revenue and tax revenue.

(e) Use. — The fee is a receipt of the Department and must be applied to the costs of collecting overdue tax debts. The proceeds of the fee must be credited to a special account within the Department and may be expended only as provided in this subsection. The proceeds of the fee may not be used for any purpose that is not directly and primarily related to collecting overdue tax debts. The Department may apply the proceeds of the fee for the purposes listed in this subsection. The remaining proceeds of the fee may be spent only pursuant to appropriation by the General Assembly. The fee proceeds do not revert but remain in the special account until spent for the costs of collecting overdue tax debts. The Department and the Office of State Budget and Management must account for all expenditures using accounting procedures that clearly distinguish costs allocable to collecting overdue tax debts from costs allocable to other purposes and must demonstrate that none of the fee proceeds are used for any purpose other than collecting overdue tax debts.

The Department may apply the fee proceeds for the following purposes:

(1) To pay contractors for collecting overdue tax debts under subsection (b) of this section.

(2) To pay the fee the United States Department of the Treasury charges for setoff to recover tax owed to North Carolina.

(3) To pay for taxpayer locater services, not to exceed one hundred fifty thousand dollars ($150,000) a year.

(4) To pay for postage or other delivery charges for correspondence directly and primarily relating to collecting overdue tax debts, not to exceed five hundred thousand dollars ($500,000) a year.

(5) To pay for operating expenses for Project Collection Tax and the Taxpayer Assistance Call Center.

(6) To pay for expenses of the Examination and Collection Division directly and primarily relating to collecting overdue tax debts.

(f) Reports. — The report of Department activities required by G.S. 105-256 contains information on the Department's efforts to collect tax debts and its use of the proceeds of the collection assistance fee. (2001-380, ss. 2, 8; 2002-126, s. 22.2; 2003-349, s. 3; 2004-124, ss. 23.2(a), 23.3(c); 2004-170, s. 22.5; 2005-276, ss. 22.1(a), 22.1(b), 22.6(a); 2006-66, ss. 19.2, 19.3(a); 2007-323, s. 6.9(a); 2007-491, s. 33.)

Editor's Note. — Session Laws 2001-380, which enacted G.S. 105-243.1, provides in s. 1: "The General Assembly finds that the Department of Revenue has documented that the State's cost of collecting overdue tax debts exceeds twenty percent (20%) of the amount of the overdue tax debts. The General Assembly finds that the cost of collecting overdue tax debts is currently borne by taxpayers who pay their taxes on time. It is the intent of the General Assembly by this act to shift this cost to the delinquent taxpayers who owe overdue tax debts."

Session Laws 2001-380, s. 9, as amended by Session Laws 2003-349, s. 3, makes this section effective August 20, 2001, and applicable to tax debts that remain unpaid on or after that date.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-380, s. 9, as amended by Session Laws 2003-349, s. 3, makes this section effective August 20, 2001, and applicable to tax debts that remain unpaid on or after that date.

Session Laws 2001-424, s. 14D.1, provides: "Funds appropriated to the Department of Revenue for Project Collect Tax shall be transferred to a separate Fund Code in the Department's budget."

Session Laws 2001-424, s. 14D.2, provides: "The Department of Revenue shall report to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division by October 1, 2001, and monthly thereafter regarding its progress in developing a request for proposal for a performance-based contract to collect overdue tax debts as defined in G.S. 105-243.1. The report shall include a list of any funds expended in developing the request for proposal and the purposes for which the funds were spent.

"The Department of Revenue shall consult with the Joint Legislative Commission on Governmental Operations prior to issuing the request for proposal for performance-based contracts."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 22.4, provides: "The Department of Revenue may use up to six hundred thousand dollars ($600,000) during the 2002-2003 fiscal year from the collection assistance fee account created in G.S. 105-243.1 to be allocated as follows:

"(1) Two hundred thousand dollars ($200,000) for contractual services related to system changes for managing and filing bankruptcies.

"(2) Four hundred thousand dollars ($400,000) for identifying delinquent taxpayers."

Session Laws 2002-126, ss. 22.6(a) to (c), as amended by Session Laws 2003-284, s. 23.1, and as amended by Session Laws 2004-124, ss. 23.1 and 23.3(a), provides: "(a) There is appropriated from the collection assistance fee account created in G.S. 105-243.1 to the Department of Revenue the sum of one million six hundred twenty-two thousand eight hundred ninety-six dollars ($1,622,896) for the 2003-2004 fiscal year and the sum of two million one hundred fifty-four thousand five hundred ninety-three dollars ($2,154,593) for the 2004-2005 fiscal year to pay for the costs of establishing and equipping a central taxpayer telecommunications service center for collections and assistance and for the costs associated with aligning local field offices with the new center. Of the funds appropriated in this subsection, the sum of three million dollars ($3,000,000) that was designated for the 2003-2005 biennium to pay for the costs of establishing and equipping a central taxpayer telecommunications service center does not revert at the end of the 2004-2005 fiscal year but remains available until June 30, 2006, for operating costs of the service center.

"(b) Repealed by Session Laws 2003-284, s. 23.1, effective July 1, 2003.

"(c) Beginning January 1, 2003, and ending six months following completion of the projects described in subsection (a) of this section, the Department of Revenue must report semiannually to the Joint Legislative Commission on Governmental Operations on the use of the funds and the progress of establishing the new center."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2004-124, s. 23.2(b), provides: "Funds are appropriated in this act from the collection assistance fee account created in G.S. 105-243.1 to the Department of Revenue for postage for correspondence directly and primarily relating to collecting overdue tax debts, for operating expenses for Project Collect Tax, and for expenses of the Examinations and Collections Division directly and primarily relating to collecting overdue tax debts as defined in G.S. 105-243.1. The Department of Revenue and the Office of State Budget and Management must account for all expenditures using accounting procedures that clearly distinguish costs allocable to collecting overdue tax debts as defined in G.S. 105-243.1 from costs allocable to other purposes and must demonstrate that none of the fee proceeds are used for any purpose other than collecting overdue tax debts.

"The Department of Revenue must report to the 2005 General Assembly on its implementation of this section."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2005-345, s. 37, repealed Session Laws 2005-276, s. 22.6, which had proposed to amend subsection (d) of this section by inserting "the actual cost of collection, not to exceed" preceding "twenty percent" in the second paragraph.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, ss. 6.9(b) and (c) provide: "(b) The General Assembly finds that a computer system that records tax payments and determines when the payments are overdue directly and primarily relates to the collection of overdue tax debts and that the cost of the computer system is subject to the collection assistance fee set forth in G.S. 105-243.1. The Department of Revenue is authorized to use funds in the 20% Collection Assistance Fee Account, Budget Code 24704-2474, during the 2007-2008 fiscal year to replace the Department's current computer system, and these funds are appropriated to the Department for that purpose. The Department shall not use more than fifteen million dollars ($15,000,000) from the Account to replace the Department's current computer system. Funds appropriated to the Department in this subsection remain in the Account until withdrawn for expenditures for a replacement computer system and shall remain in the Account if not expended during the 2007-2008 fiscal year for the purposes set forth in this subsection.

"(c) The Department of Revenue shall contract with private counsel with the pertinent information technology and computer law expertise to review requests for proposals and to negotiate and review contracts associated with the Integrated Tax Administration System. G.S. 114-2.3 does not apply to this subsection."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2001-380, s. 8, as amended by Session Laws 2003-384, s. 3, effective October 1, 2005, inserted "owed by nonresidents and foreign entities" at the end of the first sentence of subsection (b).

Session Laws 2005-276, ss. 22.1(a) and 22.1(b), effective July 1, 2005, in subsection (e), in the first paragraph, added the last sentence, and added subdivisions (e)(4) through (e)(6); and in subsection (f), added the second paragraph.

Session Laws 2006-66, ss. 19.2 and 19.3(a), effective July 1, 2006, substituted "one hundred fifty thousand dollars ($150,000)" for "one hundred thousand dollars ($100,000)" in subdivision (e)(3); and inserted "not to exceed three hundred fifty-three thousand dollars ($353,000) a year" in subdivision (e)(4); and rewrote subsection (f), which detailed reporting requirements.

Session Laws 2007-323, s. 6.9(a), effective July 1, 2007, substituted "five hundred thousand dollars ($500,000)" for "three hundred fifty three thousand dollars ($353,000)" at the end of subdivision (e)(4).

Session Laws 2007-491, s. 33, effective January 1, 2008, in subdivision (a)(1), substituted "it becomes collectible under G.S. 105-241.22" for "the notice of final assessment was mailed to the taxpayer" in the first sentence, and "the tax debt became collectible, if the taxpayer" for "the notice of final assessment was mailed and" in the last sentence; rewrote subdivision (a)(2); and substituted "the tax debt becomes collectible under G.S. 105-241.22" for "the notice of final assessment for the tax debt was mailed to the taxpayer" in the next-to-last sentence in subsection (d). For applicability, see Editor's note.

§ 105-244: Repealed by Session Laws 1998-212, s. 29A.14(o), effective January 1, 1999.

§ 105-244.1. Cancellation of certain assessments.

The Secretary of Revenue is hereby authorized, empowered and directed to cancel and abate all assessments made after October 16, 1940, for or on account of any tax owing to the State of North Carolina and which is payable to the Department of Revenue against any person who was killed while a member of the armed forces or who has a service connected disability as a result of which the United States is paying him disability compensation. This provision shall apply only to assessments made after October 16, 1940, for taxes which were due prior to the time the taxpayer was inducted into the armed forces. If any such assessment is or has been paid, the Secretary of Revenue may refund the amount paid but shall not add thereto any interest. (1949, c. 392, s. 6; 1973, c. 476, s. 193.)

§ 105-245. Failure of sheriff to execute order.

If any sheriff of this State shall willfully fail, refuse, or neglect to execute any order directed to him by the Secretary of Revenue and within the time provided in this Subchapter, the official bond of such sheriff shall be liable for the tax, penalty, interest, and cost due by the taxpayer. (1939, c. 158, s. 916; 1973, c. 476, s. 193.)

§ 105-246. Actions, when tried.

All actions or processes brought in any of the superior courts of this State, under provisions of this Subchapter, shall have precedence over any other civil causes pending in such courts, and the courts shall always be deemed open for trial of any such action or proceeding brought therein. (1939, c. 158, s. 917.)

§ 105-247. Municipalities not to levy income and inheritance tax.

No city, town, township, or county shall levy any tax on income or inheritance. (1939, c. 158, s. 918.)

§ 105-248. Purpose of State taxes.

The taxes levied in this Subchapter are for the expenses of the State government, the appropriations to its educational, charitable, and penal institutions, the interest on the debt of the State, the public schools, and other specific appropriations made by law, and shall be collected and paid into the General Fund. (1939, c. 158, s. 919; 1981, c. 3; 1993 (Reg. Sess., 1994), c. 745, s. 17.)

Legal Periodicals. — For discussion of section, see 12 N.C.L. Rev. 23 (1934).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

§ 105-248.1: Repealed by Session Laws 2007-527, s. 32, effective August 31, 2007.

§ 105-249: Repealed by Session Laws 1998-95, s. 27, effective July 1, 1999.

§ 105-249.1: Repealed by Session Laws 1998-95, s. 28, effective July 1, 1999.

§ 105-249.2. Due date extended and penalties waived for certain military personnel or persons affected by a presidentially declared disaster.

(a) Combat. — The Secretary may not assess interest or a penalty against a taxpayer for any period that is disregarded under section 7508 of the Code in determining the taxpayer's liability for a federal tax. A taxpayer is granted an extension of time to file a return or take another action concerning a State tax for any period during which the Secretary may not assess interest or a penalty under this section.

(b) Disaster. — The penalties in G.S. 105-236(2), (3), and (4) may not be assessed for any period in which the time for filing a federal return or report or for paying a federal tax is extended under section 7508A of the Code because of a presidentially declared disaster. For the purpose of this section, "presidentially declared disaster" has the same meaning as in section 1033(h) (3) of the Code. (1967, c. 706, s. 1; 1991, c. 439, s. 1; 1991 (Reg. Sess., 1992), c. 922, s. 10; 2001-87, s. 1; 2001-414, s. 24; 2006-162, s. 18.)

Editor's Note. — The reference in subsection (b) to "G.S. 105-236(2), (3), and (4)" should probably be to "G.S. 105-236(a)(2), (3), and (4)."

Effect of Amendments. — Session Laws 2006-162, s. 18, effective July 24, 2006, substituted "persons" for "individuals" in the middle of the section catchline.

§ 105-249.3: Repealed by Session Laws 1998-98, s. 19, effective August 14, 1998.

§ 105-250. Law applicable to foreign corporations.

All foreign corporations, and the officers and agents thereof, doing business in this State, shall be subject to all the liabilities and restrictions that are or may be imposed upon corporations of like character, organized under the laws of this State, and shall have no other or greater powers. (1939, c. 158, s. 920.)

§ 105-250.1: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1209.

§ 105-251. Type of information a taxpayer must provide.

A taxpayer must give information to the Secretary when the Secretary requests the information. The Secretary may request a taxpayer to provide only the following kinds of information on a return, a report, or otherwise:

(1) Information that identifies the taxpayer.
(2) Information needed to determine the liability of the taxpayer for a tax.
(3) Information needed to determine whether an item is subject to a tax.
(4) Information that enables the Secretary to collect a tax.

(5) Other information the law requires a taxpayer to provide or the Secretary needs to perform a duty a law requires the Secretary to perform. (1939, c. 158, s. 921; 1973, c. 476, s. 193; 1993 (Reg. Sess., 1994), c. 661, s. 2.)

§ 105-251.1: Repealed by Session Laws 1991 (Regular Session, 1992), c. 1007, s. 14.

§ 105-252. Returns required.

A person who receives from the Secretary any form requiring information shall fill the form out properly and answer each question fully and correctly. If unable to answer a question, the person shall explain why in writing. The person shall return the form to the Secretary at the time and place required by the Secretary. The person shall also furnish an oath or affirmation verifying the return; the oath or affirmation shall be in the form required by the Secretary. (1939, c. 158, s. 922; 1973, c. 476, s. 193; 1991 (Reg. Sess., 1992), c. 930, s. 5.)

§ 105-253. Personal liability when certain taxes not remitted.

(a) Any officer, trustee, or receiver of any corporation or limited liability company required to file a report with the Secretary who has custody of funds of the corporation or company and who allows the funds to be paid out or distributed to the stockholders of the corporation or to the members of the company without having remitted to the Secretary any State taxes that are due is personally liable for the payment of the tax.

(b) Each responsible officer is personally and individually liable for all of the following:

(1) All sales and use taxes collected by a corporation or a limited liability company upon its taxable transactions.

(2) All sales and use taxes due upon taxable transactions of a corporation or a limited liability company but upon which it failed to collect the tax, but only if the person knew, or in the exercise of reasonable care should have known, that the tax was not being collected.

(3) All taxes due from a corporation or a limited liability company pursuant to the provisions of Articles 36C and 36D of Subchapter V of this Chapter and all taxes payable under those Articles by it to a supplier for remittance to this State or another state.

(4) All income taxes required to be withheld from the wages of employees of a corporation or a limited liability company.

The liability of the responsible officer is satisfied upon timely remittance of the tax by the corporation or the limited liability company. If the tax remains unpaid after it is due and payable, the Secretary may proceed to enforce the responsible officer's liability for the tax by sending the responsible officer a notice of proposed assessment in accordance with G.S. 105-241.9. As used in this section, the term "responsible officer" means the president, treasurer, and chief financial officer of a corporation, the manager of a limited liability company, and any other officer of a corporation or member of a limited liability company who has a duty to deduct, account for, or pay taxes listed in this subsection. Any penalties that may be imposed under G.S. 105-236 and that apply to a deficiency also apply to an assessment made under this section.

The period of limitations for assessing a responsible officer for unpaid taxes under this section expires one year after the expiration of the period of limitations for assessment against the corporation or limited liability company.

(c) Repealed by Session Laws 1991 (Regular Session, 1992), c. 1007, s. 15. (1939, c. 158, s. 923; 1941, c. 50, s. 10; 1955, c. 1350, s. 23; 1973, c. 476, s. 193; c. 1287, s. 13; 1983, c. 220, s. 1; 1991, c. 690, s. 7; 1991 (Reg. Sess., 1992), c. 1007, s. 15; 1995, c. 390, s. 15; 1995 (Reg. Sess., 1996), c. 647, s. 52; 1997-6, s. 9; 1998-212, s. 29A.14(p); 1999-337, s. 34; 2007-491, s. 34.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 34, effective January 1, 2008, in the second paragraph of subsection (b), rewrote the second sentence, in the third sentence, substituted "president, treasurer, and chief financial officer" for "president and the treasurer," and inserted "other" preceding "office of a corporation or member of a limited liability," and deleted the former last sentence, which read: "The provisions of this Article apply to an assessment made under this section to the extent they are not inconsistent with this section." For applicability, see Editor's note.

CASE NOTES

The first two paragraphs of this section are independent of each other; each provides a means for holding officers personally liable for unpaid corporate taxes. The two paragraphs were enacted at different times; the first in 1939, the second in 1973. They differ in scope; the first applies to all state tax schedules, while the second is limited to sales and use taxes. Neither paragraph requires reference to the other for definition of terms or for any other reason. In re Jonas, 70 N.C. App. 116, 318 S.E.2d 869 (1984).

Cited in In re Taylor Tobacco Enters., Inc., 106 Bankr. 441 (E.D.N.C. 1989).

§ 105-254. Secretary to furnish forms.

The Secretary shall prepare forms suitable for carrying out the duties delegated to the Secretary. Upon request, the Secretary shall provide forms to any person subject to the laws administered by the Secretary. Failure to receive or secure a form does not relieve a person from a duty to file a return or a report. (1939, c. 158, s. 924; 1973, c. 476, s. 193; 1991 (Reg. Sess., 1992), c. 930, s. 6.)

§ 105-255. Secretary of Revenue to keep records.

The Secretary of Revenue shall keep books of account and records of collections of taxes as may be prescribed by the Director of the Budget; shall keep an assessment roll for the taxes levied, assessed, and collected under this Subchapter, showing in same the name of each taxpayer, the amount of tax assessed against each, when assessed, the increase or decrease in such assessment; the penalties imposed and collected, and the total tax paid; and shall make monthly reports to the Director of the Budget and to the Auditor and/or State Treasurer of all collections of taxes on such forms as prescribed by the Director of the Budget. (1939, c. 158, s. 925; 1973, c. 476, s. 193.)

Cross References. — As to photographic reproductions of records of Department of Revenue, see G.S. 8-45.3.

§ 105-256. Publications prepared by Secretary of Revenue.

(a) Publications. — The Secretary shall prepare and publish the following:

(1) At least every two years, statistics concerning taxes imposed by this Chapter, including amounts collected, classifications of taxpayers, geographic distribution of taxes, and other facts considered pertinent and valuable.

(2) At least every two years, a tax expenditure report that lists the tax expenditures made by a provision in this Chapter, other than a provision in Subchapter II, and gives an estimate of the amount by which revenue is reduced by each tax expenditure. A "tax expenditure" is an exemption, an exclusion, a deduction, an allowance, a credit, a refund, a preferential tax rate, or another device that reduces the amount of tax revenue that would otherwise be available to the State. An estimate of the amount by which revenue is reduced by a tax expenditure may be stated as ranging between two amounts if the Department does not have sufficient data to make a more specific estimate.

(3) As often as required, a report that is not listed in this subsection but is required by another law.

(4) As often as the Secretary determines is needed, other reports concerning taxes imposed by this Chapter.

(5) At least once a year, a statement of the taxpayer's bill of rights, which sets forth in simple and nontechnical terms the following:

a. The taxpayer's right to have the taxpayer's tax information kept confidential.

b. The rights of a taxpayer and the obligations of the Department during an audit.

c. The procedure for a taxpayer to appeal an adverse decision of the Department at each level of determination.

d. The procedure for a taxpayer to claim a refund for an alleged overpayment.

e. The procedure for a taxpayer to request information, assistance, and interpretations or to make complaints.

f. Penalties and interest that may apply and the basis for requesting waiver of a penalty.

g. The procedures the Department may use to enforce the collection of a tax, including assessment, jeopardy assessment, enforcement of liens, and garnishment and attachment.

(6) On an annual basis, a report on the quality of services provided to taxpayers through the Taxpayer Assistance Call Center, walk-in assistance, and taxpayer education. The report must be submitted to the Joint Legislative Commission on Governmental Operations.

(7) The reports required under G.S. 105-129.19 and G.S. 105-129.44.

(8) By January 1 and July 1 of each year, a semiannual report on the Department's activities listed in this subdivision. The report must be submitted to the Joint Legislative Commission on Governmental Operations and to the Revenue Laws Study Committee.

a. Its efforts to increase compliance with the tax laws. The report must describe the Department's existing initiatives in this area as of July 1, 2006, and must estimate, by tax type and amount, the revenue expected in the fiscal year by the initiative. The report must describe any new initiative implemented since July 1, 2006, and estimate, by tax type and amount, the revenue expected in the fiscal year by the initiative.

b. Its efforts to identify and address fraud and other abuses of the voluntary tax compliance system that result in unreported and underreported tax. The report must describe the Department's long-term plan for achieving greater voluntary compliance and must summarize the steps taken since the last report and their results.

c. Its efforts to collect tax debts. The report must include a breakdown of the amount and age of tax debts collected through warning letters and by other means, must itemize collections by type of tax, must describe the Department's long-term collection plan, and must summarize the steps taken since the last report and their results.

d. Its use of the proceeds of the collection assistance fee imposed by G.S. 105-243.1.

(9) A final decision of the Secretary in a contested tax case. The Secretary must redact identifying taxpayer information from a final decision prior to publication.

(b) Information. — The Secretary may require a unit of State or local government to furnish the Secretary statistical information the Secretary needs to prepare a report under this section. Upon request of the Secretary, a unit of government shall submit statistical information on one or more forms provided by the Secretary.

(c) Distribution. — The Secretary shall distribute reports prepared by the Secretary as follows without charge:

(1) Five copies to the Division of State Library of the Department of Cultural Resources, as required by G.S. 125-11.7.

(2) Five copies to the Legislative Services Commission for the use of the General Assembly.

(3) Upon request, one copy to each entity and official to which a copy of the reports of the Appellate Division of the General Court of Justice is furnished under G.S. 7A-343.1.

(4) One copy of the tax expenditure report to each member of the General Assembly and, upon request, one copy of any other report to each member of the General Assembly.

(5) One copy of the taxpayer's bill of rights to each taxpayer the Department contacts regarding determination or collection of a tax, other than by providing a tax form.

(6) Upon request, one copy of the taxpayer's bill of rights to each taxpayer.

The Secretary may charge a person not listed in this subsection a fee for a report prepared by the Secretary in an amount that covers publication or copying costs and mailing costs.

(d) Other Requirements. — The following requirements apply to the Secretary:

(1) Repealed by Session Laws 2006-6, s. 10, effective July 1, 2007.

(2) Escheats. — G.S. 116B-60(g) requires the Secretary to furnish information to the Escheat Fund on October 1 of each year.

(e) Repealed by Session Laws 2004-124, s. 23.3(b), effective July 1, 2004. (1939, c. 158, s. 926; 1955, c. 1350, s. 8; 1973, c. 476, s. 193; 1991, c. 10, s. 1; 1991 (Reg. Sess., 1992), c. 1007, s. 16; 1993, c. 433, s. 1; c. 532, s. 6; 2001-414, ss. 25, 26; 2002-87, s. 8; 2002-126, s. 22.5; 2004-124, s. 23.3(b); 2006-6, s. 10; 2006-66, s. 19.3(b); 2007-491, ss. 35, 36.)

Cross References. — As to the annual report by the Department of Revenue to the Joint Legislative Commission on Governmental Operations, see G.S. 143B-218.1.

Editor's Note. — Session Laws 2001-414, ss. 25 and 26, effective September 14, 2001, recodified G.S. 143B-218.1 as subdivision (a)(6) of this section.

Session Laws 2003-284, s. 7.6(j), provides: "Department of Revenue Reports. — The Department of Revenue shall provide to the Department of Public Instruction a preliminary report for the current fiscal year of the assessed value of the property tax base for each county prior to March 1 of each year and a final report prior to May 1 of each year. The reports shall include for each county the annual sales assessment ratio and the taxable values of (i) total real property, (ii) the portion of total real property represented by the present-use value of agricultural land, horticultural land, and forestland as defined in G.S. 105-277.2, (iii) property of public service companies determined in accordance with Article 23 of Chapter 105 of the General Statutes, and (iv) personal property."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, is a severability clause.

Session Laws 2004-124, s. 30.9, provides: "Any funds received by the Department of Transportation as a result of the Department of Revenue's Fuel Tax Action Plan in an amount greater than the costs of administering the program during the 2004-2005 fiscal year shall be distributed equally among the 14 Highway Divisions. One-half of the funds distributed to each Highway Division shall be used for contract resurfacing and the remaining one-half of the funds distributed to each Highway Division shall be used for highway maintenance.

"The Department of Revenue shall submit periodic reports to the Joint Legislative Transportation Oversight Committee and the Joint Legislative Commission on Governmental Operations on the implementation of the Department's Fuel Tax Action Plan. The initial report shall describe the plan, the steps the Department intends to take to implement the plan, the timetable for implementation of the steps, and the amount of revenue the Department expects to generate. Subsequent reports shall describe the Department's progress in implementing the plan, the number of newly authorized positions that have been filled, and the amount and source of revenue generated from implementation. The Department shall submit the initial report August 1, 2004. Subsequent reports shall be submitted every three months starting November 1, 2004, until the end of the plan. The Department shall not distribute revenue generated by the Fuel Tax Action Plan until the revenue has been included in a report submitted under this section."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2006-6, s. 10, provides, in part, that the repeal of subdivision (d)(1) does not affect reports for activities prior to July 1, 2007.

Session Laws 2006-6, s. 12, provides: "Prosecutions for offenses committed before the effective dates in this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. If a final Order by a court of competent jursidiction prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that activity is not allowed elsewhere in this State, this act is void."

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 19.3(c), provides: "The first report required under G.S. 105-256(a)(8), as enacted by this section, is due by January 1, 2007."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6, is a severability clause.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2006-6, s. 10, effective July 1, 2007, and applicable to offenses committed on or after that date, repealed subdivision (d)(1) relating to video poker.

Session Laws 2006-66, s. 19.3(b), effective July 1, 2006, substituted "through the Taxpayer Assistance Call Center" for "including telephone and walk-in assistance" in subdivision (a)(6); and added subdivision (a)(8).

Session Laws 2007-491, ss. 35, 36, effective January 1, 2008, substituted "Publications" for "Reports" in the section catchline and in subsection (a); and added subdivision (a)(9). For applicability, see Editor's note.

§ 105-256.1. Corporate annual report.

A corporation that files its annual report with the Secretary must pay the amount provided in G.S. 55-1-22 when it files the report. Amounts collected under this section shall be credited to the General Fund as tax revenue. The Secretary must transmit an annual report filed with the Secretary in accordance with G.S. 55-16-22 to the Secretary of State. (1997-475, s. 6.10.)

CASE NOTES

Applied in Ben Johnson Homes, Inc. v. Watkins, 142 N.C. App. 162, 541 S.E.2d 769, 2001 N.C. App. LEXIS 32 (2001), aff'd, 354 N.C. 563, 555 S.E.2d 608 (2001).

§ 105-257. Department may charge fee for report or other document.

The Secretary of Revenue may charge a fee for a report or another document in an amount that covers copying or publication costs and mailing costs. (1933, c. 88, s. 2; 1955, c. 1350, s. 9; 1973, c. 476, s. 193; 1991, c. 10, s. 2.)

Legal Periodicals. — For discussion of section, see 11 N.C.L. Rev. 250 (1933).

§ 105-258. Powers of Secretary of Revenue; who may sign and verify legal documents; who may serve civil papers.

(a) Secretary May Examine Data and Summon Persons. — The Secretary of Revenue, for the purpose of ascertaining the correctness of any return, making a return where none has been made, or determining the liability of any person for a tax, or collecting any such tax, shall have the power to examine, personally, or by an agent designated by him, any books, papers, records, or other data which may be relevant or material to such inquiry, and the Secretary may summon the person liable for the tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, care or control of books of account containing entries relevant or material to the income and expenditures of the person liable for the tax or required to perform the act, or any other person having knowledge in the premises, to appear before the Secretary, or his agent, at a time and place named in the summons, and to produce such books, papers, records or other data, and to give such testimony under oath as may be relevant or material to such inquiry, and the Secretary or his agent may administer oaths to such person or persons. If any person so summoned refuses to obey such summons or to give testimony when summoned, the Secretary may apply to the Superior Court of Wake County for an order requiring such person or persons to comply with the summons of the Secretary, and the failure to comply with such court order shall be punished as for contempt.

(b) Department Employees May Sign and Verify Legal Documents. — In a matter to which the Secretary of Revenue is a party or in which the Secretary has an interest, all legal documents may be signed and verified on behalf of the Secretary by (i) a Deputy or Assistant Secretary; (ii) any director or assistant director of any division of the Department of Revenue; or (iii) any other agent or employee of the Department so authorized by the Secretary of Revenue.

(c) Department Employees May Serve Civil Papers. — In a civil matter to which the Secretary of Revenue is a party or in which the Secretary has an interest, any agent or employee of the Department of Revenue may serve summonses and other legal documents lawfully issued when so authorized by the Secretary of Revenue. (1939, c. 158, s. 927; 1943, c. 400, s. 9; 1955, c. 435; 1959, c. 1259, s. 8A; 1973, c. 476, s. 193; 1987 (Reg. Sess., 1988), c. 1044, s. 1; 1991, c. 157, s. 1; 2007-527, s. 15.)

Effect of Amendments. — Session Laws 2007-527, s. 15, effective August 31, 2007, substituted "a tax" for "any tax imposed by this Subchapter" in the first sentence of subsection (a).

CASE NOTES

Constitutionality. — This section is not unconstitutional under N.C. Const., Art. I, § 19 and 20. State v. Davis, 96 N.C. App. 545, 386 S.E.2d 743 (1989).

This section does not violate constitutional search and seizure provisions, because the statute is not self-enforcing. The Secretary of Revenue does not have the authority to compel compliance with a summons, and if a revenue agent is forced to go to superior court to enforce compliance with an order, the court's scrutiny of the order will ensure that no abuse of process occurs. State v. Davis, 96 N.C. App. 545, 386 S.E.2d 743 (1989).

Scope of Administrative Summons Power. — The administrative summons power under this section is more analogous to that held by a grand jury than to the search and seizure power of a police officer. It grants inquisitional powers, allowing investigations on the suspicion that a law is being violated, or even because the Department wants assurances that it is not. State v. Davis, 96 N.C. App. 545, 386 S.E.2d 743 (1989).

This section does not require that a tax investigator have probable cause before examining a taxpayer's records. State v. Davis, 96 N.C. App. 545, 386 S.E.2d 743 (1989).

A summons under this section would violate constitutional protections if it was overly broad, not issued in good faith for a legitimate purpose, or not relevant to that purpose. State v. Davis, 96 N.C. App. 545, 386 S.E.2d 743 (1989).

§ 105-258.1. Taxpayer interviews.

(a) Scope. — This section applies to in-person interviews between a taxpayer and an officer or employee of the Department relating to the determination or collection of a tax, other than an in-person interview concerning any of the following:

(1) A criminal investigation.
(2) The determination or collection of a tax imposed by Article 2D of this Chapter.
(3) Repealed by Session Laws 2007-491, s. 37, effective January 1, 2008.
(4) A jeopardy assessment and collection.

(b) Recording of Interview. — The Department shall allow a taxpayer to make an audio recording of an interview at the taxpayer's expense and using the taxpayer's equipment. The Department may make an audio recording of an interview at its own expense and using its own equipment. The Department shall, upon request of the taxpayer, provide the taxpayer a transcript of an interview recorded by the Department; the Department may charge the taxpayer for the cost of the requested transcription and reproduction of the transcript.

(c) Disclosure of Procedure. — At or before an initial interview relating to the determination of a tax, the Department shall provide the taxpayer a written explanation of the audit process and the taxpayer's rights in the process. At or before an initial interview relating to the collection of a tax, the Department shall provide the taxpayer a written explanation of the collection process and the taxpayer's rights in the process.

(d) Right of Consultation. — A taxpayer may authorize a person to represent the taxpayer in an interview if the person has a written power of attorney executed by the taxpayer. The Department may not require a taxpayer to accompany the taxpayer's representative to the interview unless the Secretary has summoned the taxpayer pursuant to G.S. 105-258.

(e) Suspension of Interview. — The Department shall suspend an interview relating to the determination of a tax if the taxpayer is not accompanied by a representative and, at any time during the interview, expresses the desire to consult with another person. (1993, c. 532, s. 7; 1993 (Reg. Sess., 1994), c. 745, s. 18; 2007-491, s. 37.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 37, effective January 1, 2008, repealed former subdivision (a)(3) which read: "The assessment under G.S. 105-241.1(g) of a tax whose collection is in jeopardy"; and rewrote subdivision (a)(4). For applicability, see Editor's note.

§ 105-259. Secrecy required of officials; penalty for violation.

(a) Definitions. — The following definitions apply in this section:
 (1) Employee or officer. — The term includes a former employee, a former officer, and a current or former member of a State board or commission.
 (2) Tax information. — Any information from any source concerning the liability of a taxpayer for a tax, as defined in G.S. 105-228.90. The term includes the following:
  a. Information contained on a tax return, a tax report, or an application for a license for which a tax is imposed.
  b. Information obtained through an audit of a taxpayer or by correspondence with a taxpayer.

c. Information on whether a taxpayer has filed a tax return or a tax report.

d. A list or other compilation of the names, addresses, social security numbers, or similar information concerning taxpayers.

The term does not include (i) statistics classified so that information about specific taxpayers cannot be identified, (ii) an annual report required to be filed under G.S. 55-16-22 or (iii) the amount of tax refunds paid to a governmental entity listed in G.S. 105-164.14(c) or to a State agency.

(b) Disclosure Prohibited. — An officer, an employee, or an agent of the State who has access to tax information in the course of service to or employment by the State may not disclose the information to any other person unless the disclosure is made for one of the following purposes:

(1) To comply with a court order, an administrative law judge's order in a contested tax case, or a law.

(2) Review by the Attorney General or a representative of the Attorney General.

(3) To exchange the following types of information with a tax official of another jurisdiction if the laws of the other jurisdiction allow it to provide similar tax information to a representative of this State:

a. Information to aid the jurisdiction in collecting a tax imposed by this State or the other jurisdiction.

b. Information needed for statistical reports and revenue estimates.

(4) To provide a governmental agency or an officer of an organized association of taxpayers with a list of taxpayers who have paid a privilege license tax under Article 2 of this Chapter.

(5) To furnish to the chair of a board of county commissioners information on the county sales and use tax.

(5a) Reserved.

(5b) To furnish to the finance officials of a city a list of the utility taxable gross receipts and piped natural gas tax revenues attributable to the city under G.S. 105-116.1 and G.S. 105-187.44 or under former G.S. 105-116 and G.S. 105-120.

(5c) To provide the following information to a regional public transportation authority or a regional transportation authority created pursuant to Article 26 or Article 27 of Chapter 160A of the General Statutes on an annual basis, when the information is needed to enable the authority to administer its tax laws:

a. The name, address, and identification number of retailers who collect the tax on leased vehicles imposed by G.S. 105-187.5.

b. The name, address, and identification number of a retailer audited by the Department of Revenue regarding the tax on leased vehicles imposed by G.S. 105-187.5, when the Department determines that the audit results may be of interest to the authority.

(5d) To provide the following information to a county or city on an annual basis, when the county or city needs the information for the administration of its local prepared food and beverages tax or room occupancy tax:

a. The name, address, and identification number of retailers who collect the sales and use taxes imposed under Article 5 of this Chapter and may be engaged in a business subject to a local prepared food and beverages tax or room occupancy tax.

b. The name, address, and identification number of a retailer audited by the Department of Revenue regarding the sales and use taxes imposed under Article 5 of this Chapter, when the Department determines that the audit results may be of interest to the county or city in the administration of its local prepared food and beverages tax or room occupancy tax.

(6) To sort, process, or deliver tax information on behalf of the Department of Revenue.

(6a) To furnish the county or city official designated under G.S. 105-164.14(f) a list of claimants that have received a refund of the county sales or use tax to the extent authorized in G.S. 105-164.14(f).

(7) To exchange information with the Division of the State Highway Patrol of the Department of Crime Control and Public Safety, the Division of Motor Vehicles of the Department of Transportation, the International Fuel Tax Association, Inc., or the Joint Operations Center for National Fuel Tax Compliance when the information is needed to fulfill a duty imposed on the Department of Revenue, the Division of the State Highway Patrol of the Department of Crime Control and Public Safety, or the Division of Motor Vehicles of the Department of Transportation.

(7a) To furnish the name and identifying information of motor carriers whose licenses have been revoked to the administrator of a national criminal justice system database that makes the information available only to criminal justice agencies and public safety organizations.

(8) To furnish to the Department of State Treasurer, upon request, the name, address, and account and identification numbers of a taxpayer who may be entitled to property held in the Escheat Fund.

(9) To furnish to the Employment Security Commission the name, address, and account and identification numbers of a taxpayer when the information is requested by the Commission in order to fulfill a duty imposed under Article 2 of Chapter 96 of the General Statutes.

(9a) To furnish information to the Employment Security Commission to the extent required for its NC WORKS study of the working poor pursuant to G.S. 108A-29(r). The Employment Security Commission shall use information furnished to it under this subdivision only in a nonidentifying form for statistical and analytical purposes related to its NC WORKS study. The information that may be furnished under this subdivision is the following with respect to individual income taxpayers, as shown on the North Carolina income tax forms:

a. Name, social security number, spouse's name, spouse's social security number, and county of residence.

b. Filing status and federal personal exemptions.

c. Federal taxable income, additions to federal taxable income, and total of federal taxable income plus additional income.

d. Income while a North Carolina resident, total income from North Carolina sources while a nonresident, and total income from all sources.

e. Exemption for children, nonresidents' and part-year residents' exemption for children, and credit for children.

f. Expenses for child and dependent care, portion of expenses paid while a resident of North Carolina, portion of expenses paid while a resident of North Carolina that was incurred for dependents who were under the age of seven and dependents who were physically or mentally incapable of caring for themselves, credit for child and dependent care expenses, other qualifying expenses, credit for other qualifying expenses, total credit for child and dependent care expenses.

(10) Review by the State Auditor to the extent authorized in G.S. 147-64.7.

(11) To give a spouse who elects to file a joint tax return a copy of the return or information contained on the return.

(11a) To provide a copy of a return to the taxpayer who filed the return.

(11b) In the case of a return filed by a corporation, a partnership, a trust, or an estate, to provide a copy of the return or information on the return to a person who has a material interest in the return if, under the circumstances, section 6103(e)(1) of the Code would require disclosure to that person of any corresponding federal return or information.

(11c) In the case of a return of an individual who is legally incompetent or deceased, to provide a copy of the return to the legal representative of the estate of the incompetent individual or decedent.

(12) To contract with a financial institution for the receipt of withheld income tax payments under G.S. 105-163.6 or for the transmittal of payments by electronic funds transfer.

(13) To furnish the following to the Fiscal Research Division of the General Assembly, upon request:

a. A sample, suitable in character, composition, and size for statistical analyses, of tax returns or other tax information from which taxpayers' names and identification numbers have been removed.

b. An analysis of the fiscal impact of proposed legislation.

(14) To exchange information concerning a tax imposed by Subchapter V of this Chapter with the Standards Division of the Department of Agriculture and Consumer Services when the information is needed to administer the Gasoline and Oil Inspection Act, Article 3 of Chapter 119 of the General Statutes.

(15) To exchange information concerning a tax imposed by Articles 2A, 2C, or 2D of this Chapter with one of the following agencies when the information is needed to fulfill a duty imposed on the Department or the agency:

a. The North Carolina Alcoholic Beverage Control Commission.

b. The Division of Alcohol Law Enforcement of the Department of Crime Control and Public Safety.

c. The Bureau of Alcohol, Tobacco, and Firearms of the United States Treasury Department.

d. Law enforcement agencies.

e. The Division of Community Corrections of the Department of Correction.

(15a) To furnish to the head of the appropriate State or federal law enforcement agency information concerning the commission of an offense under the jurisdiction of that agency discovered by the Department during a criminal investigation of the taxpayer.

(16) To furnish to the Department of Secretary of State the name, address, tax year end, and account and identification numbers of a corporation liable for corporate income or franchise taxes or of a limited liability company liable for a corporate or a partnership tax return to enable the Secretary of State to notify the corporation or the limited liability company of the annual report filing requirement or that its articles of incorporation or articles of organization or its certificate of authority has been suspended.

(16a) To provide the North Carolina Self-Insurance Security Association information on self-insurers' premiums as determined under G.S. 105-228.5(b), (b1), and (c) for the purpose of collecting the assessments authorized in G.S. 97-133(a).

(17) To inform the Business License Information Office of the Department of Commerce of the status of an application for a license for which a tax is imposed and of any information needed to process the application.

G.S. 105-259(b)(20) and (b)(31) have a delayed repeal date. See notes.

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(18) To furnish to the Office of the State Controller the name, address, and account and identification numbers of a taxpayer upon request to enable the State Controller to verify statewide vendor files or track debtors of the State.

(19) To furnish to the North Carolina Industrial Commission information concerning workers' compensation reported to the Secretary under G.S. 105-163.7.

(20) **(Repealed effective January 1, 2012)** To furnish to the Environmental Management Commission information concerning whether a person who is requesting certification of a dry-cleaning facility or wholesale distribution facility from the Commission is liable for privilege tax under Article 5D of this Chapter.

(21) To exchange information concerning the tax on piped natural gas imposed by Article 5E of this Chapter with the North Carolina Utilities Commission or the Public Staff of that Commission.

(22) To provide the Secretary of Administration pursuant to G.S. 143-59.1 a list of vendors and their affiliates who meet one or more of the conditions of G.S. 105-164.8(b) but refuse to collect the use tax levied under Article 5 of this Chapter on their sales delivered to North Carolina.

(23) To provide public access to a database containing the names and account numbers of taxpayers who are not required to pay sales and use taxes under Article 5 of this Chapter to a retailer because of an exemption or because they are authorized to pay the tax directly to the Department of Revenue.

(24) To furnish the Department of Commerce and the Employment Security Commission a copy of the qualifying information required in G.S. 105-129.7(b) or G.S. 105-129.86(b).

(25) To provide public access to a database containing the names of retailers who are registered to collect sales and use taxes under Article 5 of this Chapter.

(26) To contract for the collection of tax debts pursuant to G.S. 105-243.1.

(27) To provide a report required under this Chapter.

(28) To exchange information concerning a tax credit claimed under Article 3E of this Chapter with the North Carolina Housing Finance Agency.

(29) To provide to the Economic Investment Committee established pursuant to G.S. 143B-437.48 information necessary to implement Part 2F of Article 10 of Chapter 143B of the General Statutes.

(30) To prove that a business does not meet the definition of "small business" under Article 3F of this Chapter because the annual receipts of the business, combined with the annual receipts of all related persons, exceeds the applicable amount.

(31) **(Repealed for business activities occurring in taxable years beginning on or after January 1, 2020)** To verify with a related entity or strategic partner information relating to that entity provided by a taxpayer claiming a credit under Article 3G of this Chapter.

(32) Repealed by Session Laws 2006-162, s. 4(c), as amended by Session Laws 2007-527, s. 24, effective July 24, 2006.

(33) To provide to the North Carolina State Lottery Commission the information required under G.S. 18C-141.

(34) To exchange information concerning a tax credit claimed under G.S. 105-130.47 or G.S. 105-151.29 with the North Carolina Film Office of the Department of Commerce and with the regional film commissions.

G.S. 105-259(b)(20) and (b)(31) have a delayed repeal date. See notes.

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(35) To furnish to a taxpayer claiming a credit under Article 3G of this Chapter information from a related entity or strategic partner to the extent that information was used by the Secretary to adjust the amount of tax credit claimed by the taxpayer.

(36) To furnish to a taxpayer claiming a credit under G.S. 105-130.47 or G.S. 105-151.29 information used by the Secretary to adjust the amount of the credit claimed by the taxpayer.

(37) To furnish the Department of Commerce with the information needed to complete the studies required under G.S. 105-129.2A and G.S. 105-129.82.

(38) **(Effective for taxable years beginning on or after January 1, 2008)** To verify with a nonprofit organization information relating to eligibility for a credit under G.S. 105-129.16H.

(c) Punishment. — A person who violates this section is guilty of a Class 1 misdemeanor. If the person committing the violation is an officer or employee, that person shall be dismissed from public office or public employment and may not hold any public office or public employment in this State for five years after the violation. (1939, c. 158, s. 928; 1951, c. 190, s. 2; 1973, c. 476, s. 193; c. 903, s. 4; c. 1287, s. 13; 1975, c. 19, s. 29; c. 275, s. 7; 1977, c. 657, s. 6; 1979, c. 495; 1983, c. 7; 1983 (Reg. Sess., 1984), c. 1004, s. 3; c. 1034, s. 125; 1987, c. 440, s. 4; 1989, c. 628; c. 728, s. 1.47; 1989 (Reg. Sess., 1990), c. 945, s. 15; 1993, c. 485, s. 31; c. 539, s. 712; 1994, Ex. Sess., c. 14, s. 51; c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 679, s. 8.4; 1995, c. 17, s. 11; c. 21, s. 2; 1997-118, s. 6; 1997-261, s. 14; 1997-340, s. 2; 1997-392, s. 4.1; 1997-475, s. 6.11; 1998-22, ss. 10, 11; 1998-98, ss. 13.1(b), 20; 1998-139, s. 1; 1998-212, s. 12.27A(o); 1999-219, s. 7.1; 1999-340, s. 8; 1999-341, s. 8; 1999-360, s. 2.1; 1999-438, s. 18; 1999-452, s. 28.1; 2000-120, s. 8; 2000-173, s. 11; 2001-205, s. 1; 2001-380, s. 5; 2001-476, s. 8(b); 2001-487, ss. 47(d), 123; 2002-87, s. 7; 2002-106, s. 5; 2002-172, s. 2.3; 2003-349, s. 4; 2003-416, s. 2; 2004-124, s. 32D.3; 2004-170, s. 23; 2004-204, 1st Ex. Sess., s. 4; 2005-276, ss. 31.1(cc), 39.1(c), 7.27(b); 2005-400, s. 20; 2005-429, s. 2.13; 2005-435, ss. 32(b), 32(c), 37, 48; 2006-162, s. 4(c); 2006-196, s. 11; 2006-252, s. 2.21; 2007-397, s. 13(d); 2007-491, s. 38; 2007-527, ss. 24, 33, 34, 35, 36.)

Editor's Note. — Session Laws 1997-392, s. 8 provides in part that s. 4.1 of Session Laws 1997-392, which added subdivision (b)(20) of this section, is repealed effective January 1, 2012.

The number of subdivision (b)(24) was assigned by the Revisor of Statutes, the designation in Session Laws 1999-360, s. 2.1 having been subdivision (b)(22).

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2005-429, s. 3, provides: "The Economic Development Oversight Committee shall study the issue of public disclosure as it relates to economic development efforts. Specifically, the Committee shall study ways of providing the public information about the employment levels, and any changes in employment levels, of businesses that receive economic development incentives from the State or local governments. The Committee may make an interim report on this study, including any recommendations for legislative proposals, to the 2006 Regular Session of the 2005 General Assembly and shall make a final report on this study to the 2007 General Assembly."

Subdivision (b)(37) was added by Session Laws 2006-252, s. 2.21, as subdivision (b)(36), and was redesignated at the direction of the Revisor of Statutes.

Subdivision (b)(27) of this section was amended twice in 2006 in the code bill drafting format provided in G.S. 120-1. Session Laws 2006-162, s. 4(c), rewrote subdivision (b)(27). Session Laws 2006-252, s. 2.21, amended subdivision (b)(27) by inserting "105-129.85," without referring to changes made by Session Laws 2006-162. Subdivision (b)(27) has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2006-162, s. 33, as amended by Session Laws 2007-527, s. 24, provides: "Sections 4(a) and 4(b) of this act are effective for taxable years beginning on or after January 1, 2006. Section 13 of this act becomes effective July 1, 2007, and applies to motor fuel transported on or after that date. Sections 14, 15, and 17 of this act become effective January 1, 2007, and apply to motor fuel purchased on or after that date. An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007. Section 26 of this act is effective when it becomes law and applies to the estates of decedents dying on or after January 1, 2005. Section 32 of this act becomes effective January 1, 2007. The remainder of this act is effective when it becomes law."

Session Laws 2006-196, s. 13, provides: "The Revenue Laws Study Committee shall study the following issues:

"(1) The simplification of the additional tax imposed on insurance contracts on property coverage, as enacted in Section 3 of this act, and the distribution of the revenue generated by the tax. The study of this issue may include a recommendation on the percentage of revenue to be distributed to the firemen's local relief funds and the formula for making this distribution. The study may also consider the increasing difference between the amount of revenue available in the Volunteer Fire Department Fund for matching grants to purchase equipment and make capital improvements and the amount of grant requests received.

"(2) The authority of the Secretary of Revenue to require taxpayers to file consolidated returns. The study of this issue may include consideration of whether the State should require some corporations or all corporations to file a consolidated return.

"(3) The feasibility of replacing the State's current corporate income and franchise tax laws with a commercial activity tax based upon business gross receipts.

"(4) The administrative process for the review of disputed tax matters."

Session Laws 2007-345, s. 14.8(a), repealed Session Laws 2007-323, s. 24.4, which transferred certain revenue hearings positions to the Department of Administration. Session Laws 2007-345, s. 14.8(c), provides that the actions taken by the Administrative Hearings Officer at the Department of Revenue from the period beginning July 1, 2007, are given full force and effect as if Session Laws 2007-323, s. 24.4 had never been enacted. Session Laws 2007-345, s. 14.8(c) further provides: "Notwithstanding any provision of G.S. 105-259 to the contrary, any officer, employee, or agent of the State that provided access to tax information to the Administrative Hearings Officer or Administrative Assistant transferred under Section 24.4 of S.L. 2007-323 is not guilty of any offense to the extent that the provision of the information would have been authorized by that statute if the transfer had not occurred."

Session Laws 2007-397, s. 15, contains a severability clause.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2004-204, s. 4, as amended by Session Laws 2005-435, s. 48, effective, for business activities occurring on or after November 1, 2004, and for taxable years beginning on or after January 1, 2005, and repealed for business activities occurring in taxable years beginning on or after January 1, 2020, added the subdivision designated herein as subdivision (31).

Session Laws 2005-276, s. 7.27(b), effective July 1, 2005, added subdivision (b)(32).

Session Laws 2005-276, s. 39.1(c), effective for taxable years beginning on or after January 1, 2005, and applicable to qualifying expenses incurred on or after July 1, 2005, added subdivision (b)(34).

Session Laws 2005-344, s. 10.2(b), as added by Session Laws 2005-276, s. 31.1(cc), effective August 31, 2005, added subdivision (b)(33).

Session Laws 2005-400, s. 20, effective January 1, 2006, substituted "Security" for "Guaranty" in subdivision (b)(16a).

Session Laws 2005-429, s. 2.13, effective January 1, 2007, rewrote subdivision (b)(27).

Session Laws 2005-435, ss. 32(b), 32(c) and 37, effective January 1, 2006, substituted "the amount of tax refunds paid to a governmental entity listed in G.S. 105-164.14(c) or to a State agency" for "information submitted to the Business License Information Office of the Department of Secretary of State on a master application form for various business licenses" at the end of the second paragraph of subdivision (a)(2); in subdivision (b)(6a), inserted "or city" following "To furnish the county" and made a minor stylistic change; substituted "Commerce" for "Secretary of State" in subdivision (b)(17); and added subdivision (b)(32), because a subdivision (b)(32) had already been added by Session Laws 2005-276, s. 7.27(b), the subdivision added by this act was redesignated as (b)(35) at the direction of the Revisor of Statutes.

Session Laws 2006-162, s. 4, as amended by Session Laws 2007-527, s. 24, in subsection (b), rewrote subdivision (b)(27) which read: "To publish the information required under G.S. 105-129.6, 105-129.19, 105-129.26, 105-129.38, 105-129.44, 105-129.65A, 105-130.41, 105-130.45, 105-151.22, and 105-164.14."; deleted "publish the information required under G.S. 105-129.52 and to" preceding "prove that" in subdivision (b)(30); deleted former subdivision (b)(32) which read: "To provide the report required under G.S. 105-164.14(c) to the Department of Public Information and the Fiscal Research Division of the General Assembly."; deleted "and to publish the reports required under those sections" following "commissions" at the end of subdivision (b)(34); and added subdivision (b)(36). For effective dates, see Editor's note.

Session Laws 2006-196, s. 11, effective August 3, 2006, in paragraph (b)(5d), substituted "prepared food and beverages tax or room occupancy tax" for "tax on prepared food and beverages" at the end of the introductory paragraph, substituted "a business subject to a local prepared food and beverages tax or room occupancy tax" for "the business of selling prepared food and beverages" at the end of paragraph (b)(5d)a and substituted "local prepared food and beverages tax or room occupancy tax" for "local tax on prepared food and beverages" at the end of paragraph (b)(5d)b.

Session Laws 2006-252, s. 2.21, effective January 1, 2007, added "or G.S. 105-129.86(b)" at the end of subdivision (b)(24); inserted "105-129.85" in subdivision (b)(27); and added subdivision (b)(37).

Session Laws 2007-397, s. 13(d), effective for taxable years beginning on or after January 1, 2008, added subdivision (b)(38).

Session Laws 2007-491, s. 38, effective January 1, 2008, substituted "order, an administrative law judge's order in a contested tax case" for "order" in subdivision (b)(1). For applicability, see Editor's note.

Session Laws 2007-527, ss. 33-36, effective August 31, 2007, rewrote subdivision (b)(3); in subdivision (b)(7), inserted "or the Joint Operations Center for National Fuel Tax Compliance" and made a stylistic change; rewrote subdivision (b)(13); and in subdivision (b)(27), deleted "105-129.85" following "under this Chapter."

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 481.

See legislative survey, 21 Campbell L. Rev. 323 (1999).

OPINIONS OF ATTORNEY GENERAL

Transfer of Division of Motor Vehicles Enforcement Section to Department of Crime Control and Public Safety. — The failure of Session Laws 2002-190 (HB 314) to include subdivision (b)(7) of this section in the series of specific statutes for which the term "Department of Crime Control and Public Safety" was substituted for the term "Division of Motor Vehicles of the Department of Transportation," has no legal significance because the General Assembly intended that the subdivision should remain a viable exception to the general prohibition against disclosure of tax information. See opinion of Attorney General to Sabra J. Faires, Assistant Secretary for Tax Administration, Department of Revenue, 2002 N.C.A.G. 30 (11/18/02).

Effective January 1, 2003, the Department of Revenue should administer subdivision (b)(7) of this section as if it reads: "To exchange information with Motor Vehicles Enforcement Section of the Department of Crime Control and Public Safety or the International Fuel Tax Association Inc. when the information is needed to fulfill a duty imposed on the Department of Revenue or the Motor Vehicles Enforcement Section of the Department of Crime Control and Public Safety." See opinion of Attorney General to Sabra J. Faires, Assistant Secretary for Tax Administration, Department of Revenue, 2002 N.C.A.G. 30 (11/18/02).

Applicability of Open Meetings Law to Tax Review Board Proceedings. — The Tax Review Board is exempt from the Open Meetings Law while it is meeting "solely for the purpose of making a decision" in a petition pending before the Board; however, the exemption only applies to the deliberations of the Board and does not apply when it is receiving evidence or arguments in a hearing prior to deliberating upon the evidence, nor when it is meeting for any purpose other than deciding the outcome of a petition pending before it. See opinion of Attorney General to The Honorable Richard H. Moore, Treasurer, State of North Carolina, 2004 N.C.A.G. 10 (10/12/04).

Applicability of Secrecy Law to Tax Review Board Members. — Employees and officers of the State, including members of the Tax Review Board are prohibited from disclosing any tax information as defined in subdivision (a)(2) of this section. See opinion of Attorney General to The Honorable Richard H. Moore, Treasurer, State of North Carolina, 2004 N.C.A.G. 10 (10/12/04).

Members of the Tax Review Board and staff must comply with both the confidentiality obligations of subsection (b) of this section and the obligations for disclosure set forth in the Public Records Law, G.S.132-1 et seq., with respect to the release of records and other information; the obligation does not vary based upon whether the Board receives a request for information prior to or after publication of an order by the Board. See opinion of Attorney General to The Honorable Richard H. Moore, Treasurer, State of North Carolina, 2004 N.C.A.G. 10 (10/12/04).

§ 105-260. Evaluation of Department personnel.

The Secretary may not use records of tax enforcement results, or production goals based on these records, as the sole criteria in evaluating employees of the Department who are directly involved in tax collection activities or in evaluating the immediate supervisors of these employees. The Secretary must consider records of taxpayer complaints that named an employee as discourteous, unresponsive, or incompetent in evaluating the employee. (1939, c. 158, s. 929; 1973, c. 476, s. 193; 1981, c. 859, s. 79; c. 1127, s. 53; 1993, c. 532, s. 8.)

§ 105-260.1. Delegation of authority to hold hearings.

The Secretary of Revenue may delegate to a Deputy or Assistant Secretary of Revenue the authority to hold any hearing required or allowed under this Chapter. (1985, c. 258.)

§ 105-261. Secretary and deputies to administer oaths.

The Secretary of Revenue and such deputies as he may designate shall have the power to administer an oath to any person or to take the acknowledgment of any person in respect to any return or report required by this Subchapter or under the rules and regulations of the Secretary of Revenue, and shall have access to all the books and records of any person, firm, corporation, county, or municipality in this State. (1939, c. 158, s. 930; 1973, c. 476, s. 193.)

§ 105-262. Rules.

(a) The Secretary of Revenue may adopt rules needed to administer a tax collected by the Secretary or to fulfill another duty delegated to the Secretary. G.S. 150B-1 and Article 2A of Chapter 150B of the General Statutes set out the procedure for the adoption of rules by the Secretary.

(b) The Secretary must ask the Office of State Budget and Management to prepare a fiscal note for a proposed new rule or a proposed change to a rule that has a substantial economic impact, as defined in G.S. 150B-21.4(b1). The Secretary shall not take final action on a proposed rule change that has a substantial economic impact until at least 60 days after the fiscal note has been prepared. (1939, c. 158, s. 931; 1955, c. 1350, s. 2; 1973, c. 476, s. 193; 1981, c. 859, s. 80; c. 1127, s. 53; 1991, c. 45, s. 28; c. 477, s. 7; 1995, c. 507, s. 27.8(p); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2007-491, s. 39.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act.

This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 39, effective January 1, 2008, rewrote the second sentence of subsection (a), which formerly read: "The Tax Review Board shall review a new rule or a change to a rule before it is filed in the North Carolina Administrative Code." For applicability, see Editor's note.

CASE NOTES

Editor's Note. *— The cases below were decided prior to the 1991 amendment, which rewrote this section.*

Remedies of Taxpayer. — Any interested citizen may procure a copy of the regulations promulgated pursuant to this section and apply the administrator's interpretation of the law to the citizen's tax situation. If, under the regulations, tax liability seems likely, he may present the matter to the Secretary of Revenue for examination and determination. If the Secretary assesses a tax, the party who deems himself aggrieved may, as provided by statute, protect himself against an illegal assessment. Duke v. State, 247 N.C. 236, 100 S.E.2d 506 (1957).

Petition will not lie directly to the superior court to have an administrative interpretation promulgated by the Secretary under this section declared to be erroneous, unlawful or improper. Duke v. State, 247 N.C. 236, 100 S.E.2d 506 (1957).

Interpretation of Secretary Prima Facie Correct. — While a decision or regulation of the Secretary of Revenue interpreting a taxing statute is not controlling, the Secretary of Revenue is authorized by this section to implement taxing statutes, with certain specific exceptions, and his interpretation is made prima facie correct, and such interpretive regulation will ordinarily be upheld when it is not in conflict with the statute and is within the authority of the Secretary to promulgate. Campbell v. Currie, 251 N.C. 329, 111 S.E.2d 319 (1959); In re Alamance Mem. Park, 41 N.C. App. 278, 254 S.E.2d 671 (1979).

Cited in Sale v. Johnson, 258 N.C. 749, 129 S.E.2d 465 (1963); Oscar Miller Contractor v. North Carolina Tax Rev. Bd., 61 N.C. App. 725, 301 S.E.2d 511 (1983); In re Assessment of Additional Sales & Use Tax Against Strawbridge Studios, Inc., 94 N.C. App. 300, 380 S.E.2d 142 (1989).

OPINIONS OF ATTORNEY GENERAL

Approval of Rules by Tax Review Board. — This section does not require that the Tax Review Board approve the Revenue Department's rules which have been filed with the Attorney General as Title 17 of the North Carolina Administrative Code in order for those rules to become effective. See opinion of Attorney General to Mr. Sam T. Currin, Assistant to the Secretary, Department of Revenue, 46 N.C.A.G. 53 (1976), rendered prior to 1991 amendment.

§ 105-263. Extensions of time for filing a report or return.

The Secretary may extend the time in which a person must file a report or return with the Secretary. To obtain an extension of time for filing a report or return, a person must comply with any application requirement set by the Secretary. An extension of time for filing a franchise tax return, an income tax return, or a gift tax return does not extend the time for paying the tax due or the time when a penalty attaches for failure to pay the tax. An extension of time for filing a report or any return other than a franchise tax return, an income tax return, or a gift tax return extends the time for paying the tax due and the time when a penalty attaches for failure to pay the tax. When an extension of time for filing a report or return extends the time for paying the tax expected to be due with the report or return, interest, at the rate established pursuant to G.S. 105-241.21, accrues on the tax due from the original due date of the report or return to the date the tax is paid. (1939, c.

158, s. 932; 1973, c. 476, s. 193; 1977, c. 1114, s. 2; 1989 (Reg. Sess., 1990), c. 984, s. 14; 1991 (Reg. Sess., 1992), c. 930, s. 11; 1997-300, s. 1; 2007-491, s. 44(1)a.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 44(1)a., effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in the last sentence. For applicability, see Editor's note.

§ 105-264. Effect of Secretary's interpretation of revenue laws.

It is the duty of the Secretary to interpret all laws administered by the Secretary. The Secretary's interpretation of these laws shall be consistent with the applicable rules.

An interpretation by the Secretary is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation. If the Secretary changes an interpretation, a taxpayer who relied on it before it was changed is not liable for any penalty or additional assessment on any tax that accrued before the interpretation was changed and was not paid by reason of reliance upon the interpretation. If a taxpayer requests in writing specific advice from the Department and receives in response erroneous written advice, the taxpayer is not liable for any penalty or additional assessment attributable to the erroneous advice furnished by the Department to the extent the advice was reasonably relied upon by the taxpayer and the penalty or additional assessment did not result from the taxpayer's failure to provide adequate or accurate information.

This section does not prevent the Secretary from changing an interpretation and it does not prevent a change in an interpretation from applying on and after the effective date of the change. (1939, c. 158, s. 933; 1955, c. 1350, s. 4; 1957, c. 1340, s. 14; 1973, c. 476, s. 193; 1991, c. 45, s. 29; 1993, c. 532, s. 9; 1998-98, s. 21.)

CASE NOTES

Applicability of "Prima Facie Correct" Standard. — Interpretation of a tax statute by the Secretary of Revenue is prima facie correct, and when the Secretary interprets a tax law by adopting a rule or publishing a bulletin on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation. Polaroid Corp. v. Offerman, 349 N.C. 290, 507 S.E.2d 284 (1998), cert. denied, 526 U.S. 1098, 119 S. Ct. 1576, 143 L. Ed. 2d 671 (1999) (decided prior to the 2002 amendment to the definition of "business income" in this section).

A reading of this entire section indicates that only decisions of the Secretary of Revenue to initiate or propose regulations that modify, change, alter or repeal existing regulations are "prima facie correct." This "prima facie correct" standard does not apply to administrative interpretations. National Serv. Indus., Inc. v.

Powers, 98 N.C. App. 504, 391 S.E.2d 509 (1990).

Under operation of G.S. 105-264, the North Carolina Secretary of Revenue's interpretation of a statute he administers is prima facie correct. A&F Trademark, Inc. v. Tolson, 167 N.C. App. 150, 605 S.E.2d 187, 2004 N.C. App. LEXIS 2162 (2004), appeal dismissed, 359 N.C. 320, — S.E.2d — (2005), cert. denied, — U.S. —, 126 S. Ct. 353, 163 L. Ed. 2d 62 (2005).

Authority of Secretary to Construe This Subchapter. — This section gives the Secretary of Revenue the power to construe the Revenue Act of 1939, codified as this Subchapter, and such construction will be given due consideration by the courts, although it is not controlling. Valentine v. Gill, 223 N.C. 396, 27 S.E.2d 2 (1943). See also Powell v. Maxwell, 210 N.C. 211, 186 S.E. 326 (1936); Dayton Rubber Co. v. Shaw, 244 N.C. 170, 92 S.E.2d 799 (1956).

Weight Given Secretary's Construction. — The construction given a taxing statute by the Secretary of Revenue will be given consideration by the courts though not controlling. Charlotte Coca-Cola Bottling Co. v. Shaw, 232 N.C. 307, 59 S.E.2d 819 (1950); Campbell v. Currie, 251 N.C. 329, 111 S.E.2d 319 (1959).

Attorney General's Opinion Advisory Only. — The responsibility for interpreting a tax statute is placed on the Secretary of Revenue by this section, and an Attorney General's opinion in regard thereto was advisory only. In re Virginia-Carolina Chem. Corp., 248 N.C. 531, 103 S.E.2d 823 (1958).

Court Interpretation Prevails. — If there should be a conflict between the interpretation placed upon any of the provisions of the Revenue Act by the Secretary of Revenue and the interpretation of the courts, the interpretation or construction by the latter will prevail. Campbell v. Currie, 251 N.C. 329, 111 S.E.2d 319 (1959).

Cited in Clark v. City of Greenville, 221 N.C. 255, 20 S.E.2d 56 (1942); Sale v. Johnson, 258 N.C. 749, 129 S.E.2d 465 (1963); Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968); Oscar Miller Contractor v. North Carolina Tax Rev. Bd., 61 N.C. App. 725, 301 S.E.2d 511 (1983).

§ **105-265:** Repealed by Session Laws 1991, c. 45, s. 19.

§ **105-266:** Repealed by Session Laws 2007-491, s. 2, effective January 1, 2008.

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ **105-266.1:** Repealed by Session Laws 2007-491, s. 2, effective January 1, 2008.

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-266.2. Refund of tax paid on substantial income later restored.

This section applies to a taxpayer who is subject to the alternative tax under § 1341(a)(5) of the Code for the current taxable year because the taxpayer restored an item of income that had been included in the taxpayer's gross income for an earlier taxable year. For the purpose of Article 4 of this Chapter, the taxpayer is considered to have made a payment of tax for the current taxable year on the later of the date the return for the current taxable year was filed or the date the return was due to be filed. The amount of this payment of tax is (i) the amount the taxpayer's tax under Article 4 for the earlier taxable year was increased because the item of income was included in gross income for that year minus (ii) the amount the taxpayer's tax under Article 4 for the current taxable year was decreased because the item was deductible for that year. To the extent this payment of tax creates an overpayment, the overpayment is refundable in accordance with G.S. 105-241.21. (1997-213, s. 1; 2007-491, s. 44(1)c.)

Editor's Note. — Session Laws 1997-213, s. 2, made this section effective for taxable years beginning on or after January 1, 1995.

Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 44(1)c., effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-266" in the last sentence. For applicability, see Editor's note.

§ 105-267: Repealed by Session Laws 2007-491, s. 2, effective January 1, 2008.

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-267.1: Repealed by Session Laws 1991, c. 45, s. 30.

§ 105-268. Reciprocal comity.

The courts of this State shall recognize and enforce liabilities for taxes lawfully imposed by other states which extend a like comity to this State. (1939, c. 158, s. 938.)

Legal Periodicals. — See 13 N.C.L. Rev. 405. For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

§ 105-268.1. Agreements to coordinate the administration and collection of taxes.

The Secretary of Revenue is hereby authorized, with the approval of the Governor and Council of State, to enter into agreements with the United States government or any department or agency thereof, or with a state or any political subdivision thereof, for the purpose of coordinating the administration and collection of taxes imposed by this State and administered and collected by said Secretary with taxes imposed by the United States or by any other state or political subdivision thereof. (1943, c. 747, s. 1; 1971, c. 806, s. 2; 1973, c. 476, s. 193.)

Editor's Note. — Session Laws 1987 (Reg. Sess., 1988), c. 1096, s. 6 provided: "It is the intent of the General Assembly that the Department of Revenue shall collect all of the sales and use taxes due to the State and local governments. Notwithstanding the provisions of G.S. 105-268.1, the Secretary of Revenue may, without seeking prior approval of the Governor and the Council of State, enter into agreements with any other state to coordinate and promote collection of sales and use taxes by retailers making mail order sales, as defined in this act."

Legal Periodicals. — For comment on enactment of this section, see 21 N.C.L. Rev. 363 (1943).

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

CASE NOTES

Cited in United States v. Williams, 139 F. Supp. 94 (M.D.N.C. 1956).

§ 105-268.2. Expenditures and commitments authorized to effectuate agreements.

The Secretary of Revenue with the approval of the Governor and Council of State is authorized and empowered to undertake such commitments and make such expenditures, within the appropriations provided by law, as may be necessary to effectuate such agreements. (1943, c. 747, s. 2; 1971, c. 806, s. 2; 1973, c. 476, s. 193.)

Legal Periodicals. — For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

§ 105-268.3. Returns to be filed and taxes paid pursuant to agreements.

Notwithstanding any other provision of law, returns shall be filed and taxes paid in accordance with the provisions of any agreement entered into pursuant to this Article. (1943, c. 747, s. 3; 1971, c. 806, s. 2.)

Legal Periodicals. — For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

§ 105-269. Extraterritorial authority to enforce payment.

(a) The Secretary, with the assistance of the Attorney General, is authorized to bring suits in the courts of other states to collect taxes legally due this State. The officials of other states that extend a like comity to this State are empowered to sue for the collection of taxes in the courts of this State. A certificate by the Secretary of State, under the Great Seal of the State, that these officers have authority to collect the tax is conclusive evidence of this authority. Whenever the Secretary considers it expedient to employ local counsel to assist in bringing suit in an out-of-state court, the Secretary, with the concurrence of the Attorney General, may employ local counsel on the basis of a negotiated retainer or in accordance with prevailing commercial law league rates.

(b) Repealed by Session Laws 2001-380, s. 4, effective August 20, 2001, and applicable to tax debts that remain unpaid on or after that date. (1939, c. 158, s. 939; 1963, c. 1169, s. 6; 1973, c. 476, s. 193; 1983 (Reg. Sess., 1984), c. 1005; 2001-380, s. 4.)

Cross References. — As to collection of tax debts, see G.S. 105-243.1.

Legal Periodicals. — For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

§ 105-269.1. Local authorities authorized to furnish office space.

Boards of county commissioners and governing boards of cities and towns are hereby fully authorized and empowered to furnish adequate and suitable office space for field representatives of the Department of Revenue upon request of the Secretary of Revenue, and are hereby authorized and empowered to make necessary expenditures therefor. (1951, c. 643, s. 9; 1973, c. 476, s. 193.)

§ 105-269.2: Repealed by Session Laws 2007-491, s. 2, effective January 1, 2008.

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

§ 105-269.3. Enforcement of Subchapter V and fuel inspection tax.

The State Highway Patrol and law enforcement officers and other appropriate personnel in the Department of Crime Control and Public Safety may assist the Department of Revenue in enforcing Subchapter V of this Chapter and Article 3 of Chapter 119 of the General Statutes. The State Highway Patrol and law enforcement officers of the Department of Crime Control and Public Safety have the power of peace officers in matters concerning the enforcement of Subchapter V of this Chapter and Article 3 of Chapter 119 of the General Statutes. (1963, c. 1169, s. 6; 1991, c. 42, s. 16; 1991 (Reg. Sess., 1992), c. 1007, s. 17; 1993, c. 485, s. 15; 1993 (Reg. Sess., 1994), c. 745, s. 19; 2002-159, s. 31.5(b); 2002-190, s. 2.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act."

§ 105-269.4. Election to apply income tax refund to following year's tax.

Any taxpayer required to file an income tax return under Article 4 of this Subchapter whose return shows that the taxpayer is entitled to a refund may elect to apply part or all of the refund to that taxpayer's estimated income tax liability for the following year. The Secretary of Revenue shall amend the income tax returns to permit the election authorized by this section. (1983, c. 663, s. 1; 1989 (Reg. Sess., 1990), c. 814, s. 28.)

§ 105-269.5. Contribution of income tax refund to Wildlife Conservation Account.

Any taxpayer entitled to a refund of income taxes under Article 4 of this Chapter may elect to contribute all or part of the refund to the Wildlife Conservation Account established under G.S. 143-247.2 to be used for the management, protection, and preservation of wildlife in accordance with that statute. The Secretary shall provide appropriate language and space on the income tax form in which to make the election. The taxpayer's election becomes irrevocable upon filing the taxpayer's income tax return for the taxable year. The Secretary shall transmit the contributions made pursuant to this section to the State Treasurer for credit to the Wildlife Conservation Account. (1983, c. 865, s. 2; 1991, c. 45, s. 20; 1993, c. 543, s. 6.)

Editor's Note. — This section is former G.S. 105-130.35, as amended and recodified as G.S. 105-269.5 by Session Laws 1991, c. 45, s. 20.

Session Laws 1983, c. 865, ss. 3 and 4 provided: "Sec. 3. At least seventy-five percent (75%) of the total amount of the funds derived during any year from the contributions made pursuant to this act must be used for nongame, endangered and threatened species, and urban wildlife programs, and the remainder may be used by the Wildlife Resources Commission for other wildlife management programs."

G.S. 105-269.14(b) is set out twice. See note.

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§ 105-269.6: Repealed by Session Laws 2002-158, s. 6(a), effective for taxable years beginning on or after January 1, 2003.

Editor's Note. — Session Laws 2002-158, s. 15.1, provides that nothing in the act obligates the General Assembly to appropriate funds to implement the act now or in the future.

Session Laws 2002-158, s. 15, contains a severability clause.

§§ 105-269.7 through 105-269.12: Reserved for future codification purposes.

§ 105-269.13. Debts not collectible under North Carolina law.

(a) Debts Not Collectible. — The following debts are not collectible and are not subject to execution under Article 28 of Chapter 1 of the General Statutes or any other provision of law:

(1) A loan made by a person who does not comply with G.S. 105-88.

(2) A debt owed to a retailer described in subsection (b) of this section as the result of the purchase of tangible personal property.

(b) Retailer. — A debt owed to a retailer is subject to this section if all of the following applies to the retailer:

(1) The retailer meets one or more of the conditions in G.S. 105-164.8(b).

(2) The retailer is not registered to collect the use tax due under Article 5 of this Chapter on its sales delivered to an address in North Carolina.

(3) The retailer reported gross sales of at least five million dollars ($5,000,000) on its most recent federal income tax return.

(c) Assignment. — An assignment to a person of a debt listed in subsection (a) of this section is subject to the collection restrictions imposed by this section. (2000-120, s. 9.)

§ 105-269.14. (Repealed effective for taxable years beginning on or after January 1, 2010) Payment of use tax with individual income tax.

(a) Requirement. — An individual who owes use tax that is payable on an annual basis pursuant to G.S. 105-164.16(d) and who is required to file an individual income tax return under Part 2 of Article 4 of this Chapter must pay the use tax with the individual income tax return for the taxable year. The Secretary must provide appropriate space and information on the individual income tax form and instructions. The information must include the following:

(1) An explanation of an individual's obligation to pay use tax on items purchased from mail order, Internet, or other sellers that do not collect State and local sales and use taxes on the items.

(2) A method to help an individual determine the amount of use tax the individual owes. The method must list categories of items, such as personal computers and clothing, that are commonly sold by mail order or Internet and must include a table that gives the average amounts of use tax payable by taxpayers in various income ranges.

(b) **(Effective until October 1, 2008)** Distribution. — The Secretary must distribute a portion of the net use tax proceeds collected under this section to counties and cities. The portion to be distributed to all counties and cities is the total net use tax proceeds collected under this section multiplied by a fraction. The numerator of the fraction is the local use tax proceeds collected under this section. The denominator of the fraction is the total use tax proceeds collected under this section. The Secretary must distribute this portion to the counties

G.S. 105-269.14(b) is set out twice. See note.

and cities in proportion to their total distributions under Articles 39, 40, 42, 43, and 44 of this Chapter and Chapter 1096 of the 1967 Session Laws for the most recent period for which data are available. The provisions of G.S. 105-472, 105-486, and 105-501 do not apply to tax proceeds distributed under this section.

(b) **(Effective October 1, 2008)** Distribution. — The Secretary must distribute a portion of the net use tax proceeds collected under this section to counties and cities. The portion to be distributed to all counties and cities is the total net use tax proceeds collected under this section multiplied by a fraction. The numerator of the fraction is the local use tax proceeds collected under this section. The denominator of the fraction is the total use tax proceeds collected under this section. The Secretary must distribute this portion to the counties and cities in proportion to their total distributions under Articles 39, 40, 42, and 43 of this Chapter and Chapter 1096 of the 1967 Session Laws for the most recent period for which data are available. The provisions of G.S. 105-472, 105-486, and 105-501 do not apply to tax proceeds distributed under this section. (1999-341, s. 2; 2000-120, s. 10; 2002-72, s. 20; 2003-284, s. 44.1; 2005-276, s. 33.24; 2007-323, s. 31.16.3(i).)

Section Repealed Effective for Taxable Years Beginning on or after January 1, 2010. — This section is repealed effective for taxable years beginning on or after January 1, 2010, by Session Laws 2000-120, s. 10, as amended by Session Laws 2003-284, s. 44.1 and by Session Laws 2005-276, s. 33.24.

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until October 1, 2008. The second version of subsection (b) set out above is effective October 1, 2008.

Editor's Note. — Session Laws 1999-341, s. 9, made this section effective for taxable years beginning on or after January 1, 1999.

Session Laws 1999-341, ss. 3 to 6, as amended by Session Laws 2000-120, ss. 16 and 17, and by Session Laws 2001-380, ss. 6 and 7, provide that the Secretary of Revenue may draw up to $150,000 for the 1999-2000 fiscal year from net collections that would otherwise be credited to the General Fund under G.S. 105-269.14 to pay for the costs of programming, form revision, and resources for taxpayer assistance to implement ss. 1 and 2 of Session Laws 1999-341.

During the 1999-2000 fiscal year, the Secretary of Revenue is to implement a program to allow those taxpayers required under G.S. 105-164.16 to report and pay sales and use taxes on a semimonthly basis to file the semimonthly return electronically. To pay for this program, the Secretary is authorized to draw up to $500,000 for the 1999-2000 fiscal year from net collections that would otherwise be credited to the General Fund under G.S. 105-269.14.

The Secretary shall contract during the 1999-2001 fiscal biennium for the collection of delinquent tax debts owed by nonresidents and foreign entities. To implement this section, the Secretary may draw funds for the 1999-2000 fiscal year from the net collections that would otherwise be credited to the General Fund under G.S. 105-269.14. For the 2000-2001 and 2001-2002 fiscal years the Secretary may retain costs of implementing the section from amounts collected pursuant to contracts authorized by the section. The Secretary is to report annually to the Revenue Laws Study Committee on its collections during the biennium.

The Department of Revenue is directed to conduct a study to identify and evaluate proposals for more efficient collection of taxes, and the State Controller is to cooperate with the Department of Revenue in this study. The Department is to report the results of its study, including findings, recommendations, and estimated revenue gains of each recommendation, to the Revenue Laws Study Committee by May 1, 2000. The Secretary of Revenue is authorized to draw up to $50,000 for the 1999-2000 fiscal year from net collections that would otherwise be credited to the General Fund under G.S. 105-269.14. To implement the recommendations of the study, the Secretary may enter into a performance-based contract and may withhold from the revenue collected the amount needed to obtain assistance in developing a request for proposal for the performance-based contract. For the 2001-2002 fiscal year the Department may draw up to $500,000 from the collection assistance fee account created in G.S. 105-243.1 to pay for assistance in developing a request for proposals for a performance-based contract to implement the results of the study; the fee proceeds may be used for this purpose only to the extent the contract is for collecting overdue tax debts as defined in G.S. 105-243.1.

Session Laws 2001-380, s. 7 provides that for the 2001-2002 fiscal year the Department may draw up to $500,000 from the collection assistance fee account created in G.S. 105-243.1 to pay for assistance in developing a request for proposals for a performance-based contract to implement the results of the study; the fee proceeds may be used for this purpose only to the extent the contract is for collecting overdue tax debts as defined in G.S. 105-243.1.

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 31.16.3(i), effective October 1, 2008, and applicable to distributions for months beginning on or after October 1, 2008, substituted "42, and 43" for "42, 43, and 44" in the next to last sentence of subsection (b).

OPINIONS OF ATTORNEY GENERAL

Validity of Statute. — The federal Internet Tax Freedom Act does not prohibit a state from bundling payment of use taxes with payment for income taxes and, therefore, does not invalidate this section. See opinion of Attorney General to Representative Cary D. Allred, 2000 N.C. AG LEXIS 22 (3/6/2000).

§ 105-269.15. Income tax credits of partnerships.

(a) Qualification. — A partnership that engages in an activity that is eligible for a tax credit qualifies for the credit as an entity and then passes through to each of its partners the partner's distributive share of the credit for which the partnership entity qualifies. Maximum dollar limits and other limitations that apply in determining the amount of a tax credit available to a taxpayer apply to the same extent in determining the amount of a tax credit for which the partnership entity qualifies, with one exception. The exception is a limitation that the tax credit cannot exceed the amount of tax imposed on the taxpayer.

(b) Allowance of Credit to Partner. — A partner's distributive share of an income tax credit passed through by a partnership is allowed to the partner only to the extent the partner would have qualified for the credit if the partner stood in the position of the partnership. All limitations on an income tax credit apply to each partner to the extent of the partner's distributive share of the credit, except that a corporate partner's distributive share of an individual income tax credit is allowed as a corporation income tax credit to the extent the corporate partner could have qualified for a corporation income tax credit if it stood in the position of the partnership. All limitations on an income tax credit apply to the sum of the credit passed through to the partner plus the credit for which the partner qualifies directly.

(c) Determination of Distributive Share. — A partner's distributive share of an income tax credit shall be determined in accordance with sections 702 and 704 of the Code. (1993 (Reg. Sess., 1994), c. 674, s. 3; 2001-335, s. 1.)

Cross References. — As to tax credits for rehabilitated mill property, see G.S. 105-129.71 and 105-129.72.

ARTICLE 10.

Liability for Failure to Levy Taxes.

§ 105-270. Repeal of laws imposing liability upon governing bodies of local units.

All laws and clauses of laws, statutes and parts of statutes, imposing civil or criminal liability upon the governing bodies, of local units, or the members of such governing bodies, for failure to levy or to vote for the levy of any particular tax or rate of tax for any particular purpose, are hereby repealed, and said governing bodies and any and all members thereof are hereby freed and released from any civil or criminal liability heretofore imposed by any law or statute for failure to levy or to vote for the levy of any particular tax or tax rate for any particular purpose. (1933, c. 418.)

CASE NOTES

Cited in County of Carteret v. Long, 128 N.C. App. 477, 495 S.E.2d 391 (1998).

SUBCHAPTER II. LISTING, APPRAISAL, AND ASSESSMENT OF PROPERTY AND COLLECTION OF TAXES ON PROPERTY.

ARTICLE 11.

Short Title, Purpose, and Definitions.

§ 105-271. Official title.

This Subchapter may be cited as the Machinery Act. (1939, c. 310, s. 1; 1971, c. 806. s. 1.)

Cross References. — As to the use and confidential nature of actual addresses of Address Confidentiality Program participants by boards of elections for election-related purposes, see G.S. 15C-8.

Legal Periodicals. — For note on procedural developments in the discovery of property unlisted for purposes of ad valorem taxation, see 51 N.C.L. Rev. 531 (1973).

For article, "State Jurisdiction To Tax Tangible Personal Property," see 56 N.C.L. Rev. 807 (1978).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former similar provisions.*

Consistent with the supremacy clause, a State may impose a nondiscriminatory ad valorem property tax on imported goods stored in a customs-bonded warehouse and destined for domestic manufacture and sale. R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986).

Subject of taxation is regulated entirely by statutes, and the revenues of this State are collected under the operation of what is known as the Machinery Act. Wade v. Commissioners of Craven County, 74 N.C. 81 (1876).

Assessment, listing, and collection of taxes is regulated by this Subchapter, which prescribes the time and manner for listing and valuing property for ad valorem tax purposes. In re Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

The discovery, assessment, listing and collection of ad valorem taxes on tangible personal property in North Carolina is regulated by this Subchapter, the Machinery Act. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

What Machinery Act Prescribes. — This Subchapter, the Machinery Act, prescribes the time and manner for listing and valuing property for ad valorem tax purposes; it also fixes the time for payment. Spiers v. Davenport, 263 N.C. 56, 138 S.E.2d 762 (1964).

Use, rather than ownership or objective, is the primary exempting characteristic of this Subchapter. In re North Carolina Forestry Found., Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978), aff'd, 296 N.C. 330, 250 S.E.2d 236 (1979).

First Lien Priority of Ad Valorem Tax Liens. — In the Machinery Act the General Assembly has expressly recognized the first lien priority to be afforded local ad valorem tax liens by its recommended wording of documents entitled "orders of collection" which are issued under seal by local governing bodies. County of Lenoir v. Moore, 114 N.C. App. 110, 441 S.E.2d 589 (1994), aff'd, 340 N.C. 104, 455 S.E.2d 158 (1995).

Applied in Albemarle Elec. Membership Corp. v. Alexander, 282 N.C. 402, 192 S.E.2d 811 (1972); In re R.J. Reynolds Tobacco Co., 73 N.C. App. 475, 326 S.E.2d 911 (1985).

Cited in In re Wesleyan Educ. Center, 68 N.C. App. 742, 316 S.E.2d 87 (1984); In re Westinghouse Elec. Corp., 93 N.C. App. 710, 379 S.E.2d 37 (1989); In re Perry-Griffin Found., 108 N.C. App. 383, 424 S.E.2d 212 (1993); In re Hotel L'Europe, 116 N.C. App. 651, 448 S.E.2d 865 (1994), cert. denied, 339 N.C. 612, 454 S.E.2d 252 (1995); Commissioner of Labor v. House of Raeford Farms, Inc., 124 N.C. App. 349, 477 S.E.2d 230 (1996); County of Carteret v. Long, 128 N.C. App. 477, 495 S.E.2d 391 (1998).

§ 105-272. Purpose of Subchapter.

The purpose of this Subchapter is to provide the machinery for the listing, appraisal, and assessment of property and the levy and collection of taxes on property by counties and municipalities. It is the intent of the General Assembly to make the provisions of this Subchapter uniformly applicable throughout the State, and to assure this objective no local act to become effective on or after July 1, 1971, shall be construed to repeal or amend any section of this Subchapter in whole or in part unless it shall expressly so provide by specific reference to the section to be repealed or amended. As used in this section, the term "local act" means any act of the General Assembly that applies to one or more counties by name, to one or more municipalities by name, or to all municipalities within one or more named counties. (1939, c. 310, s. 1802; 1971, c. 806, s. 1; 1991, c. 11, s. 1.)

CASE NOTES

Cited in In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981); R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986).

§ 105-273. Definitions.

When used in this Subchapter (unless the context requires a different meaning):

(1) "Abstract" means the document on which the property of a taxpayer is listed for ad valorem taxation and on which the appraised and assessed values of the property are recorded.

(2) "Appraisal" means both the true value of property and the process by which true value is ascertained.

(3) "Assessment" means both the tax value of property and the process by which the assessment is determined.

(4) Repealed by Session Laws 1973, c. 695, s. 15, effective January 1, 1974.

(4a) "Code" [is] defined in G.S. 105-228.90.

(5) "Collector" or "tax collector" means any person charged with the duty of collecting taxes for a county or municipality.

(5a) "Contractor" means a taxpayer who is regularly engaged in building, installing, repairing, or improving real property.

(6) "Corporation" includes nonprofit corporation and every type of organization having capital stock represented by shares.

(6a) "Discovered property" includes all of the following:
   a. Property that was not listed during a listing period.
   b. Property that was listed but the listing included a substantial understatement.
   c. Property that has been granted an exemption or exclusion and does not qualify for the exemption or exclusion.

(6b) "To discover property" means to determine any of the following:
   a. Property has not been listed during a listing period.
   b. A taxpayer made a substantial understatement of listed property.
   c. Property was granted an exemption or exclusion and the property does not qualify for an exemption or exclusion.

(7) "Document" includes book, paper, record, statement, account, map, plat, film, picture, tape, object, instrument, and any other thing conveying information.

(7a) "Failure to list property" includes all of the following:
   a. Failure to list property during a listing period.
   b. A substantial understatement of listed property.
   c. Failure to notify the assessor that property granted an exemption or exclusion under an application for exemption or exclusion does not qualify for the exemption or exclusion.

(8) "Intangible personal property" means patents, copyrights, secret processes, formulae, good will, trademarks, trade brands, franchises, stocks, bonds, cash, bank deposits, notes, evidences of debt, leasehold interests in exempted real property, bills and accounts receivable, and other like property.

(8a) "Inventories" means (i) goods held for sale in the regular course of business by manufacturers, retail and wholesale merchants, and contractors, and (ii) goods held by contractors to be furnished in the course of building, installing, repairing, or improving real property. As to manufacturers, the term includes raw materials, goods in process, and finished goods, as well as other materials or supplies that are consumed in manufacturing or processing, or that accompany and become a part of the sale of the property being sold. The term also includes a modular home as defined in G.S. 105-164.3(21b) that is used exclusively as a display model and held for eventual sale at the retail merchant's place of business. The term also includes crops, livestock, poultry, feed used in the production of livestock and poultry, and other agricultural or horticultural products held for sale, whether in process or ready for sale. The term does not include fuel used in manufacturing or processing, nor does it include materials or supplies not used directly in manufacturing or processing. As to retail and wholesale merchants and contractors, the term includes, in addition to articles held for sale, packaging materials that accompany and become a part of the sale of the property being sold.

(9) "List" or "listing," when used as a noun, means abstract.

(10) Repealed by Session Laws 1987, c. 43, s. 1.

(10a) "Local tax official" includes a county assessor, an assistant county assessor, a member of a county board of commissioners, a member of a county board of equalization and review, a county tax collector, and the municipal equivalents of these officials.

(10b) "Manufacturer" means a taxpayer who is regularly engaged in the mechanical or chemical conversion or transformation of materials or substances into new products for sale or in the growth, breeding, raising, or other production of new products for sale. The term does not include delicatessens, cafes, cafeterias, restaurants, and other similar retailers that are principally engaged in the retail sale of foods prepared by them for consumption on or off their premises.

(11) "Municipal corporation" and "municipality" mean city, town, incorporated village, sanitary district, rural fire protection district, rural recreation district, mosquito control district, hospital district, metropolitan sewerage district, watershed improvement district, or other district or unit of local government by or for which ad valorem taxes are levied. The terms also include a consolidated city-county as defined by G.S. 160B-2(1).

(12) "Person" and "he" include any individual, trustee, executor, administrator, other fiduciary, corporation, limited liability company, unincorporated association, partnership, sole proprietorship, company, firm, or other legal entity.

(13) "Real property," "real estate," and "land" mean not only the land itself, but also buildings, structures, improvements, and permanent fixtures on the land, and all rights and privileges belonging or in any way appertaining to the property. These terms also mean a manufactured home as defined in G.S. 143-143.9(6) if it is a residential structure; has the moving hitch, wheels, and axles removed; and is placed upon a permanent foundation either on land owned by the owner of the manufactured home or on land in which the owner of the manufactured home has a leasehold interest pursuant to a lease with a primary term of at least 20 years for the real property on which the manufactured home is affixed and where the lease expressly provides for disposition of the manufactured home upon termination of the lease. A manufactured home as defined in G.S. 143-143.9(6) that does not meet all of these conditions is considered tangible personal property.

(13a) "Retail Merchant" means a taxpayer who is regularly engaged in the sale of tangible personal property, acquired by a means other than manufacture, processing, or producing by the merchant, to users or consumers.

(13b) "Substantial understatement" means the omission of a material portion of the value, quantity, or other measurement of taxable property. The determination of materiality in each case shall be made by the assessor, subject to the taxpayer's right to review of the determination by the county board of equalization and review or board of commissioners and appeal to the Property Tax Commission.

(14) "Tangible personal property" means all personal property that is not intangible and that is not permanently affixed to real property.

(15) "Tax" and "taxes" include the principal amount of any tax, costs, penalties, and interest imposed upon property tax or dog license tax.

(16) "Taxing unit" means a county or municipality authorized to levy ad valorem property taxes.

(17) "Taxpayer" means any person whose property is subject to ad valorem property taxation by any county or municipality and any

person who, under the terms of this Subchapter, has a duty to list property for taxation. For purposes of collecting delinquent ad valorem taxes assessed on real property under G.S. 105-366 through G.S. 105-375, "taxpayer" means the owner of record on the date the taxes become delinquent and any subsequent owner of record of the real property if conveyed after that date.

(18) "Valuation" means appraisal and assessment.

(19) "Wholesale Merchant" means a taxpayer who is regularly engaged in the sale of tangible personal property, acquired by a means other than manufacture, processing, or producing by the merchant, to other retail or wholesale merchants for resale or to manufacturers for use as ingredient or component parts of articles being manufactured for sale. (1939, c. 310, s. 2; 1971, c. 806, s. 1; 1973, c. 695, ss. 14, 15; 1985, c. 656, s. 20; 1985 (Reg. Sess., 1986), c. 947, ss. 3, 4; 1987, c. 43, s. 1; c. 440, s. 2; c. 805, s. 3; c. 813, ss. 1-4; 1991, c. 34, s. 3; 1991 (Reg. Sess., 1992), c. 975, s. 1; c. 1004, s. 1; 1993, c. 354, s. 23; c. 459, s. 1; 1995, c. 461, s. 15; 1998-212, s. 29A.18(c); 2001-506, s. 1; 2002-156, s. 4; 2003-400, s. 4; 2006-106, ss. 1, 8.)

Effect of Amendments. — Session Laws 2006-106, ss. 1 and 8, effective for taxes imposed for taxable years beginning on or after July 1, 2006, added the last sentence in subdivision (17) and added the third sentence in subdivision (8a).

Legal Periodicals. — For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

CASE NOTES

"Appraisal" and "Assessment" Synonymous for Public Service Companies. — For public service companies, the true value of property is its tax value, and "appraisal" and "assessment" are synonymous. In re S. Ry., 59 N.C. App. 119, 296 S.E.2d 463, rev'd on other grounds, 313 N.C. 177, 328 S.E.2d 235 (1985).

Leases are intangible personal property only when they are leases in "exempted real property." Thus, the only leases taxable to the lessee are leases on fees exempt from taxation on the lessor. Where the fee is nonexempt, the lease is not intangible personal property and is taxable to the owner, as is all real and personal property not exempt under G.S. 105-274. In re North Carolina Forestry Found., Inc., 35 N.C. App. 430, 242 S.E.2d 502 (1978), aff'd, 296 N.C. 330, 250 S.E.2d 236 (1979).

Leasehold Estate. — A lease is a chattel real, and as such is a species of intangible personal property. However, the value of a leasehold estate is subject to ad valorem tax and not to the State intangible tax. Bragg Inv. Co. v. Cumberland County, 245 N.C. 492, 96 S.E.2d 341 (1957), decided under former similar provisions.

Used Machinery Is Not Inventory. — Where taxpayer which acquired used machinery and equipment primarily for use in its manufacture of textiles and only held the goods for sale after the property was no longer useful in taxpayer's textile business, the equipment and machinery at issue were not inventory held for sale in the regular course of business by a wholesale merchant. Consequently, the property was not excluded from ad valorem taxation. In re Cone Mills Corp., 112 N.C. App. 539, 435 S.E.2d 835 (1993), cert. denied, 335 N.C. 555, 441 S.E.2d 112 (1994).

Use as Income Produce Equipment Incompatible with Character As Inventory. — Where defendant treated equipment as income producing property rather than inventory for financial reporting purposes, depreciating only that part of its inventory of new and used equipment that it used for rental purposes, this treatment rendered the equipment used for rental purposes ineligible for tax exclusion because its use and consumption as income producing property was incompatible with its character as inventory. In re R.W. Moore Equip. Co., 115 N.C. App. 129, 443 S.E.2d 734, cert. denied, 337 N.C. 693, 448 S.E.2d 533 (1994).

Rental Equipment Not "Held." — Equipment was not "held" as stated in subsection (8a) by taxpayer when rented to third parties. In re R.W. Moore Equip. Co., 115 N.C. App. 129, 443 S.E.2d 734, cert. denied, 337 N.C. 693, 448 S.E.2d 533 (1994).

Husband and Wife Are Separate "Taxpayers" as to Land Held by Entirety. — A husband and wife are "taxpayers" with reference to taxes levied on account of property owned by each alone, but they are, in contemplation of law, a separate person from either with reference to land owned by them as tenants by the entirety. Consequently, no lien attaches to such land on account of a tax levied upon either on account of separately owned property. Duplin County v. Jones, 267 N.C. 68, 147 S.E.2d 603 (1966), decided under former similar provisions.

Mobile Homes. — Mobile home that was placed on real property with the wheels and axles removed and affixed to a concrete foundation became realty. The creditor's claim was thus secured only by the real property that was the debtor's principal residence, and the claim could not be modified pursuant to 11 U.S.C.S. § 1322(b)(2). In re McNeill, — Bankr. —, 2006 Bankr. LEXIS 871 (Bankr. M.D.N.C. May 12, 2006).

When a county assessed the value of a mobile home located on leased land without taking into consideration the personal property elements in G.S. 105-317.1, its appraisal arbitrarily or illegally under G.S. 105-345.2(b) appraised the home as if it were real property and assigned it a value that substantially exceeded its true value, because G.S. 105-273(13) expressly defined differences between real property and tangible personal property as it pertained to manufactured homes. In re Murray, — N.C. App. —, 635 S.E.2d 477, 2006 N.C. App. LEXIS 2157 (2006).

Applied in In re R.J. Reynolds Tobacco Co., 73 N.C. App. 475, 326 S.E.2d 911 (1985); Computer Sales Int'l, Inc. v. Forsyth Mem. Hosp., 112 N.C. App. 633, 436 S.E.2d 263 (1993).

Cited in City of Charlotte v. Little McMahan Properties, Inc., 52 N.C. App. 464, 279 S.E.2d 104 (1981); In re Champion Int'l Corp., 74 N.C. App. 639, 329 S.E.2d 691 (1985); In re Dickey, 110 N.C. App. 823, 431 S.E.2d 203 (1993); In re Philip Morris U.S.A, 335 N.C. 227, 436 S.E.2d 828 (1993), cert. denied, 335 N.C. 466, 441 S.E.2d 118, 512 U.S. 1228, 114 S. Ct. 2726, 129 L. Ed. 2d 850 (1994); Altman v. City of High Point, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 26412 (M.D.N.C. Jan. 17, 2002).

OPINIONS OF ATTORNEY GENERAL

Discovered Property. — Where a town simply possessed a leasehold interest, the real estate was not exempt as property belonging to a municipality; therefore, the county properly discovered the land leased to the town. See opinion of Attorney General to Huey Marshall, County Attorney, 2000 N.C. AG LEXIS 1 (3/28/2000).

ARTICLE 12.

Property Subject to Taxation.

§ 105-274. Property subject to taxation.

(a) All property, real and personal, within the jurisdiction of the State shall be subject to taxation unless it is:

(1) Excluded from the tax base by a statute of statewide application enacted under the classification power accorded the General Assembly by Article V, § 2(2), of the North Carolina Constitution, or

(2) Exempted from taxation by the Constitution or by a statute of statewide application enacted under the authority granted the General Assembly by Article V, § 2(3), of the North Carolina Constitution.

(b) No provision of this Subchapter shall be construed to exempt from taxation any property situated in this State belonging to any foreign corporation unless the context of the provision clearly indicates a legislative intent to grant such an exemption. (1939, c. 310, ss. 303, 1800; 1961, c. 1169, s. 8; 1967, c. 1185; 1971, c. 806, s. 1.)

Legal Periodicals. — For survey of 1974 case law on taxation of personal property owned by nonresidents, see 53 N.C.L. Rev. 1132 (1975).

For article, "State Jurisdiction To Tax Tangible Personal Property," see 56 N.C.L. Rev. No. 807 (1978).

For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former similar provisions.*

Legislative Purpose. — The legislature has decreed that all property, real and personal, within the jurisdiction of the State, is subject to taxation whether owned by a resident or a nonresident. The purpose of this strong decree is to treat all property owners equally so that the tax burden will be shared proportionately, and to gather in all the tax money to which the various counties and municipalities are entitled. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

All property privately owned within this State is subject to taxation unless exempt by strict construction of the pertinent statute. Bragg Inv. Co. v. Cumberland County, 245 N.C. 492, 96 S.E.2d 341 (1957).

All personal property whatsoever within the jurisdiction of the State and not specifically exempted from taxation by law is subject to taxation in North Carolina. Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

All property, real and personal, within the jurisdiction of this State, whether owned by a foreign corporation or a domestic corporation, is subject to taxation unless specifically excluded or exempted from the tax base. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

All property in North Carolina, both real and personal, is subject to property tax unless it was excluded or exempted from taxation by statute or the Constitution. Edward Valves, Inc. v. Wake County, 117 N.C. App. 484, 451 S.E.2d 641 (1995), rev'd in part, aff'd in part, 343 N.C. 426, 471 S.E.2d 342 (1996), cert. denied, 519 U.S. 1112, 117 S. Ct. 952, 136 L. Ed. 2d 839 (1997).

No state may tax anything not within her jurisdiction without violating U.S. Const., Amend. XIV. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

But interstate commerce can be required to pay its nondiscriminatory share of taxes which each state may impose on property within its borders. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

The ad valorem property tax may be levied by the proper taxing authority upon personal property of an individual or corporation engaged in interstate commerce the same as upon any other property so long as the effect of such taxation does not place interstate commerce at a competitive disadvantage with intrastate commerce. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Test of whether tax law violates due process is whether the taxing power exerted by the State bears fiscal relation to protection, opportunities and benefits given by the State. The simple but controlling question is whether the State has given anything for which it can ask return. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Taxation of Personal Property of Nonresidents Is Constitutional. — The taxation of personal property of nonresidents by this State when such personal property has acquired a taxable situs here does not violate the provisions of U.S. Const., Amend. XIV, the rule that personal property follows the domicile of the owner being subject to an exception when such personalty is held in such a manner as to create a "business situs" for the purpose of taxation. County of Mecklenburg v. Sterchi Bros. Stores, 210 N.C. 79, 185 S.E. 454 (1936).

When personal property belonging to a nonresident has acquired a taxable situs in this State, this State may tax that nonresident's property without violating the provisions of U.S. Const., Amend. XIV. In re Bassett Furn. Indus., Inc., 79 N.C. App. 258, 339 S.E.2d 16, appeal dismissed, 316 N.C. 553, 344 S.E.2d 4 (1986).

Situs Essential for Tax Exaction. — Taxable tangible personal property must have acquired a tax situs in this State, for situs is an absolute essential for tax exaction. In re Bassett Furn. Indus., Inc., 79 N.C. App. 258, 339 S.E.2d 16, appeal dismissed, 316 N.C. 553, 344 S.E.2d 4 (1986).

Situs of personal property for tax purposes is determined by the legislature, and the legislature may provide different rules for different kinds of property and may change the rules from time to time. In re Bassett Furn. Indus., Inc., 79 N.C. App. 258, 339 S.E.2d 16, appeal dismissed, 316 N.C. 553, 344 S.E.2d 4 (1986).

A jet aircraft hangared in Rockingham County, North Carolina for approximately one year by a nonresident corporation having no principal place of business in this State, under the stipulated facts and evidence, was "situated" or "more or less permanently located" in Rockingham County on January 1, 1984, and therefore had a tax situs in Rockingham County on that date. The fact that the airplane happened to be physically located at a Virginia airport on January 1, 1984, did not defeat taxation by Rockingham County. In re Bassett

Furn. Indus., Inc., 79 N.C. App. 258, 339 S.E.2d 16, appeal dismissed, 316 N.C. 553, 344 S.E.2d 4 (1986).

Exemptions Strictly Construed. — Exemption from taxation is exceptional. Such exemptions should be strictly construed. In re Notice of Attachment & Garnishment Issued by Catawba County Tax Collector, 59 N.C. App. 332, 296 S.E.2d 499 (1982), cert. denied, 307 N.C. 576, 299 S.E.2d 645 (1983).

Inventory Exclusion Not Applicable to Rental Equipment. — Taxpayer, by renting equipment to third parties, was not entitled to the inventory tax exclusion for the rented equipment. In re R.W. Moore Equip. Co., 115 N.C. App. 129, 443 S.E.2d 734, cert. denied, 337 N.C. 693, 448 S.E.2d 533 (1994).

Where defendant treated equipment as income producing property rather than inventory for financial reporting purposes, depreciating only that part of its inventory of new and used equipment that it used for rental purposes, this treatment rendered the equipment used for rental purposes ineligible for tax exclusion because its use and consumption as income producing property was incompatible with its character as inventory. In re R.W. Moore Equip. Co., 115 N.C. App. 129, 443 S.E.2d 734, cert. denied, 337 N.C. 693, 448 S.E.2d 533 (1994).

As to right of State to tax foreign corporations, see Commissioners of Beaufort County v. Old Dominion S.S. Co., 128 N.C. 558, 39 S.E. 18 (1901).

When Lease Taxable to Lessee and When to Lessor. — Leases are intangible personal property only when they are leases in "exempted real property." Thus, the only leases taxable to the lessee are leases on fees exempt from taxation on the lessor. Where the fee is nonexempt, the lease is not intangible personal property and is taxable to the owner as is all real and personal property not exempt under this section. In re North Carolina Forestry Found., Inc., 35 N.C. App. 430, 242 S.E.2d 502 (1978), aff'd, 296 N.C. 330, 250 S.E.2d 236 (1979).

Used Machinery and Equipment. — Where taxpayer which acquired used machinery and equipment primarily for use in its manufacture of textiles and only held the goods for sale after the property was no longer useful in taxpayer's textile business, the equipment and machinery at issue were not inventory held for sale in the regular course of business by a wholesale merchant. Consequently, the property was not excluded from ad valorem taxation. In re Cone Mills Corp., 112 N.C. App. 539, 435 S.E.2d 835 (1993), cert. denied, 335 N.C. 555, 441 S.E.2d 112 (1994).

Educational Exemption Upheld. — A seminary met its burden of proving that three parcels of its property were entitled to an exemption under G.S. 105-278.4, although the land in question was undeveloped, the future planned use might not be exempt, and the seminary had sold some timber from the land to maintain a healthy forested state, to remove trees damaged by a hurricane, and to pay for other repairs caused by that hurricane. In re Southeastern Baptist Theological Seminary, Inc., 135 N.C. App. 247, 520 S.E.2d 302 (1999).

Taxable Situs of Cottonseed Oil Stored at Refinery. — See Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

Structures and improvements, together with stoves and refrigerators, placed by lessee on lands within a military reservation leased from the federal government are subject to taxation by the county in which the property is situated, the improvements as realty and the stoves and refrigerators as tangible personal property. Bragg Inv. Co. v. Cumberland County, 245 N.C. 492, 96 S.E.2d 341 (1957).

Applied in Cleland v. Children's Home, Inc., 64 N.C. App. 153, 306 S.E.2d 587 (1983).

Cited in In re Hanes Dye & Finishing Co., 285 N.C. 598, 207 S.E.2d 729 (1974); In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981); In re Atl. Coast Conference, 112 N.C. App. 1, 434 S.E.2d 865 (1993); In re Dickey, 110 N.C. App. 823, 431 S.E.2d 203 (1993).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The opinions of the Attorney General cited below were rendered under former similar provisions.*

Timberland owned by nonstock corporation and leased to paper company is subject to ad valorem taxation by county in which land is located. See opinion of Attorney General to Mr. James R. Hood, Jones County Attorney 40 N.C.A.G. 786 (1969).

As to when personal property of nonresident stored in a warehouse in North Carolina is not subject to ad valorem taxes, see opinion of Attorney General to Mr. T.R. Holbrook, Administrative Officer, State Board of Assessment, 41 N.C.A.G. 27 (1970).

§ 105-275. Property classified and excluded from the tax base.

The following classes of property are hereby designated special classes under authority of Article V, Sec. 2(2), of the North Carolina Constitution and shall not be listed, appraised, assessed, or taxed:

(1) Repealed by Session Laws 1987, c. 813, s. 5.

(2) Tangible personal property that has been imported from a foreign country through a North Carolina seaport terminal and which is stored at such a terminal while awaiting further shipment for the first 12 months of such storage. (The purpose of this classification is to encourage the development of the ports of this State.)

(3) Real and personal property owned by nonprofit water or nonprofit sewer associations or corporations.

(4) Repealed by Session Laws 1987, c. 813, s. 5.

(5) Vehicles that the United States government gives to veterans on account of disabilities they suffered in World War II, the Korean Conflict, or the Vietnam Era so long as they are owned by:

- a. A person to whom a vehicle has been given by the United States government or
- b. Another person who is entitled to receive such a gift under Title 38, section 252, United States Code Annotated.

(5a) A motor vehicle owned by a disabled veteran that is altered with special equipment to accommodate a service-connected disability. As used in this section, disabled veteran means a person as defined in 38 U.S.C. § 101(2) who is entitled to special automotive equipment for a service-connected disability, as provided in 38 U.S.C. § 3901.

(6) Special nuclear materials held for or in the process of manufacture, processing, or delivery by the manufacturer or processor thereof, regardless whether the manufacturer or processor owns the special nuclear materials. The terms "manufacture" and "processing" do not include the use of special nuclear materials as fuel. The term "special nuclear materials" includes (i) uranium 233, uranium enriched in the isotope 233 or in the isotope 235; and (ii) any material artificially enriched by any of the foregoing, but not including source material. "Source material" means any material except special nuclear material which contains by weight one twentieth of one percent (0.05%) or more of (i) uranium, (ii) thorium, or (iii) any combination thereof. Provided however, that to qualify for this exemption no such nuclear materials shall be discharged into any river, creek or stream in North Carolina. The classification and exclusion provided for herein shall be denied to any manufacturer, fabricator or processor who permits burial of such material in North Carolina or who permits the discharge of such nuclear materials into the air or into any river, creek or stream in North Carolina if such discharge would contravene in any way the applicable health and safety standards established and enforced by the Department of Environment and Natural Resources or the Nuclear Regulatory Commission. The most stringent of these standards shall govern.

(7) Real and personal property that is:

- a. Owned either by a nonprofit corporation formed under the provisions of Chapter 55A of the General Statutes or by a bona fide charitable organization, and either operated by such owning organization or leased to another such nonprofit corporation or charitable organization, and
- b. Appropriated exclusively for public parks and drives.

(8)a. Real and personal property that is used or, if under construction, is to be used exclusively for air cleaning or waste disposal or to abate, reduce, or prevent the pollution of air or water (including, but not limited to, waste lagoons and facilities owned by public or private utilities built and installed primarily for the purpose of providing sewer service to areas that are predominantly residential in character or areas that lie outside territory already having sewer service), if the Department of Environment and Natural Resources or a local air pollution control program for air-cleaning devices located in an area where the Environmental Management Commission has certified a local air pollution control program pursuant to G.S. 143-215.112 furnishes a certificate to the tax supervisor of the county in which the property is situated or to be situated stating that the Environmental Management Commission or local air pollution control program has found that the described property:

1. Has been or will be constructed or installed;
2. Complies with or that plans therefor which have been submitted to the Environmental Management Commission or local air pollution control program indicate that it will comply with the requirements of the Environmental Management Commission or local air pollution control program;
3. Is being effectively operated or will, when completed, be required to operate in accordance with the terms and conditions of the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission or local air pollution control program; and
4. Has or, when completed, will have as its primary rather than incidental purpose the reduction of water pollution resulting from the discharge of sewage and waste or the reduction of air pollution resulting from the emission of air contaminants.

a1. Sub-subdivision a. of this subdivision shall not apply to an animal waste management system, as defined in G.S. 143-215.10B, unless the Environmental Management Commission determines that the animal waste management system will accomplish all of the following:

1. Eliminate the discharge of animal waste to surface waters and groundwater through direct discharge, seepage, or runoff.
2. Substantially eliminate atmospheric emissions of ammonia.
3. Substantially eliminate the emission of odor that is detectable beyond the boundaries of the parcel or tract of land on which the farm is located.
4. Substantially eliminate the release of disease-transmitting vectors and airborne pathogens.
5. Substantially eliminate nutrient and heavy metal contamination of soil and groundwater.

b. Real or personal property that is used or, if under construction, is to be used exclusively for recycling or resource recovering of or from solid waste, if the Department of Environment and Natural Resources furnishes a certificate to the tax supervisor of the county in which the property is situated stating the Department of Environment and Natural Resources has found that the described property has been or will be constructed or installed, complies or will comply with the rules of the Department of Environment and Natural Resources, and has, or will have as its primary purpose recycling or resource recovering of or from solid waste.

c. Tangible personal property that is used exclusively, or if being installed, is to be used exclusively, for the prevention or reduction of cotton dust inside a textile plant for the protection of the health of the employees of the plant, in accordance with occupational safety and health standards adopted by the State of North Carolina pursuant to Article 16 of G.S. Chapter 95. Notwithstanding the exclusive use requirement of this sub-subdivision, all parts of a ventilation or air conditioning system that are integrated into a system used for the prevention or reduction of cotton dust, except for chillers and cooling towers, are excluded from taxation under this sub-subdivision. The Department of Revenue shall adopt guidelines to assist the tax supervisors in administering this exclusion.

d. Real or personal property that is used or, if under construction, is to be used by a major recycling facility as defined in G.S. 105-129.25 predominantly for recycling or resource recovering of or from solid waste, if the Department of Environment and Natural Resources furnishes a certificate to the tax supervisor of the county in which the property is situated stating the Department of Environment and Natural Resources has found that the described property has been or will be constructed or installed for use by a major recycling facility, complies or will comply with the rules of the Department of Environment and Natural Resources, and has, or will have as a purpose recycling or resource recovering of or from solid waste.

(9) through (11) Repealed by Session Laws 1987, c. 813, s. 5.

(12) Real property owned by a nonprofit corporation or association exclusively held and used by its owner for educational and scientific purposes as a protected natural area. (For purposes of this subdivision, the term "protected natural area" means a nature reserve or park in which all types of wild nature, flora and fauna, and biotic communities are preserved for observation and study.)

(13) Repealed by Session Laws 1973, c. 904.

(14) Motor vehicles chassis belonging to nonresidents, which chassis temporarily enters the State for the purpose of having a body mounted thereon.

(15) Upon the date on which each county's next general reappraisal of real property under the provisions of G.S. 105-286(a) becomes effective, standing timber, pulpwood, seedlings, saplings, and other forest growth. (The purpose of this classification is to encourage proper forest management practices and to develop and maintain the forest resources of the State.)

(16) Non-business Property. — As used in this subdivision, the term "non-business property" means personal property that is used by the owner of the property for a purpose other than the production of income and is not used in connection with a business. The term includes household furnishings, clothing, pets, lawn tools, and lawn equipment. The term does not include motor vehicles, mobile homes, aircraft, watercraft, or engines for watercraft.

(17) Real and personal property belonging to the American Legion, Veterans of Foreign Wars, Disabled American Veterans, or to any similar veterans organizations chartered by the Congress of the United States or organized and operated on a statewide or nationwide basis, and any post or local organization thereof, when used exclusively for meeting or lodge purposes by said organization, together with such additional adjacent real property as may be necessary for

the convenient and normal use of the buildings thereon. Notwithstanding the exclusive-use requirement hereinabove established, if a part of a property that otherwise meets this subdivision's requirements is used for a purpose that would require that it not be listed, appraised, assessed or taxed if the entire property were so used, that part, according to its value, shall not be listed, appraised, assessed or taxed. The fact that a building or facility is incidentally available to and patronized by the general public, so far as there is no material amount of business or patronage with the general public, shall not defeat the classification granted by this section.

(18) Real and personal property belonging to the Grand Lodge of Ancient, Free and Accepted Masons of North Carolina, the Prince Hall Masonic Grand Lodge of North Carolina, their subordinate lodges and appendant bodies including the Ancient and Arabic Order Nobles of the Mystic Shrine, and the Ancient Egyptian Order Nobles of the Mystic Shrine, when used exclusively for meeting or lodge purposes by said organization, together with such additional adjacent real property as may be necessary for the convenient normal use of the buildings thereon. Notwithstanding the exclusive-use requirement hereinabove established, if a part of a property that otherwise meets this subdivision's requirements is used for a purpose that would require that it not be listed, appraised, assessed or taxed if the entire property were so used, that part, according to its value, shall not be listed, appraised, assessed or taxed. The fact that a building or facility is incidentally available to and patronized by the general public, so far as there is no material amount of business or patronage with the general public, shall not defeat the classification granted by this section.

(19) Real and personal property belonging to the Loyal Order of Moose, the Benevolent and Protective Order of Elks, the Knights of Pythias, the Odd Fellows, the Woodmen of the World, and similar fraternal or civic orders and organizations operated for nonprofit benevolent, patriotic, historical, charitable, or civic purposes, when used exclusively for meeting or lodge purposes by the organization, together with as much additional adjacent real property as may be necessary for the convenient normal use of the buildings. Notwithstanding the exclusive-use requirement of this subdivision, if a part of a property that otherwise meets this subdivision's requirements is used for a purpose that would require that it not be listed, appraised, assessed, or taxed if the entire property were so used, that part, according to its value, shall not be listed, appraised, assessed, or taxed. The fact that a building or facility is incidentally available to and patronized by the general public, so far as there is no material amount of business or patronage with the general public, shall not defeat the classification granted by this section. Nothing in this subdivision shall be construed so as to include social fraternities, sororities, and similar college, university, or high school organizations in the classification for exclusion from ad valorem taxes.

(20) Real and personal property belonging to Goodwill Industries and other charitable organizations organized for the training and rehabilitation of disabled persons when used exclusively for training and rehabilitation, including commercial activities directly related to such training and rehabilitation.

(21) The first thirty-eight thousand dollars ($38,000) in assessed value of housing together with the necessary land therefor, owned and used as a residence by a disabled veteran who receives benefits under 38 U.S.C. § 2101. This exclusion shall be the total amount of the exclusion applicable to such property.

(22) Repealed by Session Laws 1987, c. 813, s. 5.

(23) Tangible personal property imported from outside the United States and held in a Foreign Trade Zone for the purpose of sale, manufacture, processing, assembly, grading, cleaning, mixing or display and tangible personal property produced in the United States and held in a Foreign Trade Zone for exportation, either in its original form or as altered by any of the above processes.

(24) Cargo containers and container chassis used for the transportation of cargo by vessels in ocean commerce.

The term "container" applies to those nondisposable receptacles of a permanent character and strong enough for repeated use and specially designed to facilitate the carriage of goods, by one or more modes of transport, one of which shall be by ocean vessels, without intermediate reloadings and fitted with devices permitting its ready handling particularly in the transfer from one transport mode to another.

(24a) Aircraft that is owned or leased by an interstate air courier, is apportioned under G.S. 105-337 to the air courier's hub in this State, and is used in the air courier's operations in this State. For the purpose of this subdivision, the terms "interstate air courier" and "hub" have the meanings provided in G.S. 105-164.3.

(25) Tangible personal property shipped into this State for the purpose of repair, alteration, maintenance or servicing and reshipment to the owner outside this State.

(26) For the tax year immediately following transfer of title, tangible personal property manufactured in this State for the account of a nonresident customer and held by the manufacturer for shipment. For the purpose of this subdivision, the term "nonresident" means a taxpayer having no place of business in North Carolina.

(27), (28) Repealed by Session Laws 1983, c. 643, s. 1.

(29) Real property and easements wholly and exclusively held and used for nonprofit historic preservation purposes by a nonprofit historical association or institution, including real property owned by a nonprofit corporation organized for historic preservation purposes and held by its owner exclusively for sale under an historic preservation agreement prepared and recorded under the provisions of the Conservation and Historic Preservation Agreements Act, Article 4, Chapter 121 of the General Statutes of North Carolina.

(29a) Land within an historic district held, by a nonprofit corporation organized for historic preservation purposes, for use as a future site for an historic structure that is to be moved to the site from another location. Property may be classified under this subdivision for no more than five years. The taxes that would otherwise be due on land classified under this subdivision shall be a lien on the real property of the taxpayer as provided in G.S. 105-355(a). The taxes shall be carried forward in the records of the taxing unit or units as deferred taxes and shall be payable five years from the fiscal year the exclusion is first claimed unless an historic structure is moved onto the site during that time. If an historic structure has not been moved to the site within five years, then deferred taxes for the preceding five fiscal years shall immediately be payable, together with interest as provided in G.S. 105-360 for unpaid taxes that shall accrue on the deferred taxes as if they had been payable on the dates on which they would originally become due. All liens arising under this subdivision are extinguished upon either the payment of any deferred taxes under this subdivision or the location of an historic structure on the site within the five-year period allowed under this subdivision.

(30) Repealed by Session Laws 1987, c. 813, s. 5.

(31) Intangible personal property other than leasehold interests in exempted real property. This subdivision does not affect the taxation of software not otherwise excluded by subdivision (40) of this section.

(31a) through (31d) Repealed by Session Laws 1997-23, s. 3.

(32) Recodified as § 105-278.6A by Session Laws 1998-212, s. 29A.18(a), effective for taxes imposed for taxable years beginning on or after July 1, 1998.

(32a) Inventories owned by contractors.

(33) Inventories owned by manufacturers.

(34) Inventories owned by retail and wholesale merchants.

(35) Severable development rights, as defined in G.S. 136-66.11(a), when severed and evidenced by a deed recorded in the office of the register of deeds pursuant to G.S. 136-66.11(c).

(36) Repealed by Session Laws 2001-474, s. 8, effective November 29, 2001.

(37) Poultry and livestock and feed used in the production of poultry and livestock.

(38) Repealed by Session Laws 2001-474, s. 8, effective November 29, 2001.

(39) Real and personal property that is: (i) owned by a nonprofit corporation organized upon the request of a State or local government unit for the sole purpose of financing projects for public use, (ii) leased to a unit of State or local government whose property is exempt from taxation under G.S. 105-278.1, and (iii) used in whole or in part for a public purpose by the unit of State or local government. If only part of the property is used for a public purpose, only that part is excluded from the tax. This subdivision does not apply if any distributions are made to members, officers, or directors of the nonprofit corporation.

(39a) A correctional facility, including construction in progress, that is located on land owned by the State and is constructed pursuant to a contract with the State, and any leasehold interest in the land owned by the State upon which the correctional facility is located.

(40) Computer software and any documentation related to the computer software. As used in this subdivision, the term "computer software" means any program or routine used to cause a computer to perform a specific task or set of tasks. The term includes system and application programs and database storage and management programs.

The exclusion established by this subdivision does not apply to computer software and its related documentation if the computer software meets one or more of the following descriptions:

a. It is embedded software. "Embedded software" means computer instructions, known as microcode, that reside permanently in the internal memory of a computer system or other equipment and are not intended to be removed without terminating the operation of the computer system or equipment and removing a computer chip, a circuit, or another mechanical device.

b. It is purchased or licensed from a person who is unrelated to the taxpayer and it is capitalized on the books of the taxpayer in accordance with generally accepted accounting principles, including financial accounting standards issued by the Financial Accounting Standards Board. A person is unrelated to a taxpayer if (i) the taxpayer and the person are not subject to any common ownership, either directly or indirectly, and (ii) neither the taxpayer nor the person has any ownership interest, either directly or indirectly, in the other.

This subdivision does not affect the value or taxable status of any property that is otherwise subject to taxation under this Subchapter.

The provisions of the exclusion established by this subdivision are not severable. If any provision of this subdivision or its application is held invalid, the entire subdivision is repealed.

(41) Objects of art held by the North Carolina State Art Society, Incorporated.

(42) A vehicle that is offered at retail for short-term lease or rental and is owned or leased by an entity engaged in the business of leasing or renting vehicles to the general public for short-term lease or rental. For the purposes of this subdivision, the term "short-term lease or rental" shall have the same meaning as in G.S. 105-187.1, and the term "vehicle" shall have the same meaning as in G.S. 153A-156(e) and G.S. 160A-215.1(e). A gross receipts tax as set forth by G.S. 153A-156 and G.S. 160A-215.1 is substituted for and replaces the ad valorem tax previously levied on these vehicles.

(43) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2007)** Real or tangible personal property that is subject to a capital lease pursuant to G.S. 115C-531. (1939, c. 310, s. 303; 1961, c. 1169, s. 8; 1967, c. 1185; 1971, c. 806, s. 1; c. 1121, s. 3; 1973, cc. 290, 451; c. 476, s. 128; c. 484; c. 695, s. 1; c. 790, s. 1; cc. 904, 962, 1028, 1034, 1077; c. 1262, s. 23; c. 1264, s. 1; 1975, cc. 566, 755; c. 764, s. 6; 1977, c. 771, s. 4; c. 782, s. 2; c. 1001, ss. 1, 2; 1977, 2nd Sess., c. 1200, s. 4; 1979, c. 200, s. 1; 1979, 2nd Sess., c. 1092; 1981, c. 86, s. 1; 1981 (Reg. Sess., 1982), c. 1244, ss. 1, 2; 1983, c. 643, ss. 1, 2; c. 693; 1983 (Reg. Sess., 1984), c. 1060; 1985, c. 510, s. 1; c. 656, s. 37; 1985 (Reg. Sess., 1986), c. 982, s. 18; 1987, c. 356; c. 622, s. 2; c. 747, s. 8; c. 777, s. 6; c. 813, ss. 5, 6, 22; c. 850, s. 17; 1987 (Reg. Sess., 1988), c. 1041, s. 1.1; 1989, c. 148, s. 4; c. 168, s. 6; c. 705; c. 723, s. 1; c. 727, ss. 28, 29; 1991, c. 717, s. 1; 1991 (Reg. Sess., 1992), c. 975, s. 2; 1993, c. 459, s. 2; 1993 (Reg. Sess., 1994), c. 745, s. 39; 1995, c. 41, s. 2; c. 509, s. 51; 1995 (Reg. Sess., 1996), c. 646, s. 12; 1997-23, ss. 1, 3, 9; 1997-443, s. 11A.119(a); 1997-456, s. 27; 1998-55, ss. 10, 18; 1998-212, s. 29A.18(a); 1999-337, s. 35(a); 2000-2, s. 1; 2000-18, s. 1, 2000-140, ss. 71, 72(a); 2001-84, s. 3; 2001-427, s. 15(a); 2001-474, s. 8; 2002-104, s. 1; 2003-284, s. 43A.1; 2007-477, s. 1; 2007-527, s. 37.)

Editor's Note. — Session Laws 2001-84, s. 2, provided: "This act, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect its purposes."

Effect of Amendments. — Session Laws 2007-477, s. 1, effective July 1, 2007, and applicable to taxes imposed for taxable years beginning on or after that date, added subdivision (43).

Session Laws 2007-527, s. 37, effective August 31, 2007, inserted "State" in subsection (41).

Legal Periodicals. — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

For article discussing legal issues of historic preservation for local government in North Carolina, see 17 Wake Forest L. Rev. 707 (1981).

For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

For 1997 legislative survey, see 20 Campbell L. Rev. 481.

See legislative survey, 21 Campbell L. Rev. 323 (1999).

CASE NOTES

I. General Consideration.
II. Protected Natural Areas.
III. Decisions under Prior Law.
  A. In General.
  B. Farm Products Held for

Shipment to Foreign Country.
C. Property Shipped into State and Warehoused for Transshipment.
D. Property Warehoused for Transshipment Outside State.

I. GENERAL CONSIDERATION.

County Precluded from Challenging Constitutionality of Former § 105-281. — See In re Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

Application of North Carolina's ad valorem property tax to imported tobacco destined for domestic markets does not violate the import-export clause or the due process clause of the federal Constitution. R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986).

Consistent with the supremacy clause, a State may impose a nondiscriminatory ad valorem property tax on imported goods stored in a customs-bonded warehouse and destined for domestic manufacture and sale. R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986).

Use, rather than ownership or objective, is the primary exempting characteristic of this Subchapter. In re North Carolina Forestry Found., Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978), aff'd, 296 N.C. 330, 250 S.E.2d 236 (1979).

Not only the purpose for holding the real property but also its actual use determines whether it is to be excluded from or included in the tax base. In re North Carolina Forestry Found., Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978), aff'd, 296 N.C. 330, 250 S.E.2d 236 (1979).

It is not the nature or characteristic of the owning entity which ultimately determines whether property shall be exempt from taxation, but it is the use to which the property is dedicated which controls. In re Wake Forest Univ., 51 N.C. App. 516, 277 S.E.2d 91, cert. denied, 303 N.C. 544, 281 S.E.2d 391 (1981).

Construction. — This section provides an exemption from taxation and is strictly construed against the taxpayer and in favor of the State. In re R.J. Reynolds Tobacco Co., 52 N.C. App. 299, 278 S.E.2d 575 (1981).

While the courts have consistently held that tax exemption statutes must be strictly construed against exemption, they have also held that such statutes should not be given a narrow or stingy construction. In re Wake Forest Univ., 51 N.C. App. 516, 277 S.E.2d 91, cert. denied, 303 N.C. 544, 281 S.E.2d 391 (1981).

This statute's function is to describe a separate class of property for exclusion from the tax base, rather than to provide a tax exemption to religious organizations for property used for religious purposes. In re Springmoor, Inc., 348 N.C. App. 1, 498 S.E.2d 177 (1998).

Uniformity in taxation relates to equality in the burden of the State's taxpayers. In re Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

Burden is on the taxpayer to show that it comes within the exemption or exception. In re Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

Used Machinery Is Not Inventory. — Where taxpayer which acquired used machinery and equipment primarily for use in its manufacture of textiles and only held the goods for sale after the property was no longer useful in taxpayer's textile business, the equipment and machinery at issue were not inventory held for sale in the regular course of business by a wholesale merchant. Consequently, the property was not excluded from ad valorem taxation. In re Cone Mills Corp., 112 N.C. App. 539, 435 S.E.2d 835 (1993), cert. denied, 335 N.C. 555, 441 S.E.2d 112 (1994).

Inventory Exclusion Not Applicable to Rental Equipment. — Taxpayer, by renting equipment to third parties, was not entitled to the inventory tax exclusion for the rented equipment. In re R.W. Moore Equip. Co., 115 N.C. App. 129, 443 S.E.2d 734, cert. denied, 337 N.C. 693, 448 S.E.2d 533 (1994).

Where defendant treated equipment as income producing property rather than inventory for financial reporting purposes, depreciating only that part of its inventory of new and used equipment that it used for rental purposes, this treatment rendered the equipment used for rental purposes ineligible for tax exclusion because its use and consumption as income producing property was incompatible with its character as inventory. In re R.W. Moore Equip. Co., 115 N.C. App. 129, 443 S.E.2d 734, cert. denied, 337 N.C. 693, 448 S.E.2d 533 (1994).

Applied in In re K-Mart Corp., 319 N.C. 378, 354 S.E.2d 468 (1987).

Cited in In re North Carolina Forestry Found., Inc., 35 N.C. App. 430, 242 S.E.2d 502 (1978).

II. PROTECTED NATURAL AREAS.

Term "protected natural areas" in subdivision (12) of this section means property which, insofar as possible, is kept in a pristine state free from those interferences which any given generation may feel to be "improvements" on nature. The General Assembly intended the protection of such natural areas be of a passive nature designed to prevent manmade or natural disasters and not of an active nature envisioned as "improvements" of the areas. In re North Carolina Forestry Found., Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978), aff'd, 296 N.C. 330, 250 S.E.2d 236 (1979).

A forest owned by a foundation did not come within the statutory definition of a "protected natural area" due to the extensive program of road building, construction of drainage ditches and fire lanes, site preparation, including disking and burning, leasing of hunting rights to local hunting clubs, and the cutting of timber and pulpwood. While such activities may well constitute prudent management techniques, they certainly do not result in the preservation of all types of wild nature, flora and fauna. In re North Carolina Forestry Found., Inc., 296 N.C. 330, 250 S.E.2d 236 (1979).

III. DECISIONS UNDER PRIOR LAW.

A. In General.

Editor's Note. *— The cases in the annotations below were decided under former subdivisions of this section that have now been repealed or under prior provisions.*

B. Farm Products Held for Shipment to Foreign Country.

Classification of Tobacco Generally. — The legislature plainly intended to establish two classes of property: (1) under former subdivision (1) of this section, if tobacco is held or stored for shipment to any foreign country, it is exempt; and (2) under former G.S. 105-277(a), if tobacco (or other farm products) is held or stored for manufacture or processing, it is taxed at the preferential rate. In re R.J. Reynolds Tobacco Co., 52 N.C. App. 299, 278 S.E.2d 575 (1981).

Raw Tobacco to Be Manufactured into Cigarettes and Then Shipped. — Raw tobacco is not exempt from taxation as being held or stored for shipment to a foreign country within the meaning of former subdivision (1) of this section where the tobacco is to be manufactured into cigarettes and other tobacco products, and the cigarettes and other products will be shipped to a foreign country; rather, the tobacco is held or stored for processing or manufacture and is taxable at the preferential rate of 60 percent of value under former G.S. 105-277(a). In re R.J. Reynolds Tobacco Co., 52 N.C. App. 299, 278 S.E.2d 575 (1981).

C. Property Shipped into State and Warehoused for Transshipment.

Exemption under former subdivision (10) applied only when, among other things, the goods moved into this State from some place without the State. Scovill Mfg. Co. v. County of Guilford, 28 N.C. App. 209, 220 S.E.2d 188 (1975), cert. denied, 289 N.C. 452, 223 S.E.2d 160 (1976), decided under subdivisions (10) and (11) as they stood before the 1977 amendment.

D. Property Warehoused for Transshipment Outside State.

Assuming that goods are otherwise qualified for exemption under former subdivision (11), they must also be placed in a public warehouse for transshipment to an out-of-state destination. Scovill Mfg. Co. v. County of Guilford, 28 N.C. App. 209, 220 S.E.2d 188 (1975), cert. denied, 289 N.C. 452, 223 S.E.2d 160 (1976) decided under subdivisions (10) and (11) as they stood before the 1977 amendment.

General Assembly intended to deny public warehouse status to owned or leased premises of ultimate consignee or its subsidiary. In re Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

"Transship". — There is nothing to indicate that the word "transship" has a special or technical meaning, therefore, the word is given its natural, approved and recognized meaning. In re Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

Goods Held for Transshipment to Taxpayer Stores. — Warehoused goods held for transshipment to taxpayer's customers are within the exempted class under former subdivision (10) of this section, but goods held for transshipment to taxpayer stores were outside the exempted class and were therefore subject to taxation. In re K-Mart Corp., 79 N.C. App. 725, 340 S.E.2d 752, modified on other grounds, 319 N.C. 378, 354 S.E.2d 468 (1987).

Goods designated for transshipment "to an out-of-state or within the state destination" were not goods designated to an out-of-state destination within the meaning of former subdivision (11) as it stood before the 1977 amendment. Scovill Mfg. Co. v. County of Guilford, 28 N.C. App. 209, 220 S.E.2d 188 (1975), cert. denied, 289 N.C. 452, 223 S.E.2d 160 (1976).

Evidence that most of the goods were eventually shipped to points without State was immaterial. Scovill Mfg. Co. v. County of Guilford, 28 N.C. App. 209, 220 S.E.2d 188 (1975), cert. denied, 289 N.C. 452, 223 S.E.2d 160 (1976), decided under former subdivisions (10) and (11) as they stood before the 1977 amendment.

No time limit on the act of transshipping. — See In re Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

OPINIONS OF ATTORNEY GENERAL

Property of a labor union is not classified out of the ad valorem tax base by subdivision (19) of this section. See opinion of Attorney General to J. Bourke Bilisoly, Wake County Tax Attorney, 50 N.C.A.G. 35 (1980).

Dining facilities located with the lodge structure of Elks Club come within the provisions of subdivision (19), but a swimming pool does not. See opinion of Attorney General to Mr. D.R. Holbrook, Ad Valorem Tax Division, Department of Revenue, 44 N.C.A.G. 160 (1974).

§ 105-275.1: , 105-275.2Repealed by Session Laws 2001-424, s. 34.15, as amended by Session Laws 2002-126, 30A.1, effective July 1, 2002.

§ 105-276. Taxation of intangible personal property.

Intangible personal property that is not excluded from taxation under G.S. 105-275 is subject to this Subchapter. The exclusion of a class of intangible personal property from taxation under G.S. 105-275 does not affect the appraisal or assessment of real property and tangible personal property. (1939, c. 310, s. 601; 1971, c. 806, s. 1; 1973, c. 1180; 1985, c. 656, s. 38; 1987, c. 813, s. 8; 1995, c. 41, s. 6; 1997-23, s. 2.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 481.

CASE NOTES

Applied in Edward Valves, Inc. v. Wake County, 117 N.C. App. 484, 451 S.E.2d 641 (1995), rev'd in part, aff'd in part, 343 N.C. 426, 471 S.E.2d 342 (1996), cert. denied, 519 U.S. 1112, 117 S. Ct. 952, 136 L. Ed. 2d 839 (1997).

§ 105-277. Property classified for taxation at reduced rates; certain deductions.

(a) through (c) Repealed by Session Laws 1987, c. 813, s. 9, effective for taxable years beginning on or after January 1, 1988.

(d) All bona fide indebtedness incurred in the purchase of fertilizer and fertilizer materials owing by a taxpayer as principal debtor may be deducted from the total value of all fertilizer and fertilizer materials as are held by such taxpayer for his own use in agriculture during the current year.

(e) Repealed by Session Laws 1987, c. 813, s. 9, effective for taxable years beginning on or after January 1, 1988.

(f) Repealed by Session Laws 1977, c. 869, s. 1.

(g) Buildings equipped with a solar energy heating or cooling system, or both, are hereby designated a special class of property under authority of Article V, Sec. 2(2) of the North Carolina Constitution. Such buildings shall be assessed for taxation in accordance with each county's schedules of value for buildings equipped with conventional heating or cooling systems and no additional value shall be assigned for the difference in cost between a solar energy heating or cooling system and a conventional system typically found in the county. As used in this classification, the term "system" includes all controls, tanks, pumps, heat exchangers and other equipment used directly and exclusively for the conversion of solar energy for heating or cooling. The term "system" does not include any land or structural elements of the building such as walls and roofs nor other equipment ordinarily contained in the structure.

(h) Private Water Companies. — Contributions in aid of construction and acquisition adjustments. In assessing the property of any private water company, there shall be excluded that portion of the investment of the company represented by contributions in aid of construction and by acquisition adjustments which is designated a special class of property under Article V, Sec. 2(2) of the Constitution. "Investment," "contributions in aid of construction" and "acquisition adjustment" shall have the meanings as those terms are defined in the Uniform System of Accounts specified by the North Carolina Utilities Commission for use by such private water company.

(i) Repealed by Session Laws 1987, c. 622, s. 5. (1947, c. 1026; 1955, c. 697, s. 1; 1961, c. 1169, ss. 6, 7, 71/2; 1963, c. 940; 1971, c. 806, s. 1; 1973, c. 511, s. 4; c. 695, s. 2; 1975, c. 578; 1977, c. 869, s. 1; c. 965; 1979, c. 605, s. 1; 1985, c. 440; c. 656, ss. 52, 52.1; 1985 (Reg. Sess., 1986), c. 947, s. 5; 1987, c. 622, s. 5; c. 813, s. 9; 2003-416, s. 20.)

Cross References. — For present provisions covering subject matter of former subsection (f), see G.S. 105-278.

Legal Periodicals. — For survey of 1977 law on taxation, see 56 N.C.L. Rev. 1128 (1978).

CASE NOTES

I. In General.
II. Decisions under Prior Law.

I. IN GENERAL.

A taxpayer does not have to cite or make reference to the applicable statute in order to claim the applicable exemption allowed by this section if the application shows facts which entitle the applicant to such exemption. In re R.J. Reynolds Tobacco Co., 74 N.C. App. 140, 327 S.E.2d 607 (1985).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases below were decided under former subsections of this section.*

Catchline of Former Subsection (a) Did Not Control over Body of Subsection. — See In re Forsyth County, 285 N.C. 64, 203 S.E.2d 51 (1974).

Assuming the catchline "(a) Agricultural Products in Storage" was inserted by the General Assembly and not by a compiler, nevertheless the body of former subsection (a) provided that the product be held for manufacturing and processing. In re Forsyth County, 285 N.C. 64, 203 S.E.2d 51 (1974).

Former Subsection (a) Held to Discriminate Against Railroads. — Former subsection (a) of this section, which required tobacco warehouses to pay tax on only 60% of their tobacco in storage, discriminated against railroads, whose property was assessed at 100% of market value, in violation of G.S. 306 of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503. Clinchfield R.R. v. Lynch, 605 F. Supp. 1005 (E.D.N.C. 1985), aff'd, 784 F.2d 545 (4th Cir. 1986).

In suits alleging discriminatory taxation of real and personal property in violation of G.S. 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), codified at 49 U.S.C. § 11503 (1982), the trial court was correct in considering as a factor in its finding of tax discrimination the fact that under this section stored tobacco inventories were taxed at only 60% of fair market value. Clinchfield R.R. v. Lynch, 784 F.2d 545 (4th Cir. 1986).

Application of North Carolina's ad valorem property tax to imported tobacco destined for domestic markets did not violate the import-export clause or the due process clause of the federal Constitution. R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986).

Consistent with the supremacy clause, a State may impose a nondiscriminatory ad valorem property tax on imported goods stored in a customs-bonded warehouse and destined for domestic manufacture and sale. R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986).

Classification of Tobacco Generally. — The legislature plainly intended to establish two classes of property: (1) under former G.S. 105-275(1), if tobacco was held or stored for shipment to any foreign country, it was exempt; and (2) under former subsection (a) of this section, if tobacco (or other farm products) was held or stored for manufacture or processing, it was taxed at the preferential rate. In re R.J. Reynolds Tobacco Co., 52 N.C. App. 299, 278 S.E.2d 575 (1981).

Tobacco was an agricultural product under this section until it was manufactured into the finished product. In re R.J. Reynolds Tobacco Co., 52 N.C. App. 299, 278 S.E.2d 575 (1981).

When Tobacco Taxed Pursuant to Former Subsection (a). — Tobacco that is being held or stored to be manufactured or processed is taxed pursuant to this section, where it is given a preferential rate of 60 percent of value for tax purposes. In re R.J. Reynolds Tobacco Co., 52 N.C. App. 299, 278 S.E.2d 575 (1981).

Tobacco removed from shed where hogsheads were stored during early part of aging process was still an agricultural product and retained its preferred status. In re Forsyth County, 285 N.C. 64, 203 S.E.2d 51 (1974).

Raw tobacco was not exempt from taxation as being held or stored for shipment to foreign country within the meaning of former G.S. 105-275(1) where the tobacco was to be manufactured into cigarettes and other tobacco products, and the cigarettes and other products would be shipped to a foreign country; rather, the tobacco was held or stored for processing or manufacture and was taxable at the preferential rate of 60 percent of value under former subsection (a) of this section. In re R.J. Reynolds Tobacco Co., 52 N.C. App. 299, 278 S.E.2d 575 (1981).

§ 105-277.001: Repealed by Session Laws 2001-424, s. 34.15, as amended by Session Laws 2002-126, 30A.1, effective July 1, 2002.

§ 105-277.01. Certain farm products classified for taxation at reduced valuation.

Farm products (including crops but excluding poultry and other livestock) held by or for a cooperative stabilization or marketing association or corporation to which they have been delivered, conveyed, or assigned by the original producer for the purpose of sale are hereby designated a special class of property under authority of Article V, Sec. 2(2), of the North Carolina Constitution. Before being assessed for taxation the appraised valuation of farm products so classified shall be reduced by the amount of any unpaid loan or advance made or granted thereon by the United States government, an agency of the United States government, or a cooperative stabilization or marketing association or corporation. (1973, c. 695, s. 3.)

§ 105-277.1. Property tax homestead exclusion.

(a) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Exclusion. — A permanent residence owned and occupied by a qualifying owner is designated a special class of property under Article V, Sec. 2(2) of the North Carolina Constitution and is taxable in accordance with this section. The amount of the appraised value of the residence equal to the exclusion amount is excluded from taxation. The exclusion amount is the greater of twenty thousand dollars ($20,000) or fifty percent (50%) of the appraised value of the residence. A qualifying owner is an owner who meets all of the following requirements as of January 1 preceding the taxable year for which the benefit is claimed:

(1) Is at least 65 years of age or totally and permanently disabled.

(2) Has an income for the preceding calendar year of not more than the income eligibility limit.

(3) Is a North Carolina resident.

(a) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** Exclusion. — A permanent residence owned and occupied by a qualifying owner is designated a special class of property under Article V, Sec. 2(2) of the North Carolina Constitution and is taxable in accordance with this section. The amount of the appraised value of the residence equal to the exclusion amount is excluded from taxation. The exclusion amount is the greater of twenty-five thousand dollars ($25,000) or fifty percent (50%) of the appraised value of the residence. A qualifying owner is an owner who meets all of the following requirements as of January 1 preceding the taxable year for which the benefit is claimed:

(1) Is at least 65 years of age or totally and permanently disabled.

(2) Has an income for the preceding calendar year of not more than the income eligibility limit.

(3) Is a North Carolina resident.

(a1) Temporary Absence. — An otherwise qualifying owner does not lose the benefit of this exclusion because of a temporary absence from his or her permanent residence for reasons of health, or because of an extended absence while confined to a rest home or nursing home, so long as the residence is unoccupied or occupied by the owner's spouse or other dependent.

(a2) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Income Eligibility Limit. — Until July 1, 2003, the income eligibility limit is eighteen thousand dollars ($18,000). For taxable years beginning on or after July 1, 2003, the income eligibility limit is the amount for the preceding year, adjusted by the same percentage of this amount as the percentage of any cost-of-living adjustment made to the benefits under Titles II and XVI of the Social Security Act for the preceding calendar year, rounded to the nearest one hundred dollars ($100.00). On or before July 1 of each year, the Department of Revenue must determine the income eligibility amount to be in effect for the taxable year beginning the following July 1 and must notify the assessor of each county of the amount to be in effect for that taxable year.

(a2) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** Income Eligibility Limit. — Until July 1, 2008, the income eligibility limit is twenty-five thousand dollars ($25,000). For taxable years beginning on or after July 1, 2008, the income eligibility limit is the amount for the preceding year, adjusted by the same percentage of this amount as the percentage of any cost-of-living adjustment made to the benefits under Titles II and XVI of the Social Security Act for the preceding calendar year, rounded to the nearest one hundred dollars ($100.00). On or before July 1 of each year, the Department of Revenue must determine the income eligibility amount to be in effect for the taxable year beginning the following July 1 and must notify the assessor of each county of the amount to be in effect for that taxable year.

(b) Definitions. — The following definitions apply in this section:

(1) Code. — The Internal Revenue Code, as defined in G.S. 105-228.90.

(1a) **(Effective for taxes imposed for taxable years beginning before July 1, 2008)** Income. — Adjusted gross income, as defined in section 62 of the Code, plus all other moneys received from every source other than gifts or inheritances received from a spouse, lineal ancestor, or lineal descendant. For married applicants residing with their spouses, the income of both spouses must be included, whether or not the property is in both names.

(1a) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** Income. — All moneys received from every source other than gifts or inheritances received from a spouse, lineal ancestor, or lineal descendant. For married applicants residing with their spouses, the income of both spouses must be included, whether or not the property is in both names.

(1b) Owner. — A person who holds legal or equitable title, whether individually, as a tenant by the entirety, a joint tenant, or a tenant in common, or as the holder of a life estate or an estate for the life of another. A manufactured home jointly owned by husband and wife is considered property held by the entirety.

(2) Repealed by Session Laws 1993, c. 360, s. 1.

(2a) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 20.

(3) Permanent residence. — A person's legal residence. It includes the dwelling, the dwelling site, not to exceed one acre, and related improvements. The dwelling may be a single family residence, a unit in a multi-family residential complex, or a manufactured home.

(3a) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2009)** Property tax relief. — The property tax homestead exclusion provided in this section or the property tax homestead circuit breaker provided in G.S. 105-277.1B.

(4) Totally and permanently disabled. — A person is totally and permanently disabled if the person has a physical or mental impairment that substantially precludes him or her from obtaining gainful employment and appears reasonably certain to continue without substantial improvement throughout his or her life.

(c) Application. — An application for the exclusion provided by this section should be filed during the regular listing period, but may be filed and must be accepted at any time up to and through June 1 preceding the tax year for which the exclusion is claimed. When property is owned by two or more persons other than husband and wife and one or more of them qualifies for this exclusion, each owner must apply separately for his or her proportionate share of the exclusion.

(1) Elderly Applicants. — Persons 65 years of age or older may apply for this exclusion by entering the appropriate information on a form made available by the assessor under G.S. 105-282.1.

(2) Disabled Applicants. — Persons who are totally and permanently disabled may apply for this exclusion by (i) entering the appropriate information on a form made available by the assessor under G.S. 105-282.1 and (ii) furnishing acceptable proof of their disability. The proof must be in the form of a certificate from a physician licensed to practice medicine in North Carolina or from a governmental agency authorized to determine qualification for disability benefits. After a disabled applicant has qualified for this classification, the applicant is not required to furnish an additional certificate unless the applicant's disability is reduced to the extent that the applicant could no longer be certified for the taxation at reduced valuation.

(d) Multiple Ownership. — A permanent residence owned and occupied by husband and wife as tenants by the entirety is entitled to the full benefit of this exclusion notwithstanding that only one of them meets the age or disability requirements of this section. When a permanent residence is owned and occupied by two or more persons other than husband and wife and one or more of the owners qualifies for this exclusion, each qualifying owner is entitled to the full amount of the exclusion not to exceed his or her proportionate share of the valuation of the property. No part of an exclusion available to one co-owner may be claimed by any other co-owner and in no event may the total exclusion allowed for a permanent residence exceed the exclusion amount provided in this section.

(e) An owner who qualifies for both kinds of property tax relief may elect the property tax homestead circuit breaker under G.S. 105-277.1B instead of the property tax homestead exclusion provided in this section. When property is owned by two or more persons, each person must qualify for both kinds of property tax relief and must elect the property tax homestead circuit breaker in order for the property tax homestead circuit breaker to be allowed instead of the property tax homestead exclusion. (1971, c. 932, s. 1; 1973, c. 448, s. 1; 1975, c. 881, s. 2; 1977, c. 666, s. 1; 1979, c. 356, s. 1; c. 846, s. 1; 1981, c. 54, s. 1; c. 1052, s. 1; 1985, c. 656, ss. 44, 45; 1985 (Reg. Sess., 1986), c. 982, ss. 19, 20; 1987, c. 45, s. 1; 1993, c. 360, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 15.1(a); 2001-308, s. 1; 2007-484, s. 43.7T(a), (b); 2007-497, ss. 1.1, 2.1, 2.2.)

Subsections (a), (a2) and Subdivision (b)(1a) Set Out Twice. — The first versions of subsections (a) and (a2) and subdivision (b)(1a) set out above are effective for taxes imposed for taxable years beginning before July 1, 2008. The second versions of subsections (a) and (a2) and subdivision (b)(1a) set out above are effective for taxes imposed for taxable years beginning on or after July 1, 2008.

Editor's Note. — Session Laws 2007-497, s. 1.2, provides: "The Revenue Laws Study Committee may study the issue of whether to index the minimum excluded appraised value limit in the property tax homestead exclusion in G.S. 105-277.1 and, if so, which index to use."

Effect of Amendments. — Session Laws 2007-497, s. 1.1, as amended by Session Laws 2007-484, s. 43.7T(a), effective for taxes imposed for taxable years beginning on or after July 1, 2008, substituted "twenty-five thousand dollars ($25,000)" for "twenty-thousand dollars ($20,000)" in subsection (a); in subsection (a2), substituted "July 1, 2008" for "July 1, 2003", twice and "twenty-five thousand dollars ($25,000)" for "eighteen-thousand dollars ($18,000)"; and in subdivision (b)(1a), substituted "All" for "Adjusted gross income, as defined in section 62 of the Code, plus all other."

Session Laws 2007-497, ss. 2.1 and 2.2, as amended by Session Laws 2007-484, s. 43.7T(b), effective for taxes imposed for taxable years beginning on or after July 1, 2009, added subdivision (b)(3a) and subsection (e).

OPINIONS OF ATTORNEY GENERAL

Exclusion May Not Be Claimed by Executor. — See opinion of Attorney General to Mr. D.R. Holbrook, State Board of Assessment, 42 N.C.A.G. 198 (1973).

Person Not Disqualified for Beneficial Treatment If Away from Residence and in Nursing Home for More Than Six Months. — See opinion of Attorney General to Mr. John R. Milliken, 41 N.C.A.G. 725 (1972).

Treatment If Away from Residence and in Nursing Home for More Than Six Months. — See opinion of Attorney General to Mr. John R. Milliken, 41 N.C.A.G. 725 (1972).

§ 105-277.1A: Repealed by Session Laws 2001-424, s. 34.15, as amended by Session Laws 2002-126, 30A.1, effective July 1, 2002.

§ 105-277.1B. (Effective for taxes imposed for taxable years beginning on or after July 1, 2009.) Property tax homestead circuit breaker.

(a) Classification. — A permanent residence owned and occupied by a qualifying owner is designated a special class of property under Article V, Section 2(2) of the North Carolina Constitution and is taxable in accordance with this section.

(b) Definitions. — The definitions provided in G.S. 105-277.1 apply to this section.

(c) Income Eligibility Limit. — The income eligibility limit provided in G.S. 105-277.1(a2) applies to this section.

(d) Qualifying Owner. — For the purpose of qualifying for the property tax homestead circuit breaker under this section, a qualifying owner is an owner who meets all of the following requirements as of January 1 preceding the taxable year for which the benefit is claimed:

(1) The owner has an income for the preceding calendar year of not more than one hundred fifty percent (150%) of the income eligibility limit specified in subsection (c) of this section.

(2) The owner has occupied the property as a permanent residence for at least five years.

(3) The owner is at least 65 years of age or totally and permanently disabled.

(4) The owner is a North Carolina resident.

(e) Multiple Owners. — When a permanent residence is owned and occupied by two or more persons other than husband and wife, no property tax homestead circuit breaker is allowed unless all of the owners qualify and elect to defer taxes under this section.

(f) Tax Limitation. — A qualifying owner may defer the portion of tax imposed on his or her permanent residence if it exceeds a percentage of the qualifying owner's income as provided in this section.

Income	**Percentage**
Less than the income eligibility limit	4.0%
100% to 150% of the income eligibility limit	5.0%

(g) Temporary Absence. — An otherwise qualifying owner does not lose the benefit of this circuit breaker because of a temporary absence from his or her permanent residence for reasons of health, or because of an extended absence while confined to a rest home or nursing home, so long as the residence is unoccupied or occupied by the owner's spouse or other dependent.

(h) Deferred Taxes. — The difference between the taxes due under this section and the taxes that would have been payable in the absence of this section are a lien on the real property of the taxpayer as provided in G.S. 105-355(a). The difference in taxes for the three fiscal years preceding the current tax year shall be carried forward in the records of the taxing unit or units as deferred taxes. Interest accrues on the deferred taxes due as if they had been payable on the dates on which they originally became due. On or before September 1 of each year, the assessor shall notify each residence owner to whom a tax deferral has previously been granted of the accumulated sum of deferred taxes and interest.

(i) Disqualifying Events. — Taxes deferred under this section are payable within nine months after a disqualifying event. The tax for the fiscal year that opens in a calendar year in which deferred taxes become due is computed as if the property was not eligible for property tax relief under this section. Each of the following constitutes a disqualifying event:

(1) The owner transfers the residence. Transfer of the residence under this subdivision is not a disqualifying event if (i) the owner transfers the residence as part of a divorce proceeding to either his or her spouse who qualifies for tax deferral under this section or to a co-owner of the residence, (ii) that individual occupies or continues to occupy the property as his or her permanent residence, and (iii) that individual elects to continue deferring payment of the tax.

(2) The owner dies. Death of the owner under this subdivision is not a disqualifying event if (i) the owner's share passes to either his or her spouse who qualifies for tax deferral under this section or to a co-owner of the residence, (ii) that individual occupies or continues to occupy the property as his or her permanent residence, and (iii) that individual elects to continue deferring payment of the tax.

(3) The owner ceases to use the property as a permanent residence.

(j) Interruption of Qualification. — If the owner of a tax-deferred residence does not qualify under this section for deferral as of January 1 preceding a taxable year for reasons other than a disqualifying event or if the owner of a tax-deferred residence revokes an application for deferral by notifying the assessor in writing, the owner may not defer any additional property taxes under this section without submitting a new application. Deferred taxes from earlier years do not become due because of an interruption of qualification; however, deferred taxes existing at the time of an interruption of qualification shall be carried forward until the occurrence of a disqualifying event. If the owner qualifies for tax deferral under this section following an interruption of qualification, the taxing unit or units shall disregard the years during which there was an interruption of qualification for purposes of determining the three fiscal years preceding the current tax year under subsection (g) of this section.

(k) Prepayment. — All or part of the deferred taxes and accrued interest may be paid to the tax collector at any time. Any partial payment is applied first to accrued interest. A residence owner to whom a tax deferral has previously been granted may revoke the application for deferral at any time by notifying the assessor in writing.

(*l*) Creditor Limitations. — A mortgagee or trustee that elects to pay any tax deferred by the owner of a residence subject to a mortgage or deed of trust does not acquire a right to foreclose as a result of the election. Except for requirements dictated by federal law or regulation, any provision in a mortgage, deed of trust, or other agreement that prohibits the owner from deferring taxes on property under this section is void.

(m) Construction. — This section does not affect the attachment of a lien for personal property taxes against a tax-deferred residence.

(n) Application. — An application for property tax relief provided by this section should be filed during the regular listing period, but may be filed and must be accepted at any time up to and through June 1 preceding the tax year for which the relief is claimed. Persons may apply for this property tax relief by entering the appropriate information on a form made available by the assessor under G.S. 105-282.1. (2007-484, s. 43.7T(b); 2007-497, s. 2.3.)

Editor's Note. — Session Laws 2007-497, s. 2.6, as amended by Session Laws 2007-484, s. 43.7T(b), made this section effective for taxes imposed for taxable years beginning on or after July 1, 2009.

§ 105-277.2. Agricultural, horticultural, and forestland — Definitions.

The following definitions apply in G.S. 105-277.3 through G.S. 105-277.7:

(1) Agricultural land. — Land that is a part of a farm unit that is actively engaged in the commercial production or growing of crops, plants, or animals under a sound management program. Agricultural land includes woodland and wasteland that is a part of the farm unit, but the woodland and wasteland included in the unit must be appraised under the use-value schedules as woodland or wasteland. A farm unit may consist of more than one tract of agricultural land, but at least one of the tracts must meet the requirements in G.S. 105-277.3(a)(1), and each tract must be under a sound management program. If the agricultural land includes less than 20 acres of woodland, then the woodland portion is not required to be under a sound management program. Also, woodland is not required to be under a sound management program if it is determined that the highest and best use of the woodland is to diminish wind erosion of adjacent agricultural land, protect water quality of adjacent agricultural land, or serve as buffers for adjacent livestock or poultry operations.

(1a) Business entity. — A corporation, a general partnership, a limited partnership, or a limited liability company.

(2) Forestland. — Land that is a part of a forest unit that is actively engaged in the commercial growing of trees under a sound management program. Forestland includes wasteland that is a part of the forest unit, but the wasteland included in the unit must be appraised under the use-value schedules as wasteland. A forest unit may consist of more than one tract of forestland, but at least one of the tracts must meet the requirements in G.S. 105-277.3(a)(3), and each tract must be under a sound management program.

(3) Horticultural land. — Land that is a part of a horticultural unit that is actively engaged in the commercial production or growing of fruits

or vegetables or nursery or floral products under a sound management program. Horticultural land includes woodland and wasteland that is a part of the horticultural unit, but the woodland and wasteland included in the unit must be appraised under the use-value schedules as woodland or wasteland. A horticultural unit may consist of more than one tract of horticultural land, but at least one of the tracts must meet the requirements in G.S. 105-277.3(a)(2), and each tract must be under a sound management program. If the horticultural land includes less than 20 acres of woodland, then the woodland portion is not required to be under a sound management program. Also, woodland is not required to be under a sound management program if it is determined that the highest and best use of the woodland is to diminish wind erosion of adjacent horticultural land or protect water quality of adjacent horticultural land. Land used to grow horticultural and agricultural crops on a rotating basis or where the horticultural crop is set out or planted and harvested within one growing season, may be treated as agricultural land as described in subdivision (1) of this section when there is determined to be no significant difference in the cash rental rates for the land.

(4) Individually owned. — Owned by one of the following:

a. A natural person. For the purpose of this section, a natural person who is an income beneficiary of a trust that owns land may elect to treat the person's beneficial share of the land as owned by that person. If the person's beneficial interest is not an identifiable share of land but can be established as a proportional interest in the trust income, the person's beneficial share of land is a percentage of the land owned by the trust that corresponds to the beneficiary's proportional interest in the trust income. For the purpose of this section, a natural person who is a member of a business entity, other than a corporation, that owns land may elect to treat the person's share of the land as owned by that person. The person's share is a percentage of the land owned by the business entity that corresponds to the person's percentage of ownership in the entity.

b. A business entity having as its principal business one of the activities described in subdivisions (1), (2), and (3) and whose members are all natural persons who meet one or more of the conditions listed in this sub-subdivision. For the purpose of this sub-subdivision, the terms "having as its principal business" and "actively engaged in the business of the entity" include the leasing of the land for one of the activities described in subdivisions (1), (2), and (3) only if all members of the business entity are relatives.

1. The member is actively engaged in the business of the entity.
2. The member is a relative of a member who is actively engaged in the business of the entity.
3. The member is a relative of, and inherited the membership interest from, a decedent who met one or both of the preceding conditions after the land qualified for classification in the hands of the business entity.

c. A trust that was created by a natural person who transferred the land to the trust and each of whose beneficiaries who is currently entitled to receive income or principal meets one of the following conditions:

1. Is the creator of the trust or the creator's relative.
2. Is a second trust whose beneficiaries who are currently entitled to receive income or principal are all either the creator of the first trust or the creator's relatives.

d. A testamentary trust that meets all of the following conditions:
  1. It was created by a natural person who transferred to the trust land that qualified in that person's hands for classification under G.S. 105-277.3.
  2. At the time of the creator's death, the creator had no relatives as defined in this section as of the date of death.
  3. The trust income, less reasonable administrative expenses, is used exclusively for educational, scientific, literary, cultural, charitable, or religious purposes as defined in G.S. 105-278.3(d).

e. Tenants in common, if each tenant is either a natural person or a business entity described in sub-subdivision b. of this subdivision. Tenants in common may elect to treat their individual shares as owned by them individually in accordance with G.S. 105-302(c)(9). The ownership requirements of G.S. 105-277.3(b) apply to each tenant in common who is a natural person, and the ownership requirements of G.S. 105-277.3(b1) apply to each tenant in common who is a business entity.

(4a) Member. — A shareholder of a corporation, a partner of a general or limited partnership, or a member of a limited liability company.

(5) Present-use value. — The value of land in its current use as agricultural land, horticultural land, or forestland, based solely on its ability to produce income and assuming an average level of management. A rate of nine percent (9%) shall be used to capitalize the expected net income of forestland. The capitalization rate for agricultural land and horticultural land is to be determined by the Use-Value Advisory Board as provided in G.S. 105-277.7.

(5a) Relative. — Any of the following:
a. A spouse or the spouse's lineal ancestor or descendant.
b. A lineal ancestor or a lineal descendant.
c. A brother or sister, or the lineal descendant of a brother or sister. For the purposes of this sub-subdivision, the term brother or sister includes stepbrother or stepsister.
d. An aunt or an uncle.
e. A spouse of a person listed in paragraphs a. through d. For the purpose of this subdivision, an adoptive or adopted relative is a relative and the term "spouse" includes a surviving spouse.

(6) Sound management program. — A program of production designed to obtain the greatest net return from the land consistent with its conservation and long-term improvement.

(7) Unit. — One or more tracts of agricultural land, horticultural land, or forestland. Multiple tracts must be under the same ownership and be of the same type of classification. If the multiple tracts are located within different counties, they must be within 50 miles of a tract qualifying under G.S. 105-277.3(a). (1973, c. 709, s. 1; 1975, c. 746, s. 1; 1985, c. 628, s. 1; c. 667, ss. 1, 4; 1987, c. 698, s. 1; 1995, c. 454, s. 1; 1995 (Reg. Sess., 1996), c. 646, s. 17; 1998-98, s. 24; 2002-184, s. 1; 2004-8, s. 1; 2005-313, ss. 1, 2.)

Editor's Note. — Session Laws 2006-106, s. 9, provides: "The Revenue Laws Study Committee shall study and recommend any changes to the special class of property taxed on the basis of the value of the property at its present use. The study shall include an evaluation of the following:

"(1) Expanding the present-use value system to include wildlife land and other conservation land.

"(2) Adding more specific land resource management criteria to the sound management programs required for lands enrolled in the present-use value system.

"The Committee shall make a report of its findings and recommendations to the 2007 General Assembly."

Effect of Amendments. — Session Laws 2005-313, ss. 1 and 2, effective for taxes imposed for taxable years beginning on or after July 1, 2005, added the last sentence of subdivision (3); and in subdivision (7), added "and be of the same type of classification" at the end of the first sentence, and in the second sentence, deleted the language following "105-277.3(a)," which read: "and share one of the following characteristics: a. Type of classification. b. Use of the same equipment or labor force."

Legal Periodicals. — For survey of 1980 tax law, see 59 N.C.L. Rev. 1233 (1981).

CASE NOTES

Ownership distinctions of subdivision (4)b and (5a) of this section satisfy equal protection requirements of state and federal constitutions. In re Consol. Appeals of Certain Timber Cos., 98 N.C. App. 412, 391 S.E.2d 503 (1990).

Statutory Scheme Is Tax Deferment. — The statutory scheme for taxation of property qualifying for present use value treatment as defined in this section and (former) G.S. 105-277.3 is a tax deferment. In re Parker, 76 N.C. App. 447, 333 S.E.2d 749 (1985).

Principal Business of a Corporation. — Factors which should be looked at in determining the principal business of a corporation for present use valuation other than gross income are net income or profit and its source, annual receipts and disbursement, the purpose of the corporation as stated in its corporate charter and the actual corporate function in relation to its stated corporate purpose. W.R. Co. v. North Carolina Property Tax Comm'n, 48 N.C. App. 245, 269 S.E.2d 636 (1980).

Property to Be Valued on Ability to Produce Income in Present Use. — Clear legislative intent under this section is that property be valued on the basis of its ability to produce income in the manner of its present use; all other uses for which the property might be employed, and the many factors enunciated in G.S. 105-317(a), are irrelevant and immaterial. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Commonality Among Land Tracts Is Required To Be Part of a Farm Unit. — In complying with the statutory requirements of G.S. 105-277.2, 105-277.3(a)(1) of the North Carolina Machinery Act, G.S. 105-277.2 et seq., for qualifying as agricultural land for taxing purposes, land tracts should at least have a rational relationship with each other in order to comprise a tract within a farm unit; there must be a reasonable amount of commonality so as to qualify a land tract as being a part of the whole. In re Frizzelle, 151 N.C. App. 552, 566 S.E.2d 506, 2002 N.C. App. LEXIS 770 (2002).

Taxpayer Had Standing to Appeal to County. — Where taxpayer complained that the property of a real estate corporation was undervalued, with the result that other property owners in the county would bear a disproportionate share of the tax burden, taxpayer was adversely affected by the alleged undervaluation of the corporation's property and had standing to appeal to the county for a revaluation of the corporate property. In re Whiteside Estates, Inc., 136 N.C. App. 360, 525 S.E.2d 196, 2000 N.C. App. LEXIS 64 (2000), cert. denied, 351 N.C. 473, 543 S.E.2d 511 (2000).

Commercial production. — Taxpayers' production of hay from their former dairy farm was sufficient to meet the statutory requirement for an agricultural land present-use classification that the land was actively engaged in the commercial production of crops during the tax year. In re Briarfield Farms, 147 N.C. App. 208, 555 S.E.2d 621, 2001 N.C. App. LEXIS 1132 (2001), cert. denied, 355 N.C. 211, 559 S.E.2d 798 (2002).

Sound management program. — Taxpayers were not required to have experience in the operation of a farm, to have training in agricultural science, or to seek advice from the county extension office before they could be considered to be operating their property under a sound management program. In re Briarfield Farms, 147 N.C. App. 208, 555 S.E.2d 621, 2001 N.C. App. LEXIS 1132 (2001), cert. denied, 355 N.C. 211, 559 S.E.2d 798 (2002).

Corporation Not Growing Trees Under a "Sound Management Program." — The Commission's findings of fact were supported by competent, material, and substantial evidence that the property of the family corporation was not actively engaged in the commercial growing of trees under a sound management program, and therefore, not eligible for taxation at present-use value. In re Whiteside Estates, Inc., 136 N.C. App. 360, 525 S.E.2d 196, 2000 N.C. App. LEXIS 64 (2000), cert. denied, 351 N.C. 473, 543 S.E.2d 511 (2000).

Agricultural Classification Was Properly Denied. — Although appellant taxpayer asserted that the taxpayer's 7.66-acre land tract should have been given the present-use value classification, agricultural, under G.S. 105-277.3(a)(1) of the North Carolina Machinery Act, G.S. 105-277.2 et seq., because it was allegedly part of a farm unit involving over 100 acres in another county, the Property Tax Commission reasonably concluded that the land tract was not part of a farm unit for purposes of G.S. 105-277.2 and refused to apply the agricultural classification where the tract was over 100 miles from the taxpayer's farm land in the other county and only a fraction of the 7.66-acre tract was used for growing crops. In re Frizzelle, 151 N.C. App. 552, 566 S.E.2d 506, 2002 N.C. App. LEXIS 770 (2002).

Applied in Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

Cited in In re Davis, 113 N.C. App. 743, 440 S.E.2d 307 (1994).

OPINIONS OF ATTORNEY GENERAL

Interest Is Due on Deferred Taxes. — See opinion of Attorney General of Honorable B.D. Schwartz, N.C. House of Representatives, 43 N.C.A.G. 64 (1973).

§ 105-277.3. Agricultural, horticultural, and forestland — Classifications.

(a) Classes Defined. — The following classes of property are designated special classes of property under authority of Section 2(2) of Article V of the North Carolina Constitution and must be appraised, assessed, and taxed as provided in G.S. 105-277.2 through G.S. 105-277.7.

(1) **Effective for taxes imposed for taxable years beginning before July 1, 2008)** Agricultural land. — Individually owned agricultural land consisting of one or more tracts, one of which consists of at least 10 acres that are in actual production and that, for the three years preceding January 1 of the year for which the benefit of this section is claimed, have produced an average gross income of at least one thousand dollars ($1,000). Gross income includes income from the sale of the agricultural products produced from the land, any payments received under a governmental soil conservation or land retirement program, and the amount paid to the taxpayer during the taxable year pursuant to P.L. 108-357, Title VI, Fair and Equitable Tobacco Reform Act of 2004. Land in actual production includes land under improvements used in the commercial production or growing of crops, plants, or animals.

(1) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2008)** Agricultural land. — Individually owned agricultural land consisting of one or more tracts, one of which satisfies the requirements of this subdivision. For agricultural land used as a farm for aquatic species, as defined in G.S. 106-758, the tract must meet the income requirement for agricultural land and must consist of at least five acres in actual production or produce at least 20,000 pounds of aquatic species for commercial sale annually, regardless of acreage. For all other agricultural land, the tract must meet the income requirement for agricultural land and must consist of at least 10 acres that are in actual production. Land in actual production includes land under improvements used in the commercial production or growing of crops, plants, or animals.

To meet the income requirement, agricultural land must, for the three years preceding January 1 of the year for which the benefit of this section is claimed, have produced an average gross income of at least one thousand dollars ($1,000). Gross income includes income from the sale of the agricultural products produced from the land, any payments received under a governmental soil conservation or land retirement program, and the amount paid to the taxpayer during the taxable year pursuant to P.L. 108-357, Title VI, Fair and Equitable Tobacco Reform Act of 2004.

G.S. 105-277.3(a)(1) is set out twice. See note.

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(2) Horticultural land. — Individually owned horticultural land consisting of one or more tracts, one of which consists of at least five acres that are in actual production and that, for the three years preceding January 1 of the year for which the benefit of this section is claimed, have met the applicable minimum gross income requirement. Land in actual production includes land under improvements used in the commercial production or growing of fruits or vegetables or nursery or floral products. Land that has been used to produce evergreens intended for use as Christmas trees must have met the minimum gross income requirements established by the Department of Revenue for the land. All other horticultural land must have produced an average gross income of at least one thousand dollars ($1,000). Gross income includes income from the sale of the horticultural products produced from the land and any payments received under a governmental soil conservation or land retirement program.

(3) Forestland. — Individually owned forestland consisting of one or more tracts, one of which consists of at least 20 acres that are in actual production and are not included in a farm unit.

(b) Natural Person Ownership Requirements. — In order to come within a classification described in subsection (a) of this section, the land must, if owned by a natural person, also satisfy one of the following conditions:

(1) It is the owner's place of residence.

(2) It has been owned by the current owner or a relative of the current owner for the four years preceding January 1 of the year for which the benefit of this section is claimed.

(3) At the time of transfer to the current owner, it qualified for classification in the hands of a business entity or trust that transferred the land to the current owner who was a member of the business entity or a beneficiary of the trust, as appropriate.

(b1) Entity Ownership Requirements. — In order to come within a classification described in subsection (a) of this section, the land must, if owned by a business entity or trust, have been owned by the business entity or trust or by one or more of its members or creators, respectively, for the four years immediately preceding January 1 of the year for which the benefit of this section is claimed.

(b2) Exception to Ownership Requirements. — Notwithstanding the provisions of subsections (b) and (b1) of this section, land may qualify for classification in the hands of the new owner if all of the conditions listed in either subdivision of this subsection are met, even if the new owner does not meet all of the ownership requirements of subsections (b) and (b1) of this section with respect to the land.

(1) Exception for assumption of deferred liability. — If the land qualifies for classification in the hands of the new owner under the provisions of this subdivision, then the deferred taxes remain a lien on the land under G.S. 105-277.4(c), the new owner becomes liable for the deferred taxes, and the deferred taxes become payable if the land fails to meet any other condition or requirement for classification. Land qualifies for classification in the hands of the new owner if all of the following conditions are met:

a. The land was appraised at its present use value at the time title to the land passed to the new owner.

b. At the time title to the land passed to the new owner, the new owner acquires the land for the purposes of and continues to use the land for the purposes it was classified under subsection (a) of this section while under previous ownership.

c. The new owner has timely filed an application as required by G.S. 105-277.4(a) and has certified that the new owner accepts liability for the deferred taxes and intends to continue the present use of the land.

(2) Exception for expansion of existing unit. — If deferred liability is not assumed under subdivision (1) of this subsection, the land qualifies for classification in the hands of the new owner if, at the time title passed to the new owner, the land was being used for the same purpose and was eligible for appraisal at its present-use value as other land already owned by the new owner and classified under subsection (a) of this section. The new owner must timely file an application as required by G.S. 105-277.4(a).

(c) Repealed by Session Laws 1995, c. 454, s. 2.

(d) Exception for Conservation Reserve Program. — Land enrolled in the federal Conservation Reserve Program authorized by 16 U.S.C. Chapter 58 is considered to be in actual production, and income derived from participation in the federal Conservation Reserve Program may be used in meeting the minimum gross income requirements of this section either separately or in combination with income from actual production. Land enrolled in the federal Conservation Reserve Program must be assessed as agricultural land if it is planted in vegetation other than trees, or as forestland if it is planted in trees.

(d1) Exception for Easements on Qualified Conservation Lands Previously Appraised at Use Value. — Property that is appraised at its present-use value under G.S. 105-277.4(b) shall continue to qualify for appraisal, assessment, and taxation as provided in G.S. 105-277.2 through G.S. 105-277.7 as long as the property is subject to an enforceable conservation easement that would qualify for the conservation tax credit provided in G.S. 105-130.34 and G.S. 105-151.12, without regard to actual production or income requirements of this section. Notwithstanding G.S. 105-277.3(b) and (b1), subsequent transfer of the property does not extinguish its present-use value eligibility as long as the property remains subject to an enforceable conservation easement that qualifies for the conservation tax credit provided in G.S. 105-130.34 and G.S. 105-151.12. The exception provided in this subsection applies only to that part of the property that is subject to the easement.

(e) Exception for Turkey Disease. — Agricultural land that meets all of the following conditions is considered to be in actual production and to meet the minimum gross income requirements:

(1) The land was in actual production in turkey growing within the preceding two years and qualified for present use value treatment while it was in actual production.

(2) The land was taken out of actual production in turkey growing solely for health and safety considerations due to the presence of Poult Enteritis Mortality Syndrome among turkeys in the same county or a neighboring county.

(3) The land is otherwise eligible for present use value treatment.

(f) Sound Management Program for Agricultural Land and Horticultural Land. — If the property owner demonstrates any one of the following factors with respect to agricultural land or horticultural land, then the land is operated under a sound management program:

(1) Enrollment in and compliance with an agency-administered and approved farm management plan.

(2) Compliance with a set of best management practices.

(3) Compliance with a minimum gross income per acre test.

(4) Evidence of net income from the farm operation.

(5) Evidence that farming is the farm operator's principal source of income.

(6) Certification by a recognized agricultural or horticultural agency within the county that the land is operated under a sound management program.

Operation under a sound management program may also be demonstrated by evidence of other similar factors. As long as a farm operator meets the sound management requirements, it is irrelevant whether the property owner received income or rent from the farm operator.

(g) Sound Management Program for Forestland. — If the owner of forestland demonstrates that the forestland complies with a written sound forest management plan for the production and sale of forest products, then the forestland is operated under a sound management program. (1973, c. 709, s. 1; 1975, c. 746, s. 2; 1983, c. 821; c. 826; 1985, c. 667, ss. 2, 3, 6.1; 1987, c. 698, ss. 2-5; 1987 (Reg. Sess., 1988), c. 1044, s. 13.1; 1989, cc. 99, 736, s. 1; 1989 (Reg. Sess., 1990), c. 814, s. 29; 1995, c. 454, s. 2; 1997-272, s. 1; 1998-98, s. 22; 2001-499, s. 1; 2002-184, s. 2; 2005-293, s. 1; 2005-313, s. 3; 2007-484, s. 43.7T(c); 2007-497, s. 3.1.)

Subdivision (a)(1) Set Out Twice. — The first version of subdivision (a)(1) set out above is effective for taxes imposed for taxable years beginning prior to July 1, 2008. The second version of subdivision (a)(1) set out above is effective for taxes imposed for taxable years beginning on or after July 1, 2008.

Cross References. — As to taxation of lessees and users of tax-exempt cropland or forestland, see G.S. 105-282.7.

Effect of Amendments. — Session Laws 2005-293, s. 1, effective for taxes imposed for taxable years beginning on or after July 1, 2005, substituted "program, and the amount paid to the taxpayer during the taxable year pursuant to P.L. 108-357, Title VI, Fair and Equitable Tobacco Reform Act of 2004" for "program" in the next-to-last sentence of subdivision (a)(1).

Session Laws 2005-313, s. 3, effective for taxes imposed for taxable years beginning on or after July 1, 2005, in subsection (b2), divided the former first paragraph into the introductory paragraph and subdivision (1), redesignated former subdivisions (1) through (3) as present subdivisions a through c, and inserted subdivision (2), inserted "either subdivision of" in the present introductory paragraph, added the catchline and last sentence of subdivision (1), substituted "subdivision" for "subsection" in subdivision (1), and deleted "or was eligible for appraisal at its present use value" following "present use value" in subdivision a.

Session Laws 2007-497, s. 3.1, as amended by Session Laws 2007-484, s. 43.7T(c), effective for taxes imposed for taxable years beginning on or after July 1, 2008, rewrote subdivision (a)(1).

Legal Periodicals. — For survey of 1980 tax law, see 59 N.C.L. Rev. 1233 (1981).

CASE NOTES

This section expressly indicates the constitutional base found in N.C. Const., Art. V, § 2(2) upon which special classification is made and permitted. W.R. Co. v. North Carolina Property Tax Comm'n, 48 N.C. App. 245, 269 S.E.2d 636 (1980), cert. denied, 301 N.C. 727, 276 S.E.2d 287 (1981).

Statutory Scheme Is Tax Deferment. — The statutory scheme for taxation of property qualifying for present use value treatment as defined in G.S. 105-277.2 and this section is a tax deferment. In re Parker, 76 N.C. App. 447, 333 S.E.2d 749 (1985).

The word "passed" in context of subsection (c) means that the transference or conveyance has already occurred and that for purposes of this portion of the statute, the property should be viewed in the hands of the grantee. In re Davis, 113 N.C. App. 743, 440 S.E.2d 307 (1994).

Commonality Among Land Tracts Is Required To Be Part of a Farm Unit. — In complying with the statutory requirements of G.S. 105-277.2, 105-277.3(a)(1) of the North Carolina Machinery Act, G.S. 105-277.2 et seq., for qualifying as agricultural land for taxing purposes, land tracts should at least have a rational relationship with each other in order to comprise a tract within a farm unit; there must be a reasonable amount of commonality so as to qualify a land tract as being a part of the whole. In re Frizzelle, 151 N.C. App. 552, 566 S.E.2d 506, 2002 N.C. App. LEXIS 770 (2002).

Present Use Violation. — Where the property met all of the requirements of subsection (c), the Property Tax Commission did not err in concluding that the property qualified for present use valuation. In re Davis, 113 N.C. App. 743, 440 S.E.2d 307 (1994).

Agricultural Classification Was Prop-

erly Denied. — Although appellant taxpayer asserted that the taxpayer's 7.66-acre land tract should have been given the present-use value classification, agricultural, under G.S. 105-277.3(a)(1) of the North Carolina Machinery Act, G.S. 105-277.2 et seq., because it was allegedly part of a farm unit involving over 100 acres in another county, the Property Tax Commission reasonably concluded that the land tract was not part of a farm unit for purposes of G.S. 105-277.2 and refused to apply the agricultural classification where the tract was over 100 miles from the taxpayer's farm land in the other county and only a fraction of the 7.66-acre tract was used for growing crops. In re Frizzelle, 151 N.C. App. 552, 566 S.E.2d 506, 2002 N.C. App. LEXIS 770 (2002).

Income requirement. — Requirement that property produce at least $1,000 in income in a tax year in order to qualify for a farm-use classification applied to the entire property, and not to each 10-acre division of the property. In re Briarfield Farms, 147 N.C. App. 208, 555 S.E.2d 621, 2001 N.C. App. LEXIS 1132 (2001), cert. denied, 355 N.C. 211, 559 S.E.2d 798 (2002).

Subsection (b) does not apply to subsection (c). In re Davis, 113 N.C. App. 743, 440 S.E.2d 307 (1994).

Cited in In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981); In re ELE, Inc., 97 N.C. App. 253, 388 S.E.2d 241 (1990); In re Consol. Appeals of Certain Timber Cos., 98 N.C. App. 412, 391 S.E.2d 503 (1990); Erwin v. Tweed, 142 N.C. App. 643, 544 S.E.2d 803, 2001 N.C. App. LEXIS 175 (2001), review denied, 353 N.C. 724, 551 S.E.2d 437 (2001).

§ 105-277.4. Agricultural, horticultural and forestland — Application; appraisal at use value; appeal; deferred taxes.

(a) Application. — Property coming within one of the classes defined in G.S. 105-277.3 is eligible for taxation on the basis of the value of the property in its present use if a timely and proper application is filed with the assessor of the county in which the property is located. The application must clearly show that the property comes within one of the classes and must also contain any other relevant information required by the assessor to properly appraise the property at its present-use value. An initial application must be filed during the regular listing period of the year for which the benefit of this classification is first claimed, or within 30 days of the date shown on a notice of a change in valuation made pursuant to G.S. 105-286 or G.S. 105-287. A new application is not required to be submitted unless the property is transferred or becomes ineligible for use-value appraisal because of a change in use or acreage. An application required due to transfer of the land may be submitted at any time during the calendar year but must be submitted within 60 days of the date of the property's transfer.

(a1) Late Application. — Upon a showing of good cause by the applicant for failure to make a timely application as required by subsection (a) of this section, an application may be approved by the board of equalization and review or, if that board is not in session, by the board of county commissioners. An untimely application approved under this subsection applies only to property taxes levied by the county or municipality in the calendar year in which the untimely application is filed. Decisions of the county board may be appealed to the Property Tax Commission.

(b) Appraisal at Present-use Value. — Upon receipt of a properly executed application, the assessor must appraise the property at its present-use value as established in the schedule prepared pursuant to G.S. 105-317. In appraising the property at its present-use value, the assessor must appraise the improvements located on qualifying land according to the schedules and standards used in appraising other similar improvements in the county. If all or any part of a qualifying tract of land is located within the limits of an incorporated city or town, or is property annexed subject to G.S. 160A-37(f1) or G.S. 160A-49(f1), the assessor must furnish a copy of the property record showing both the present-use appraisal and the valuation upon which the property would have been taxed in the absence of this classification to the collector of the city or town. The assessor must also notify the tax collector of any changes in the appraisals or in the eligibility of the property for the benefit of this classification. Upon a request for a certification pursuant to G.S. 160A-37(f1) or G.S.160A-49(f1), or any change in the certification, the assessor for the county where the land subject to the annexation is located must, within 30 days, determine if the land meets the requirements of G.S. 160A-37(f1)(2) or G.S. 160A-49(f1)(2) and report the results of its findings to the city.

(b1) Appeal. — Decisions of the assessor regarding the qualification or appraisal of property under this section may be appealed to the county board of equalization and review or, if that board is not in session, to the board of county commissioners. An appeal must be made within 60 days after the decision of the assessor. If an owner submits additional information to the assessor pursuant to G.S. 105-296(j), the appeal must be made within 60 days after the assessor's decision based on the additional information. Decisions of the county board may be appealed to the Property Tax Commission.

(c) Deferred Taxes. — Land meeting the conditions for classification under G.S. 105-277.3 must be taxed on the basis of the value of the land for its present use. The difference between the taxes due on the present-use basis and the taxes that would have been payable in the absence of this classification, together with any interest, penalties, or costs that may accrue thereon, are a lien on the real property of the taxpayer as provided in G.S. 105-355(a). The difference in taxes must be carried forward in the records of the taxing unit or units as deferred taxes. The taxes become due and payable when the land fails to meet any condition or requirement for classification. Failure to have an application approved is ground for disqualification. The tax for the fiscal year that opens in the calendar year in which deferred taxes become due is computed as if the land had not been classified for that year, and taxes for the preceding three fiscal years that have been deferred are immediately payable, together with interest as provided in G.S. 105-360 for unpaid taxes. Interest accrues on the deferred taxes due as if they had been payable on the dates on which they originally became due. If only a part of the qualifying tract of land fails to meet a condition or requirement for classification, the assessor must determine the amount of deferred taxes applicable to that part and that amount becomes payable with interest as provided above. Upon the payment of any taxes deferred in accordance with this section for the three years immediately preceding a disqualification, all liens arising under this subsection are extinguished. The deferred taxes for any given year may be paid in that year without the qualifying tract of land becoming ineligible for deferred status.

(d) Exceptions. — Notwithstanding the provisions of subsection (c) of this section, if property loses its eligibility for present use value classification solely due to one of the following reasons, no deferred taxes are due and the lien for the deferred taxes is extinguished:

(1) There is a change in income caused by enrollment of the property in the federal conservation reserve program established under 16 U.S.C. Chapter 58.

(2) The property is conveyed by gift to a nonprofit organization and qualifies for exclusion from the tax base pursuant to G.S. 105-275(12) or G.S. 105-275(29).

(3) The property is conveyed by gift to the State, a political subdivision of the State, or the United States.

(e) Repealed by Session Laws 1997-270, s. 3, effective July 3, 1997. (1973, c. 709, s. 1; c. 905; c. 906, ss. 1, 2; 1975, c. 62; c. 746, ss. 3-7; 1981, c. 835; 1985, c. 518, s. 1; c. 667, ss. 5, 6; 1987, c. 45, s. 1; c. 295, s. 5; c. 698, s. 6; 1987 (Reg. Sess., 1988), c. 1044, s. 13.2; 1995, c. 443, s. 4; c. 454, s. 3; 1997-270, s. 3; 1998-98, s. 23; 1998-150, s. 1; 2001-499, s. 2; 2002-184, s. 3; 2005-313, s. 4; 2006-30, s. 4.)

Effect of Amendments. — Session Laws 2005-313, s. 4, effective for taxes imposed for taxable years beginning on or after July 1, 2005, inserted the present second and third sentences in subsection (b1).

Session Laws 2006-30, s. 4, effective June 29, 2006, added subsection (a1).

CASE NOTES

Cited in W.R. Co. v. North Carolina Property Tax Comm'n, 48 N.C. App. 245, 269 S.E.2d 636 (1980); In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981); In re Johnson, 106 N.C. App. 61, 415 S.E.2d 108 (1992); In re Davis, 113 N.C. App. 743, 440 S.E.2d 307 (1994).

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Computation of Deferred Taxes Upon Disqualification for Present-Use Valuation. — Applying this section sequentially, current taxes for the fiscal year payable in the calendar year in which eligibility is lost are computed without benefit of the preferential classification; then, any liens carried forward from previous tax years for which present use status was allowed, not to exceed three years, become immediately collectible. See opinion of Attorney General to Representative Julia C. Howard, 2000 N.C. AG LEXIS 36 (3/22/2000).

§ 105-277.5. Agricultural, horticultural and forestland — Notice of change in use.

Not later than the close of the listing period following a change which could disqualify all or a part of a tract of land receiving the benefit of this classification, the property owner shall furnish the assessor with complete information regarding such change. Any property owner who fails to notify the assessor of changes as aforesaid regarding land receiving the benefit of this classification shall be subject to a penalty of ten percent (10%) of the total amount of the deferred taxes and interest thereon for each listing period for which the failure to report continues. (1973, c. 709, s. 1; 1975, c. 746, s. 8; 1987, c. 45, s. 1.)

CASE NOTES

Notice of change in use not required. — When the taxpayers transitioned the use of their property from a dairy farm to the cultivation of ground crops, they were not required to notify the county of this change, as both uses qualified their property as agricultural land farm-use property; so the property's status never changed. In re Briarfield Farms, 147 N.C. App. 208, 555 S.E.2d 621, 2001 N.C. App. LEXIS 1132 (2001), cert. denied, 355 N.C. 211, 559 S.E.2d 798 (2002).

Cited in W.R. Co. v. North Carolina Property Tax Comm'n, 48 N.C. App. 245, 269 S.E.2d 636 (1980).

§ 105-277.6. Agricultural, horticultural and forestland — Appraisal; computation of deferred tax.

(a) In determining the amount of the deferred taxes herein provided, the assessor shall use the appraised valuation established in the county's last general revaluation except for any changes made under the provisions of G.S. 105-287.

(b) In revaluation years, as provided in G.S. 105-286, all property entitled to classification under G.S. 105-277.3 shall be reappraised at its true value in money and at its present use value as of the effective date of the revaluation. The two valuations shall continue in effect and shall provide the basis for deferred taxes until a change in one or both of the appraisals is required by law. The present use-value schedule, standards, and rules shall be used by the tax assessor to appraise property receiving the benefit of this classification until the next general revaluation of real property in the county as required by G.S. 105-286.

(c) Repealed by Session Laws 1987, c. 295, s. 2. (1973, c. 709, s. 1; 1975, c. 746, ss. 9, 10; 1987, c. 45, s. 1; c. 295, s. 2.)

CASE NOTES

This section mandates that true value schedule and use value schedule be determined separately. In re Parker, 76 N.C. App. 447, 333 S.E.2d 749 (1985), decided prior to the 1987 amendments.

Under the plain language of this section, the board of county commissioners was required to adopt a separate market value schedule and use value schedule. In re Parker, 76 N.C. App. 447, 333 S.E.2d 749 (1985).

Cited in In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

§ 105-277.7. Use-Value Advisory Board.

(a) Creation and Membership. — The Use-Value Advisory Board is established under the supervision of the Agricultural Extension Service of North Carolina State University. The Director of the Agricultural Extension Service of North Carolina State University shall serve as the chair of the Board. The Board shall consist of the following additional members, to serve ex officio:

(1) A representative of the Department of Agriculture and Consumer Services, designated by the Commissioner of Agriculture.

(2) A representative of the Division of Forest Resources of the Department of Environment and Natural Resources, designated by the Director of that Division.

(3) A representative of the Agricultural Extension Service at North Carolina Agricultural and Technical State University, designated by the Director of the Extension Service.

(4) A representative of the North Carolina Farm Bureau Federation, Inc., designated by the President of the Bureau.

(5) A representative of the North Carolina Association of Assessing Officers, designated by the President of the Association.

(6) The Director of the Property Tax Division of the North Carolina Department of Revenue or the Director's designee.

(7) A representative of the North Carolina Association of County Commissioners, designated by the President of the Association.

(8) A representative of the North Carolina Forestry Association, designated by the President of the Association.

(b) Staff. — The Agricultural Extension Service at North Carolina State University must provide clerical assistance to the Board.

(c) Duties. — The Board must annually submit to the Department of Revenue a recommended use-value manual. In developing the manual, the Board may consult with federal and State agencies as needed. The manual must contain all of the following:

(1) The estimated cash rental rates for agricultural lands and horticultural lands for the various classes of soils found in the State. The rental rates must recognize the productivity levels by class of soil or geographic area, and the crop as either agricultural or horticultural. The rental rates must be based on the rental value of the land to be used for agricultural or horticultural purposes when those uses are presumed to be the highest and best use of the land. The recommended rental rates may be established from individual county studies or from contracts with federal or State agencies as needed.

(2) The recommended net income ranges for forestland furnished to the Board by the Forestry Section of the North Carolina Cooperative

Extension Service. These net income ranges may be based on up to six classes of land within each Major Land Resource Area designated by the United States Soil Conservation Service. In developing these ranges, the Forestry Section must consider the soil productivity and indicator tree species or stand type, the average stand establishment and annual management costs, the average rotation length and timber yield, and the average timber stumpage prices.

(3) The capitalization rates adopted by the Board prior to February 1 for use in capitalizing incomes into values. The capitalization rate for forestland shall be nine percent (9%). The capitalization rate for agricultural land and horticultural land must be no less than six percent (6%) and no more than seven percent (7%). The incomes must be in the form of cash rents for agricultural lands and horticultural lands and net incomes for forestlands.

(4) The value per acre adopted by the Board for the best agricultural land. The value may not exceed one thousand two hundred dollars ($1,200).

(5) Recommendations concerning any changes to the capitalization rate for agricultural land and horticultural land and to the maximum value per acre for the best agricultural land and horticultural land based on a calculation to be determined by the Board. The Board shall annually report these recommendations to the Revenue Laws Study Committee and to the President Pro Tempore of the Senate and the Speaker of the House of Representatives.

(6) Recommendations concerning requirements for horticultural land used to produce evergreens intended for use as Christmas trees when requested to do so by the Department. (1973, c. 709, s. 1; 1975, c. 746, s. 11; 1985, c. 628, s. 2; 1989, c. 727, s. 218(44); c. 736, s. 2; 1997-261, s. 109; 1997-443, s. 11A.119(a); 2002-184, s. 4; 2005-313, s. 5; 2005-386, s. 1.3.)

Effect of Amendments. — Session Laws 2005-313, s. 5, effective for taxes imposed for taxable years beginning on or after July 1, 2005, in subsection (c), added "and the crop as either agricultural or horticultural" at the end of the second sentence of subdivision (1), and inserted "and horticultural land" preceding "based on a calculation" in the first sentence of subdivision (5).

Session Laws 2005-386, s. 1.3, effective September 13, 2005, substituted "Division of Forest Resources" for "Forest Resources Division" in subdivision (a)(2); and substituted "Farm Bureau Federation, Inc." for "Farm Bureau" in subdivision (a)(4).

CASE NOTES

Cited in In re ELE, Inc., 97 N.C. App. 253, 388 S.E.2d 241 (1990).

§ 105-277.8. Taxation of property of nonprofit homeowners' association.

(a) The value of real and personal property owned by a nonprofit homeowners' association shall be included in the appraisals of property owned by members of the association and shall not be assessed against the association if:

(1) All property owned by the association is held for the use, benefit, and enjoyment of all members of the association equally;

(2) Each member of the association has an irrevocable right to use and enjoy, on an equal basis, all property owned by the association, subject

to any restrictions imposed by the instruments conveying the right or the rules, regulations, or bylaws of the association; and

(3) Each irrevocable right to use and enjoy all property owned by the association is appurtenant to taxable real property owned by a member of the association.

The assessor may allocate the value of the association's property among the property of the association's members on any fair and reasonable basis.

(b) As used in this section, "nonprofit homeowners' association" means a homeowners' association as defined in § 528(c) of the Internal Revenue Code. (1979, c. 686, s. 1; 1987, c. 130.)

Legal Periodicals. — For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

§ 105-277.9. Taxation of property inside certain roadway corridors.

Real property that lies within a transportation corridor marked on an official map filed under Article 2E of Chapter 136 of the General Statutes is designated a special class of property under Article V, Sec. 2(2) of the North Carolina Constitution and is taxable at twenty percent (20%) of the general tax rate levied on real property by the taxing unit in which the property is situated if:

(1) As of January 1, no building or other structure is located on the property; and

(2) The property has not been subdivided, as defined in G.S. 153A-335 or G.S. 160A-376, since it was included in the corridor. (1987, c. 747, s. 22; 1998-184, s. 2.)

§ 105-277.10. Taxation of precious metals used or held for use directly in manufacturing or processing by a manufacturer.

Precious metals, including rhodium and platinum, used or held for use directly in manufacturing or processing by a manufacturer as part of industrial machinery is designated a special class of property under Article V, Sec. 2(2) of the North Carolina Constitution and shall be assessed for taxation in accordance with this section. The classified property shall be assessed at the lower of its true value or the manufacturer's original cost less depreciation. The original cost of the classified property shall be adjusted by the index factor, if any, that applies in assessing the industrial machinery with which the property is used, and the depreciable life of the classified property shall be the life assigned to the industrial machinery with which the property is used. The residual value of the classified property may not exceed twenty-five percent (25%) of the manufacturer's original cost. (1989, c. 674.)

§ 105-277.11. Taxation of property subject to a development financing district agreement.

Property that is in a development financing district established pursuant to G.S. 160A-515.1 or G.S. 158-7.3 and that is subject to an agreement entered into pursuant to G.S. 159-108, shall, pursuant to Article V, Section 14 of the North Carolina Constitution, be assessed for taxation at the greater of its true value or the minimum value established in the agreement. (2003-403, s. 21.)

Editor's Note. — A G.S. 105-277.11 was enacted by Session Laws 1993, c. 497, s. 21, but was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue financing bonds to be used to finance public activities associated with private economic development projects. This amendment was submitted to the people on November 2, 1993 and was defeated. The section, therefore, never took effect.

Session Laws 2003-403, s. 25, made this section effective upon certification of approval of amendment to Article V, § 14 of the Constitution of North Carolina, as proposed in Session Laws 2003-403, s. 1.

Session Laws 2003-403, ss. 24 and 25, provide: "The amendment set out in Section 1 of this act shall be submitted to the qualified voters of the State at the statewide general election in November 2004, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163 of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

"Constitutional amendment to promote local economic and community development projects by (i) permitting the General Assembly to enact general laws giving counties, cities, and towns the power to finance public improvements associated with qualified private economic and community improvements within development districts, as long as the financing is secured by the additional tax revenues resulting from the enhanced property value within the development district and is not secured by a pledge of the local government's faith and credit or general taxing authority, which financing is not subject to a referendum; and (ii) permitting the owners of property in the development district to agree to a minimum tax value for their property, which is binding on future owners as long as the development district is in existence.

"If a majority of votes cast on the question are in favor of the amendment set out in Section 1 of this act, the State Board of Elections shall certify the amendment to the Secretary of State. The amendment set out in Section 1 of this act and the amendments set out in Sections 2 through 21 of this act become effective upon this certification. The Secretary of State shall enroll the amendment so certified among the permanent records of that office. If a majority of votes cast on the question are not in favor of the amendment set out in Section 1 of this act, that amendment and the amendments set out in Sections 2 through 21 of this act do not go into effect."

The constitutional amendment adding N.C. Const. art. 5, § 14, as proposed in Session Laws 2003-403, s. 1, was adopted by vote of the people at the general election held on November 2, 2004.

Session Laws 2003-403, s. 22, provides that the act [Session Laws 2003-403], being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect these purposes.

Session Laws 2003-403, s. 23, is a severability clause.

Legal Periodicals. — For note, "Tax Increment Financing in North Carolina: The Myth of the Countermajoritarian Difficulty," see 83 N.C. L. Rev. 1526 (2005).

§ 105-277.12. Antique airplanes.

(a) For the purpose of this section, the term "antique airplane" means an airplane that meets all of the following conditions:

(1) It is registered with the Federal Aviation Administration and is a model year 1954 or older.

(2) It is maintained primarily for use in exhibitions, club activities, air shows, and other public interest functions.

(3) It is used only occasionally for other purposes.

(4) It is used by the owner for a purpose other than the production of income.

(b) Antique airplanes are designated a special class of property under Article V, Sec. 2(2) of the North Carolina Constitution and shall be assessed for taxation in accordance with this section. An antique airplane shall be assessed at the lower of its true value or five thousand dollars ($5,000). (1997-355, s. 1.)

§ 105-277.13. Taxation of improvements on brownfields.

(a) Qualifying improvements on brownfields properties are designated a special class of property under Article V, Sec. 2(2) of the North Carolina

Constitution and shall be appraised, assessed, and taxed in accordance with this section. An owner of land is entitled to the partial exclusion provided by this section for the first five taxable years beginning after completion of qualifying improvements made after the later of July 1, 2000, or the date of the brownfields agreement. After property has qualified for the exclusion provided by this section, the assessor for the county in which the property is located shall annually appraise the improvements made to the property during the period of time that the owner is entitled to the exclusion.

(b) For the purposes of this section, the terms "qualifying improvements on brownfields properties" and "qualifying improvements" mean improvements made to real property that is subject to a brownfields agreement entered into by the Department of Environment and Natural Resources and the owner pursuant to G.S. 130A-310.32.

(c) The following table establishes the percentage of the appraised value of the qualified improvements that is excluded based on the taxable year:

Year	Percent of Appraised Value Excluded
Year 1	90%
Year 2	75%
Year 3	50%
Year 4	30%
Year 5	10%.

(2000-158, s. 1.)

Editor's Note. — Session Laws 2000-158, s. 3, made this section effective for taxes imposed for taxable years beginning on or after July 1, 2001.

§ 105-277.14. (Effective for taxes imposed for taxable years beginning on or after July 1, 2009.) Taxation of working waterfront property.

(a) Definitions. — The following definitions apply in this section:

(1) Coastal fishing waters. — Defined in G.S. 113-129.

(2) Commercial fishing operation. — Defined in G.S. 113-168.

(3) Fish processing. — Processing fish, as defined in G.S. 113-129, for sale.

(4) Working waterfront property. — Any of the following property that has, for the most recent three-year period, produced an average gross income of at least one thousand dollars ($1,000):

a. A pier that extends into coastal fishing waters and limits access to those who pay a fee.

b. Real property that is adjacent to coastal fishing waters and is primarily used for a commercial fishing operation or fish processing, including adjacent land that is under improvements used for one of these purposes.

(b) Classification. — Working waterfront property is designated a special class of property under Section 2(2) of Article V of the North Carolina Constitution and must be appraised, assessed, and taxed on the basis of the value of the property in its present use rather than on its true value. Working waterfront property includes land reasonably necessary for the convenient use of the property.

(c) Deferred Taxes. — The difference between the taxes that are due on working waterfront property taxed on the basis of its present use and that would be due if the property were taxed on the basis of its true value is a lien on the property. The difference in taxes must be carried forward in the records of each taxing unit as deferred taxes. The deferred taxes become due when the property no longer qualifies as working waterfront property. The tax for the fiscal year that opens in the calendar year in which deferred taxes become due is computed as if the property had not been classified for that year, and taxes for the preceding three fiscal years that have been deferred are immediately payable, together with interest, as provided in G.S. 105-360 for unpaid taxes. Interest accrues on the deferred taxes due as if they had been payable on the dates on which they originally became due. If only a part of the property no longer qualifies as working waterfront property, the assessor must determine the amount of deferred taxes applicable to that part and that amount becomes payable with interest. Upon the payment of any taxes deferred under this section for the three years immediately preceding a disqualification, all liens arising under this subsection are extinguished.

(d) Application. — To obtain the benefit of this section, the owner of working waterfront property must submit an application for classification and exclusion to the assessor of the county in which the property is located, and the assessor must approve the application. An application must contain the information and be in the form required by the assessor. An initial application must be filed during the regular listing period of the year for which the benefit of this classification is first claimed or within 30 days of the date shown on a notice of change in valuation made pursuant to G.S. 105-286 or G.S. 105-287. A new application is not required to be submitted unless the property is transferred or becomes ineligible for classification under this section. " (2007-485, s. 1.)

Editor's Note. — Session Laws 2007-485, s. 7, made this section effective for taxes imposed for taxable years beginning on or after July 1, 2009.

§ 105-278. Historic properties.

(a) Real property designated as a historic property by a local ordinance adopted pursuant to former G.S. 160A-399.4 or designated as a historic landmark by a local ordinance adopted pursuant to G.S. 160A-400.5 is designated a special class of property under authority of Article V, Sec. 2(2) of the North Carolina Constitution. Property so classified shall be taxed uniformly as a class in each local taxing unit on the basis of fifty percent (50%) of the true value of the property as determined pursuant to G.S. 105-285 and 105-286, or 105-287.

(b) The difference between the taxes due on the basis of fifty percent (50%) of the true value of the property and the taxes that would have been payable in the absence of the classification provided for in subsection (a) shall be a lien on the property of the taxpayer as provided in G.S. 105-355(a) and shall be carried forward in the records of the taxing unit or units as deferred taxes, but shall not be payable until the property loses its eligibility for the benefit of this classification because of a change in an ordinance designating a historic property or a change in the property, except by fire or other natural disaster, which causes its historical significance to be lost or substantially impaired. The tax for the fiscal year that opens in the calendar year in which a disqualification occurs shall be computed as if the property had not been classified for that year, and taxes for the preceding three fiscal years that have been deferred as provided herein shall be payable immediately, together with interest thereon as provided in G.S. 105-360 for unpaid taxes, which shall accrue on the deferred taxes as if they had been payable on the dates on which they originally became due. If only a part of the historic property loses its eligibility for the classification, a determination shall be made of the amount of deferred taxes applicable to that part, and the amount shall be payable with interest as provided above. (1977, c. 869, s. 2; 1981, c. 501; 1989, c. 706, s. 3.1; 2005-435, s. 38; 2006-162, s. 28.)

Editor's Note. — Section 160A-399.4, referred to in subsection (a) of this section, was repealed by Session Laws 1989, c. 706, s. 1. See now G.S. 160A-400.5.

Effect of Amendments. — Session Laws 2005-435, s. 38, effective January 1, 2006, substituted "G.S. 160A-400.7" for "G.S. 160A-399.4" in the introductory language of subsection (a) and made a minor stylistic change.

Session Laws 2006-162, s. 28, effective July 24, 2006, in the first sentence of subsection (a), substituted "property" for "structure or site" near the beginning and substituted "former G.S. 160A-399.4" for "G.S. 160A-400.7" near the middle.

Legal Periodicals. — For article, "A Decade of Preservation and Preservation Law," see 11 N.C. Cent. L.J. 214 (1980).

CASE NOTES

Cited in In re North Carolina Forestry Found., Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978).

§ 105-278.1. Exemption of real and personal property owned by units of government.

(a) Real and personal property owned by the United States and, by virtue of federal law, not subject to State and local taxes shall be exempted from taxation.

(b) Real and personal property belonging to the State, counties, and municipalities is exempt from taxation.

(c) For purposes of this section:

(1) A specified unit of government (federal, State, or local) includes its departments, institutions, and agencies.

(2) By way of illustration but not by way of limitation, the following boards, commissions, authorities, and institutions are units of State government:

a. The State Marketing Authority established by G.S. 106-529.

b. The Board of Governors of the University of North Carolina incorporated under the provisions of G.S. 116-3 and known as "The University of North Carolina."

c. The North Carolina Museum of Art made an agency of the State under G.S. 140-5.12.

(3) By way of illustration but not by way of limitation, the following boards, commissions, authorities, and institutions are units of local government of this State:

a. An airport authority, board, or commission created as a separate and independent body corporate and politic by an act of the General Assembly.

b. An airport authority, board, or commission created as a separate and independent body corporate and politic by one or more counties or municipalities or combinations thereof under the authority of an act of the General Assembly.

c. A hospital authority created under G.S. 131E-17.

d. A housing authority created under G.S. 157-4 or G.S. 157- 4.1.

e. A municipal parking authority created under G.S. 160-477.

f. A veterans' recreation authority created under G.S. 165-26. (1973, c. 695, s. 4; 1987, c. 777, s. 1; 2005-435, s. 39.)

Editor's Note. — Section 160-477, referred to in subdivision (c)(3)e, has been transferred to G.S. 160A-552.

Effect of Amendments. — Session Laws 2005-435, s. 39, effective January 1, 2006, substituted "G.S. 140-5.12" for "G.S. 140-1" in subdivision (c)(2)c.; and substituted "G.S. 131E-17" for "G.S. 131-93" in subdivision (c)(3)c.

Legal Periodicals. — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

For survey of 1980 tax law, see 59 N.C.L. Rev. 1233 (1981).

For note on the rejection of the "public purpose" requirement for state tax exemption, see 17 Wake Forest L. Rev. 293 (1981).

CASE NOTES

Constitutionality. — Property owned by the State is exempt from ad valorem taxation by N.C. Const., Art. V, § 2(3) solely by reason of State ownership, and this section as it read prior to amendment in 1987, requiring property owned by the State to be held exclusively for a public purpose in order to be exempt from taxation, was unconstitutional. Therefore, the Towns of Chapel Hill and Carrboro and the County of Orange may not assess ad valorem taxes against any property owned by The University of North Carolina, an agency of the State, regardless of the purpose for which the property is held. In re University of N.C., 300 N.C. 563, 268 S.E.2d 472 (1980).

The holdings of cases misapplying the holding of Atlantic & N.C.R.R. v. Board of Comm'rs, 75 N.C. 474 (1876), as mandating a "public purpose" requirement for the exemption of State-owned property under the North Carolina Constitution: Board of Fin. Control v. County of Henderson, 208 N.C. 569, 181 S.E. 636 (1935); Town of Bensen v. County of Johnston, 209 N.C. 751, 185 S.E. 6 (1936); Town of Warrenton v. Warren County, 215 N.C. 342, 2 S.E.2d 463 (1939); and City of Winston-Salem v. Forsyth County, 217 N.C. 704, 9 S.E.2d 381 (1940), must be considered not in keeping with the rationale expressed in the present case and in other opinions of the Court of Appeals. In re University of N.C., 300 N.C. 563, 268 S.E.2d 472 (1980).

Cited in Craven County v. Hall, 87 N.C. App. 256, 360 S.E.2d 479 (1987).

OPINIONS OF ATTORNEY GENERAL

Real estate leased by a town was not exempt as property belonging to a municipality. See opinion of Attorney General to Huey Marshall, County Attorney, 2000 N.C. AG LEXIS 1 (3/28/2000).

§ 105-278.2. Burial property.

(a) Real property set apart for burial purposes shall be exempted from taxation unless it is owned and held for purposes of (i) sale or rental or (ii) sale of burial rights therein.

(b) Taxable real property set apart for human burial purposes is hereby designated a special class of property under authority of Article V, Section 2(2) of the North Carolina Constitution, and it shall be assessed for taxation taking into consideration the following:

(1) The effect on its value by division and development into burial plots;
(2) Whether it is irrevocably dedicated for human burial purposes by plat recorded with the Register of Deeds in the county in which the land is located; and
(3) Whether the owner is prohibited or restricted by law or otherwise from selling, mortgaging, leasing or encumbering the same.

(c) For purposes of this section, the term "real property" includes land, tombs, vaults, monuments, and mausoleums, and the term "burial" includes entombment. (1973, c. 695, s. 4; 1987, c. 724.)

CASE NOTES

Property Not Exempted. — Where taxpayer corporation owned undeveloped, unmapped land as part of a tract of land set apart as a cemetery, which land was irrevocably dedicated for use exclusively as a cemetery under the North Carolina Cemetery Act, and where the taxpayer was not holding undeveloped land for its own burial, because the undeveloped land was irrevocably dedicated for use exclusively as a cemetery, the taxpayer could only have been holding it for the purpose of sale to others as burial sites, and as such the land did not fall under the exemption of this section as tax-exempt property. In re Lee Memory Gardens, Inc., 110 N.C. App. 541, 430 S.E.2d 451 (1993).

Cited in In re Springmoor, Inc., 348 N.C. App. 1, 498 S.E.2d 177 (1998).

§ 105-278.3. Real and personal property used for religious purposes.

(a) Buildings, the land they actually occupy, and additional adjacent land reasonably necessary for the convenient use of any such building shall be exempted from taxation if wholly owned by an agency listed in subsection (c), below, and if:

(1) Wholly and exclusively used by its owner for religious purposes as defined in subsection (d)(1), below; or

(2) Occupied gratuitously by one other than the owner and wholly and exclusively used by the occupant for religious, charitable, or nonprofit educational, literary, scientific, or cultural purposes.

(b) Personal property shall be exempted from taxation if wholly owned by an agency listed in subsection (c), below, and if:

(1) Wholly and exclusively used by its owner for religious purposes; or

(2) Gratuitously made available to one other than the owner and wholly and exclusively used by the possessor for religious, charitable, or nonprofit educational, literary, scientific, or cultural purposes.

(c) The following agencies, when the other requirements of this section are met, may obtain exemption for their properties:

(1) A congregation, parish, mission, or similar local unit of a church or religious body; or

(2) A conference, association, presbytery, diocese, district, synod, or similar unit comprising local units of a church or religious body.

(d) Within the meaning of this section:

(1) A religious purpose is one that pertains to practicing, teaching, and setting forth a religion. Although worship is the most common religious purpose, the term encompasses other activities that demonstrate and further the beliefs and objectives of a given church or religious body. Within the meaning of this section, the ownership and maintenance of a general or promotional office or headquarters by an owner listed in subdivision (2) of subsection (c), above, is a religious purpose and the ownership and maintenance of residences for clergy, rabbis, priests or nuns assigned to or serving a congregation, parish, mission or similar local unit, or a conference, association, presbytery, diocese, district, synod, province or similar unit of a church or religious body or residences for clergy on furlough or unassigned, is also a religious purpose. However, the ownership and maintenance of residences for other employees is not a religious purpose for either a local unit of a church or a religious body or a conference, association, presbytery, diocese, district, synod, or similar unit of a church or religious body. Provided, however, that where part of property which otherwise qualifies for the exemption provided herein is made available as a residence for an individual who provides guardian, janitorial and custodial services for such property, or who oversees and supervises qualifying activities upon and in connection with said property, the entire property shall be considered as wholly and exclusively used for a religious purpose.

(2) A charitable purpose is one that has humane and philanthropic objectives; it is an activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward. The humane treatment of animals is also a charitable purpose.

(3) An educational purpose is one that has as its objective the education or instruction of human beings; it comprehends the transmission of information and the training or development of the knowledge or skills of individual persons.

(4) A literary purpose is one that pertains to letters or literature, especially writing, publishing, and the study of literature. It includes the literature of the stage and screen as well as the performance or exhibition of works based on literature.

(5) A cultural purpose is one that is conducive to the enlightenment and refinement of taste acquired through intellectual and aesthetic training, education, and discipline.

(6) A scientific purpose is one that yields knowledge systematically through research, experimentation or other work done in one or more of the natural sciences.

(e) Notwithstanding the exclusive-use requirement of subsection (a), above, if part of a property that otherwise meets that subsection's requirements is used for a purpose that would require exemption if the entire property were so used, the valuation of the part so used shall be exempted from taxation.

(f) The fact that a building or facility is incidentally available to and patronized by the general public, so long as there is no material amount of business or patronage with the general public, shall not defeat the exemption granted by this section.

(g) Notwithstanding the exclusive-use requirement of subsection (a), above, any parking lot wholly owned by an agency listed in subsection (c), above, may be used for parking without removing the tax exemption granted in this section; provided, the total charge for said uses shall not exceed that portion of the actual maintenance expenditures for the parking lot reasonably estimated to have been made on account of said uses. This subsection shall apply beginning with the taxable year that commences on January 1, 1978. (1973, c. 695, s. 4; c. 1421; 1975, c. 848; 1977, c. 867; 2005-435, s. 59(a).)

Effect of Amendments. — Session Laws 2005-435, s. 59.(a), effective January 1, 2006, rewrote subdivision (d)(4).

Legal Periodicals. — For symposium on historic preservation which includes a discussion of relevant North Carolina law, see 12 Wake Forest L. Rev. 9 (1976).

For article on mail-order ministries under the section 170 charitable contribution deduction, see 11 Campbell L. Rev. 1 (1988).

CASE NOTES

Property Must Be Presently Used for Exempt Purposes. — The rule in North Carolina is that unless property is presently used for tax exempt purposes, it is not tax exempt; because no public purpose is served by permitting land to lie unused and untaxed, present use, not intended use, controls. In re Worley, 93 N.C. App. 191, 377 S.E.2d 270 (1989).

It was undisputed that the church youth groups used the property in question for recreational church-related activities; therefore, the use was present and for religious purposes. In re Worley, 93 N.C. App. 191, 377 S.E.2d 270 (1989).

Property Held for Present and Future Use Still Exempt. — Property which was being used for religious purposes was not removed from the operation of this section simply because it was also being held for future use. In re Worley, 93 N.C. App. 191, 377 S.E.2d 270 (1989).

Natural areas reserved and used as a spiritual retreat should be exempt from ad valorem taxation on "religious purposes" grounds. In re Worley, 93 N.C. App. 191, 377 S.E.2d 270 (1989).

Property Used as a Buffer Zone. — Use of church-owned property as a buffer zone to screen the church from industrial exposure was an exempt use under this section. In re Worley, 93 N.C. App. 191, 377 S.E.2d 270 (1989).

Use of adjacent undeveloped land as a buffer zone was reasonably necessary for the convenient use of [church] buildings and the use of the property as a buffer zone to protect the sanctity and serenity of the church from encroaching industrial development was a permissible religious purpose and present use entitling the property to exemption. In re Worley, 93 N.C. App. 191, 377 S.E.2d 270 (1989).

Church Camp. — Where there was substantial evidence that the primary purpose of camp was to serve the religious and spiritual needs of the members of church, the fact that others were permitted to use the camp and that some were charged a fee was not determinative. In re Mount Shepherd Methodist Camp, 120 N.C. App. 388, 462 S.E.2d 229 (1995).

Natural Areas of Church Camp. — Property Tax Commission did not err as a matter of law in concluding that the natural areas of Church Camp, where no improvements were located, were properly within the scope of this section. In re Mount Shepherd Methodist Camp, 120 N.C. App. 388, 462 S.E.2d 229 (1995).

Cited in In re Springmoor, Inc., 348 N.C. App. 1, 498 S.E.2d 177 (1998); In re Master's Mission, 152 N.C. App. 640, 568 S.E.2d 208, 2002 N.C. App. LEXIS 964 (2002).

§ 105-278.4. Real and personal property used for educational purposes.

(a) Buildings. — Buildings, the land they actually occupy, and additional land reasonably necessary for the convenient use of any such building shall be exempted from taxation if all of the following requirements are met:

(1) Owned by either of the following:

a. An educational institution; or

b. A nonprofit entity for the sole benefit of a constituent or affiliated institution of The University of North Carolina, an institution as defined in G.S. 116-22, a North Carolina community college, or a combination of these;

(2) The owner is not organized or operated for profit and no officer, shareholder, member, or employee of the owner or any other person is entitled to receive pecuniary profit from the owner's operations except reasonable compensation for services;

(3) Of a kind commonly employed in the performance of those activities naturally and properly incident to the operation of an educational institution such as the owner; and

(4) Wholly and exclusively used for educational purposes by the owner or occupied gratuitously by another nonprofit educational institution and wholly and exclusively used by the occupant for nonprofit educational purposes.

(b) Land. — Land (exclusive of improvements); and improvements other than buildings, the land actually occupied by such improvements, and additional land reasonably necessary for the convenient use of any such improvement shall be exempted from taxation if:

(1) Owned by an educational institution that owns real property entitled to exemption under the provisions of subsection (a), above;

(2) Of a kind commonly employed in the performance of those activities naturally and properly incident to the operation of an educational institution such as the owner; and

(3) Wholly and exclusively used for educational purposes by the owner or occupied gratuitously by another nonprofit educational institution (as defined herein) and wholly and exclusively used by the occupant for nonprofit educational purposes.

(c) Partial Exemption. — Notwithstanding the exclusive-use requirements of subsections (a) and (b), above, if part of a property that otherwise meets the requirements of one of those subsections is used for a purpose that would require exemption if the entire property were so used, the valuation of the part so used shall be exempted from taxation.

(d) Public Use. — The fact that a building or facility is incidentally available to and patronized by the general public, so long as there is no material amount of business or patronage with the general public, does not defeat the exemption granted by this section.

(e) Personal Property. — Personal property owned by a church, a religious body, or an educational institution shall be exempted from taxation if:

(1) The owner is not organized or operated for profit, and no officer, shareholder, member, or employee of the owner, or any other person is entitled to receive pecuniary profit from the owner's operations except reasonable compensation for services; and

(2) Used wholly and exclusively for educational purposes by the owner or held gratuitously by a church, religious body, or nonprofit educational institution other than the owner, and wholly and exclusively used for nonprofit educational purposes by the possessor.

(f) Definitions. — The following definitions apply in this section:

(1) Educational institution. — The term includes a university, a college, a school, a seminary, an academy, an industrial school, a public library, a museum, and similar institutions.

(2) Educational purpose. — A purpose that has as its objective the education or instruction of human beings; it comprehends the transmission of information and the training or development of the knowledge or skills of individual persons. The operation of a student housing facility, a student dining facility, a golf course, a tennis court, a sports arena, a similar sport property, or a similar recreational sport property for the use of students or faculty is also an educational purpose, regardless of the extent to which the property is also available to and patronized by the general public. (1973, c. 695, s. 4; 1991 (Reg. Sess., 1992), c. 926, s. 1; 2004-173, s. 1.)

Legal Periodicals. — For symposium on historic preservation which includes a discussion of relevant North Carolina law, see 12 Wake Forest L. Rev. 9 (1976).

CASE NOTES

Constitutionality. — The court upheld this section in spite of a challenge on the constitutional grounds that it applied unequally to various property tracts and violated the rule of uniformity; the four requirements of the section were reasonably objective and did not result in any hostile or systematic discrimination and, further, the exemption requirements were sufficiently enumerated. In re Southeastern Baptist Theological Seminary, Inc., 135 N.C. App. 247, 520 S.E.2d 302 (1999).

The Atlantic Coast Conference was not a separate entity from its constituent schools and since each member was an educational institution, exempt from taxation, then the ownership requirement of this section was met. In re Atl. Coast Conference, 112 N.C. App. 1, 434 S.E.2d 865 (1993), aff'd, 336 N.C. 69, 441 S.E.2d 550 (1994).

Exemption of Portion of Property. — Where Wake Forest University granted a corporation an easement to use a football stadium parking lot for employee and visitor parking and general access to the corporation's headquarters building, the Property Tax Commission properly determined that a portion of the parking lot not regularly used by the corporation is wholly and exclusively used by Wake Forest University for educational purposes and is exempt from ad valorem taxation under subsection (c) of this section. In re Wake Forest Univ., 51 N.C. App. 516, 277 S.E.2d 91, cert. denied, 303 N.C. 544, 281 S.E.2d 391 (1981).

Exemption Upheld. — A seminary met its burden of proving that three parcels of its property were entitled to an exemption under this section, although the land in question was undeveloped, the future planned use might not be exempt, and the seminary had sold some timber from the land to maintain a healthy forested state, to remove trees damaged by a hurricane, and to pay for other repairs caused by that hurricane. In re Southeastern Baptist Theological Seminary, Inc., 135 N.C. App. 247, 520 S.E.2d 302 (1999).

North Carolina Tax Commission's decision that spiritual center where meditation was taught and practiced was not entitled to a tax exemption on property it owned, pursuant to G.S. 105-278.4, was not supported by substantial evidence in view of the entire record. In re Maharishi Spiritual Ctr. of Am., 152 N.C. App. 269, 569 S.E.2d 3, 2002 N.C. App. LEXIS 918 (2002), cert. denied, 356 N.C. 436, 572 S.E.2d 785 (2002).

Exemption Denied. — Day care center was denied a tax exemption because, while some of its activities educated the children enrolled there, substantial evidence supported the tax commission's decision that its property was not wholly and exclusively used for educational purposes, as required by G.S. 105-278.4(a)(4). In re Chapel Hill Day Care Ctr., Inc., 144 N.C. App. 649, 551 S.E.2d 172, 2001 N.C. App. LEXIS 565 (2001), appeal dismissed, 355 N.C. 492, 563 S.E.2d 564 (2002).

Taxpayer that sent missionaries to different parts of the world did not prove entitlement to additional tax exemption where buildings were used to house owner, for guest lodging, and for storage, as the buildings were not used wholly and exclusively for educational purposes; the taxpayer bore the burden of proving that its property was entitled to an exemption under the law, which it failed to do. In re Master's Mission, 152 N.C. App. 640, 568 S.E.2d 208, 2002 N.C. App. LEXIS 964 (2002).

North Carolina Property Tax Commission's decision to deny a taxpayer, a non-accredited university, a tax exemption for a property that was renovated and operated as a restaurant by the taxpayer and its students was affirmed as substantial evidence showed that the property was not used wholly and exclusively for an educational purpose by the taxpayer. In re Univ. for the Study of Human Goodness & Creative Group Work, 159 N.C. App. 85, 582 S.E.2d 645, 2003 N.C. App. LEXIS 1423 (2003).

Applied in In re North Carolina Forestry Found., Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978); In re North Carolina Forestry Found., Inc., 296 N.C. 330, 250 S.E.2d 236 (1979).

Cited in In re North Carolina Forestry Found., Inc., 35 N.C. App. 430, 242 S.E.2d 502 (1978); In re Springmoor, Inc., 348 N.C. App. 1, 498 S.E.2d 177 (1998).

§ 105-278.5. Real and personal property of religious educational assemblies used for religious and educational purposes.

(a) Buildings, the land they actually occupy, and additional adjacent land reasonably necessary for the convenient use of any such building or for the religious educational programs of the owner, shall be exempted from taxation if:

(1) Owned by a religious educational assembly, retreat, or similar organization;

(2) No officer, shareholder, member, or employee of the owner, or any other person is entitled to receive pecuniary profit from the owner's operations except reasonable compensation for services; and

(3) Of a kind commonly employed in those activities naturally and properly incident to the operation of a religious educational assembly such as the owner; and

(4) Wholly and exclusively used for

a. Religious worship or

b. Purposes of instruction in religious education.

(b) Notwithstanding the exclusive-use requirement of subsection (a), above, if part of a property that otherwise meets the subsection's requirements is used for a purpose that would require exemption if the entire property were so used, the valuation of the part so used shall be exempted from taxation.

(c) The fact that a building or facility is incidentally available to and patronized by the general public, so long as there is no material amount of business or patronage with the general public, shall not defeat the exemption granted by this section.

(d) Personal property owned by a religious educational assembly, retreat, or similar organization shall be exempted from taxation if it is exclusively maintained and used in connection with real property granted exemption under the provisions of subsection (a) or (b), above. (1973, c. 695, s. 4.)

Legal Periodicals. — For article on mail-order ministries under the section 170 charitable contribution deduction, see 11 Campbell L. Rev. 1 (1988).

CASE NOTES

Cited in In re Springmoor, Inc., 348 N.C. App. 1, 498 S.E.2d 177 (1998).

§ 105-278.6. Real and personal property used for charitable purposes.

(a) Real and personal property owned by:

(1) A Young Men's Christian Association or similar organization;
(2) A home for the aged, sick, or infirm;
(3) An orphanage or similar home;
(4) A Society for the Prevention of Cruelty to Animals;
(5) A reformatory or correctional institution;
(6) A monastery, convent, or nunnery;
(7) A nonprofit, life-saving, first aid, or rescue squad organization;
(8) A nonprofit organization providing housing for individuals or families with low or moderate incomes

shall be exempted from taxation if: (i) As to real property, it is actually and exclusively occupied and used, and as to personal property, it is entirely and completely used, by the owner for charitable purposes; and (ii) the owner is not organized or operated for profit.

(b) A charitable purpose within the meaning of this section is one that has humane and philanthropic objectives; it is an activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward. The humane treatment of animals is also a charitable purpose.

(c) The fact that a building or facility is incidentally available to and patronized by the general public, so long as there is no material amount of business or patronage with the general public, shall not defeat the exemption granted by this section.

(d) Notwithstanding the exclusive-use requirements of this section, if part of a property that otherwise meets the section's requirements is used for a purpose that would require exemption under subsection (a), above, if the entire property were so used, the valuation of the part so used shall be exempted from taxation.

(e) Real property held by an organization described in subdivision (a)(8) is held for a charitable purpose under this section if it is held for no more than five years as a future site for housing for individuals or families with low or moderate incomes. The taxes that would otherwise be due on real property exempt under this subsection shall be a lien on the property as provided in G.S. 105-355(a). The taxes shall be carried forward in the records of the taxing unit as deferred taxes and shall be payable five years after the tax year the exemption is first claimed unless the organization has constructed low- or moderate-income housing on the site. If this condition has not been met, the deferred taxes for the preceding five fiscal years shall be payable immediately, together with interest as provided in G.S. 105-360 for unpaid taxes that accrues on the deferred taxes as if they had been payable on the dates they would have originally become due. All liens arising under this subsection are extinguished upon one of the following:

(1) Payment of all deferred taxes under this subsection.
(2) Construction by the organization of low- or moderate-income housing on the site within five years after the tax year the exemption is first claimed. (1973, c. 695, s. 4; 1975, c. 808; 1993, c. 230, s. 1.)

Legal Periodicals. — For a symposium on historic preservation which includes a discussion of relevant North Carolina law, see 12 Wake Forest L. Rev. 9 (1976).

CASE NOTES

"Nonprofit" is limited to "life-saving, first aid, or rescue squad organizations." In re North Carolina Forestry Found., Inc., 296 N.C. 330, 250 S.E.2d 236 (1979).

Applied in In re North Carolina Forestry Found., Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978); In re Barham, 70 N.C. App. 236, 319 S.E.2d 657 (1984).

Cited in In re North Carolina Forestry Found., Inc., 35 N.C. App. 430, 242 S.E.2d 502 (1978); In re Chapel Hill Residential Retirement Center, Inc., 60 N.C. App. 294, 299 S.E.2d 782 (1983); In re Barbour, 112 N.C. App. 368, 436 S.E.2d 169 (1993); In re Springmoor, Inc., 348 N.C. App. 1, 498 S.E.2d 177 (1998); In re Master's Mission, 152 N.C. App. 640, 568 S.E.2d 208, 2002 N.C. App. LEXIS 964 (2002).

§ 105-278.6A. Qualified retirement facility.

(a) Classification. — Buildings, the land they actually occupy, additional adjacent land reasonably necessary for the convenient use of the buildings, and personal property owned by a qualified retirement facility and used in the operation of that facility are designated a special class of property under Section 2(2) of Article V of the North Carolina Constitution and are excluded from taxation to the extent provided in this section.

(b) Definitions. — The following definitions apply in section:

(1) Charity care. — The unreimbursed costs to the facility of providing health care, housing, or other services to a resident who is uninsured, underinsured, or otherwise unable to pay for all or part of the services rendered.

(2) Community benefits. — The unreimbursed costs to the facility of providing the following:
  a. Services, including health, recreation, community research, and education activities provided to the community at large, including the elderly.
  b. Charitable donations.
  c. Donated volunteer services.
  d. Donations and voluntary payments to government agencies.

(3) Financial reporting period. — The calendar year or tax year ending prior to the date the retirement facility applies for an exclusion under this section.

(4) Resident revenue. — Annual revenue paid by a resident for goods and services and one year's share of the initial resident fee amortized in accordance with generally accepted accounting principles.

(5) Retirement facility. — A community that meets all of the following conditions:
  a. It is licensed under Article 64 of Chapter 58 of the General Statutes.
  b. It is designed for elderly residents.
  c. It includes independent living units for elderly residents.
  d. It includes a skilled nursing facility or an adult care facility.

(6) Unreimbursed costs. — The costs a facility incurs for providing charity care or community benefits after subtracting payment or reimbursement received from any source for the care or benefits. Unreimbursed costs include costs paid from funds generated by a program described in subdivision (c)(5) of this section.

(c) Total Exclusion. — A retirement facility qualifies for total exclusion under this section if it meets all of the following conditions:

(1) It is exempt from tax under Article 4 of this Chapter and private shareholders do not benefit from its operations.

(2) All of its revenues, less operating and capital expenses, are applied to providing uncompensated goods and services to the elderly and to the local community, or are applied to an endowment or a reserve for these purposes.

(3) Its charter provides that in the event of dissolution, its assets will revert or be conveyed to an entity that is organized exclusively for charitable, educational, scientific, or religious purposes, and is an exempt organization under section 501(c)(3) of the Code.

(4) Repealed by Session Laws 2001-17, s. 1, effective July 1, 2001.

(5) It has an active program to generate funds through one or more sources, such as gifts, grants, trusts, bequests, endowment, or an annual giving program, to assist the retirement facility in serving persons who might not be able to reside there without financial assistance or subsidy.

(6) It meets at least one of the following conditions:
   a. The facility serves all residents without regard to the residents' ability to pay.
   b. At least five percent (5%) of the facility's resident revenue for the financial reporting period is provided in charity care to its residents, in community benefits, or in both.

(d) Partial Exclusion. — A retirement facility qualifies for a partial exclusion under this subsection if it meets conditions under subdivisions (c) (1) through (c)(5) of this section and at least one percent (1%) of the facility's resident revenue for the financial reporting period is provided in charity care to its residents, in community benefits, or in both. The percentage of the retirement facility's assessed value that is excluded from taxation is the applicable percentage provided in the following table, based on the minimum percentage of the facility's resident revenue that it provides in charity care to its residents, in community benefits, or in both:

Partial Exclusion	Minimum Percentage of Resident Revenue
80%	4%
60%	3%
40%	2%
20%	1%

(e) Application for Exclusion. — The application requirements of G.S. 105-282.1 apply to this section. (1939, c. 310, s. 303; 1961, c. 1169, s. 8; 1967, c. 1185; 1971, c. 806, s. 1; c. 1121, s. 3; 1973, cc. 290, 451; c. 476, s. 128; c. 484; c. 695, s. 1; c. 790, s. 1; cc. 904, 962, 1028, 1034, 1077; c. 1262, s. 23; c. 1264, s. 1; 1975, cc. 566, 755; c. 764, s. 6; 1977, c. 771, s. 4; c. 782, s. 2; c. 1001, ss. 1, 2; 1977, 2nd Sess., c. 1200, s. 4; 1979, c. 200, s. 1; 1979, 2nd Sess., c. 1092; 1981, c. 86, s. 1; 1981 (Reg. Sess., 1982), c. 1244, ss. 1, 2; 1983, c. 643, ss. 1, 2; c. 693; 1983 (Reg. Sess., 1984), c. 1060; 1985, c. 510, s. 1; c. 656, s. 37; 1985 (Reg. Sess., 1986), c. 982, s. 18; 1987, c. 356; c. 622, s. 2; c. 747, s. 8; c. 777, s. 6; c. 813, ss. 5, 6, 22; c. 850, s. 17; 1987 (Reg. Sess., 1988), c. 1041, s. 1.1; 1989, c. 148, s. 4; c. 168, s. 6; c. 705; c. 723, s. 1; c. 727, ss. 28, 29; 1991, c. 717, s. 1; 1991 (Reg. Sess., 1992), c. 975, s. 2; 1993, c. 459, s. 2; 1993 (Reg. Sess., 1994), c. 745, s. 39; 1995, c. 41, s. 2; c. 509, s. 51; 1995 (Reg. Sess., 1996), c. 646, s. 12; 1997-23, ss. 1, 3, 9; 1997-443, s. 11A.119(a); 1997-456, s. 27; 1998-55, ss. 10, 18; 1998-212, s. 29A.18(a); 1999-191, s. 1; 2000-20, s. 2; 2001-17, s. 1.)

Editor's Note. — Session Laws 1998-212, s. 29A.18(a) recodified former section 105-275(32) as this section.

Session Laws 1998-212, s. 29A.18(e), as amended by Session Laws 2000-20, s. 2, and by Session Laws 2001-17, s. 2, provides in part that s. 29A.18(a) of the act, which recodified subdivision (32) of G.S. 105-275 as G.S. 105-

278.6A, is effective for taxes imposed for taxable years begining on or after July 1, 1998. Session Laws 2001-17, s. 2, deleted the former provision that G.S. 105-278.6A would be repealed effective for taxes imposed for taxable years beginning on or after July 1, 2001.

Session Laws 1998-212, s. 30.2 provides "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year."

Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 29A.3 contains a savings clause.

Session Laws 1998-212, s. 30.5 contains a severability clause.

CASE NOTES

Editor's Note. *— The cases cited below were decided under former G.S. 105-275(32).*

Former subdivision (32)(v) Held Unconstitutional. — Subdivision (32)(v) (now 105-278.6A) of this section is unconstitutional, as violative of the prohibition against the establishment of religion as found in N.C. Const., Art. I, § 13 because it (now 105-278.6A) distinguishes between homes that are religiously affiliated and those that perform essentially the same functions but lack any religious affiliation. In re Springmoor, Inc., 125 N.C. App. 184, 479 S.E.2d 795 (1997), aff'd, 348 N.C. 1, 498 S.E.2d 177 (1998).

Because former subdivision (32) (now 105-278.6A) excludes only those homes for the elderly that are owned and operated by religious or Masonic entities, it has the principal or primary effect of advancing religion in violation of the Lemon (Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L. Ed. 2d 745 (1971)). In re Springmoor, Inc., 348 N.C. App. 1, 498 S.E.2d 177 (1998).

Former subdivision (32)(v) (now 105-278.6A) violates the constitutional prohibition against the establishment of religion as found in both the federal and state constitutions. In re Springmoor, Inc., 348 N.C. App. 1, 498 S.E.2d 177 (1998).

Severability of Subpart. — Former subpart (v) of subdivision (32) (now 105-278.6A), may not be severed from the subdivision; thus, the whole subsection must be held unconstitutional. In re Springmoor, Inc., 348 N.C. App. 1, 498 S.E.2d 177 (1998).

County Precluded from Challenging Constitutionality of Subdivision (32) (now 105-278.6A). — County, which argued that subdivision (32) (now 105-278.6A) was unconstitutional on its face because it violated the establishment clause of U.S. Const., Amend. I, did not have standing to raise such constitutional issue, as county was not a member of the class subject to the alleged discrimination, and there were other taxpayers within the State who were members of the affected class subject to the alleged discrimination who still could question the statute's validity. In re Moravian Home, Inc., 95 N.C. App. 324, 382 S.E.2d 772, appeal dismissed and cert. denied, 325 N.C. 707, 388 S.E.2d 457 (1989), cert. denied, 498 U.S. 1047, 111 S. Ct. 754, 112 L. Ed. 2d 774 (1991).

Exclusion of Home from Taxation Under Subdivision (32) (now 105-278.6A). — Property tax commission's ruling that home's property should have been excluded from ad valorem taxation was correct; sufficient evidence was presented to establish that home had an active program to generate funds to assist those who could not pay the fees charged by the home where the home's chairman of the board testified that the home had established an endowment fund to assist the indigent and where he further claimed that the home actively solicited contributions for the fund. In re Moravian Home, Inc., 95 N.C. App. 324, 382 S.E.2d 772, appeal dismissed and cert. denied, 325 N.C. 707, 388 S.E.2d 457 (1989), cert. denied, 498 U.S. 1047, 111 S. Ct. 754, 112 L. Ed. 2d 774 (1991).

Constitutionality of Subdivision (32) (now 105-278.6A). — Subdivision (32) (now 105-278.6A) of this section does not discriminate against individual property owners who own their property for residential purposes in violation of the rule of uniformity in taxation established under N.C. Const., Art. V, § 2. In re Barbour, 112 N.C. App. 368, 436 S.E.2d 169 (1993).

The distinction between "homes for the aged, sick, or infirm" and individual residential property owners under subdivision (32) (now 105-278.6A) of this section is not unconstitutional under the equal protection clause of N.C. Const., Art. I, § 19. In re Barbour, 112 N.C. App. 368, 436 S.E.2d 169 (1993).

Subdivision (32) (now 105-278.6A) Has Legitimate Purpose. — Promoting the safety and welfare of the aged and infirm is a legitimate, secular legislative purpose. In re Springmoor, Inc., 348 N.C. App. 1, 498 S.E.2d 177 (1998).

Standing to Challenge Constitutionality. — Non-profit corporation which ran a retirement community for the aged, sick and infirm, and which sought a personal property tax exemption on certain items owned by it and used in the operation of the home, had standing to challenge the constitutionality of subdivision (32) (now 105-278.6A) of this section. In re Springmoor, Inc., 125 N.C. App. 184, 479 S.E.2d 795 (1997), aff'd, 348 N.C. 1, 498 S.E.2d 177 (1998).

§ 105-278.7. Real and personal property used for educational, scientific, literary, or charitable purposes.

(a) Buildings, the land they actually occupy, and additional adjacent land necessary for the convenient use of any such building shall be exempted from taxation if wholly owned by an agency listed in subsection (c), below, and if:

(1) Wholly and exclusively used by its owner for nonprofit educational, scientific, literary, or charitable purposes as defined in subsection (f), below; or

(2) Occupied gratuitously by an agency listed in subsection (c), below, other than the owner, and wholly and exclusively used by the occupant for nonprofit educational, scientific, literary, charitable, or cultural purposes.

(b) Personal property shall be exempted from taxation if wholly owned by an agency listed in subsection (c), below, and if:

(1) Wholly and exclusively used by its owner for nonprofit educational, scientific, literary, or charitable purposes; or

(2) Gratuitously made available to an agency listed in subsection (c), below, other than the owner, and wholly and exclusively used by the possessor for nonprofit educational, scientific, literary, or charitable purposes.

(c) The following agencies, when the other requirements of this section are met, may obtain property tax exemption under this section:

(1) A charitable association or institution,
(2) An historical association or institution,
(3) A veterans' organization or association,
(4) A scientific association or institution,
(5) A literary association or institution,
(6) A benevolent association or institution, or
(7) A nonprofit community or neighborhood organization.

(d) Notwithstanding the exclusive-use requirements of subsection (a), above, if part of a property that otherwise meets the subsection's requirements is used for a purpose that would require exemption if the entire property were so used, the valuation of the part so used shall be exempted from taxation.

(e) The fact that a building or facility is incidentally available to and patronized by the general public, so long as there is no material amount of business or patronage with the general public, shall not defeat the exemption granted by this section.

(f) Within the meaning of this section:

(1) An educational purpose is one that has as its objective the education or instruction of human beings; it comprehends the transmission of information and the training or development of the knowledge or skills of individual persons.

(2) A scientific purpose is one that yields knowledge systematically through research, experimentation, or other work done in one or more of the natural sciences.

(3) A literary purpose is one that pertains to letters or literature, especially writing, publishing, and the study of literature. It includes the literature of the stage and screen as well as the performance or exhibition of works based on literature.

(4) A charitable purpose is one that has humane and philanthropic objectives; it is an activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward. The humane treatment of animals is also a charitable purpose.

(5) A cultural purpose is one that is conducive to the enlightenment and refinement of taste acquired through intellectual and aesthetic training, education, and discipline. (1973, c. 695, s. 4; 1995 (Reg. Sess., 1996), c. 646, s. 15; 2005-435, ss. 59(b), 59(c).)

Effect of Amendments. — Session Laws 2005-435, ss. 59.(b) and 59.(c), effective January 1, 2006, substituted "charitable, or cultural" for "or charitable" at the end of subdivision (a)(2); rewrote subdivision (f)(3) and added subdivision (f)(5).

CASE NOTES

Concept of charity is not confined to the relief of the needy and destitute. Aged people require care and attention apart from financial assistance, and the supply of this care and attention is as much a charitable and benevolent purpose as the relief of their financial wants. In re Chapel Hill Residential Retirement Center, Inc., 60 N.C. App. 294, 299 S.E.2d 782, cert. denied, 308 N.C. 386, 302 S.E.2d 249 (1983).

Property Occupied Gratuitously for Charitable Purpose. — Where a religious association made a loan to respondent nursing home, with which the association was affiliated, to expand its facilities, the nursing home's payment of an amount equivalent to the interest on the loan and the depreciation on the property did not prevent the nursing home from occupying the property gratuitously, and the property in question was exempt from ad valorem taxation in that it was being used for a charitable purpose by a charitable institution within the meaning of subdivisions (f)(4), (a)(2) and (c)(1) of this section. In re Taxable Status of Property, 45 N.C. App. 632, 263 S.E.2d 838 (1980).

Corporation Was Entitled to Tax Exemption. — Finding that a corporation was entitled to a tax exemption under G.S. 105-278.7 was supported by substantial evidence, including the fact that 90 percent of the corporation's income was provided by government funding, and that the corporation was recognized as a nonprofit organization by both the state and federal governments. In re Totsland Preschool, Inc., — N.C. App. —, 636 S.E.2d 292, 2006 N.C. App. LEXIS 2249 (2006).

Applied in In re Mecklenburg County, 69 N.C. App. 133, 316 S.E.2d 330 (1984).

Cited in In re Found. Health Sys. Corp., 96 N.C. App. 571, 386 S.E.2d 588 (1989); In re Barbour, 112 N.C. App. 368, 436 S.E.2d 169 (1993); In re Springmoor, Inc., 348 N.C. App. 1, 498 S.E.2d 177 (1998).

OPINIONS OF ATTORNEY GENERAL

Property of a labor union is not exempt from ad valorem taxation pursuant to this section. See opinion of Attorney General to J. Bourke Bilisoly, Wake County Tax Attorney, 50 N.C.A.G. 35 (1980).

Property was not entitled to charitable exemption. — Property owned by the Charlotte/Mecklenburg Development Corporation was not entitled to a charitable exemption pursuant to the statute where the corporation's goal was to demolish the buildings on the property, to undertake environmental clean up and site development for commercial purposes and to then sell parcels of the property to at least 10 businesses. See opinion of Attorney General to Mr. Hamlin L. Wade, Mecklenburg County Tax Attorney, 2002 N.C. AG LEXIS 1 (2/5/02).

§ 105-278.8. Real and personal property used for charitable hospital purposes.

(a) Real and personal property held for or owned by a hospital organized and operated as a nonstock, nonprofit, charitable institution (without profit to members or their successors) shall be exempted from taxation if actually and exclusively used for charitable hospital purposes.

(b) Notwithstanding the exclusive-use requirements of subsection (a), above, if part of a property that otherwise meets that subsection's requirements is used for a purpose that would require exemption under that subsection if the entire property were so used, the valuation of the part so used shall be exempted from taxation.

(c) Within the meaning of this section, a charitable hospital purpose is a hospital purpose that has humane and philanthropic objectives; it is a hospital activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward. However, the fact that a qualifying hospital charges patients who are able to pay for services rendered does not defeat the exemption granted by this section. (1973, c. 695, s. 4.)

CASE NOTES

Test for Exemption. — Pursuant to the language of this section, the test to determine whether an exemption may be granted is: (1) Whether the applicant is a hospital organized and operated without profit to members, (2) exclusively used for humane and philanthropic objectives which benefit a significant segment of the community, and (3) without expectation of reward or profit. An applicant which meets the requirements of this test will not be rejected simply because it charges those patients who are able to pay for their services. In re Found. Health Sys. Corp., 96 N.C. App. 571, 386 S.E.2d 588 (1989).

Nonprofit outpatient surgical center with operating rooms designed to render related services was a "hospital" operated without profit to its members within the meaning of this section. In re Found. Health Sys. Corp., 96 N.C. App. 571, 386 S.E.2d 588 (1989).

And Was Entitled to Tax Exemption. — Nonprofit outpatient surgical center which provided facilities for the treatment of emergency or urgent care patients without regard for their ability to pay and charged fees which were lower than those of county hospital was wholly and exclusively used for a charitable purpose or purposes within the meaning of this section, and was entitled to a property tax exemption. In re Found. Health Sys. Corp., 96 N.C. App. 571, 386 S.E.2d 588 (1989).

Hospital Day Care Center. — Hospital's Child care center which was open seven days a week, including holidays, from 6:00 a.m. to 12:00 midnight and aided hospital in the recruitment and retention of hospital employees was actually and exclusively used for a charitable hospital purpose as required by this section and accordingly, hospital was entitled to an exemption from ad valorem taxes for its child care center. In re Moses H. Cone Mem. Hosp., 113 N.C. App. 562, 439 S.E.2d 778 (1994), aff'd in part, cert. improvidently granted in part, 340 N.C. 93, 455 S.E.2d 431 (1995).

There was no direct commercial competition between hospital's child care center and other area commercial child care centers where it did not compete directly with other commercial child care centers for patrons from the general public as it was open only to hospital employees and the center met a need of its employees that was not fulfilled by other commercial child care centers by being open seven days a week, and on holidays from 6:00 a.m. to 12:00 midnight. In re Moses H. Cone Mem. Hosp., 113 N.C. App. 562, 439 S.E.2d 778 (1994), aff'd in part, cert. improvidently granted in part, 340 N.C. 93, 455 S.E.2d 431 (1995).

Cited in In re Moses H. Cone Mem. Hosp., 340 N.C. 93, 455 S.E.2d 431 (1995); In re Springmoor, Inc., 348 N.C. App. 1, 498 S.E.2d 177 (1998).

§ 105-278.9: Repealed by Session Laws 1985 (Regular Session, 1986), c. 982, s. 21.

§ 105-279: Repealed by Session Laws 1981, c. 819, s. 2.

§ 105-280: Repealed by Session Laws 1973, c. 695, s. 4.

Cross References. — For present provisions covering the subject matter of the repealed section, see G.S. 105-278.1 through 105-278.8.

G.S. 105-282.1(a)(2) is set out twice. See notes.

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§ 105-281: Repealed by Session Laws 1973, c. 695, s. 10.

Cross References. — For present provisions covering the subject matter of the repealed section, see G.S. 105-278.8.

§ 105-282: Repealed by Session Laws 1973, c. 695, s. 8.

§ 105-282.1. Applications for property tax exemption or exclusion; annual review of property exempted or excluded from property tax.

(a) Application. — Every owner of property claiming exemption or exclusion from property taxes under the provisions of this Subchapter has the burden of establishing that the property is entitled to it. If the property for which the exemption or exclusion is claimed is appraised by the Department of Revenue, the application shall be filed with the Department. Otherwise, the application shall be filed with the assessor of the county in which the property is situated. An application must contain a complete and accurate statement of the facts that entitle the property to the exemption or exclusion and must indicate the municipality, if any, in which the property is located. Each application filed with the Department of Revenue or an assessor shall be submitted on a form approved by the Department. Application forms shall be made available by the assessor and the Department, as appropriate.

Except as provided below, an owner claiming an exemption or exclusion from property taxes must file an application for the exemption or exclusion annually during the listing period.

(1) No application required. — Owners of the following exempt or excluded property do not need to file an application for the exemption or exclusion to be entitled to receive it:
  a. Property exempt from taxation under G.S. 105-278.1 or G.S. 105-278.2.
  b. Special classes of property excluded from taxation under G.S. 105-275(15), (16), (26), (31), (32a), (33), (34), (37), (40), or (42).
  c. Property classified for taxation at a reduced valuation under G.S. 105-277(g) or G.S. 105-277.9.

(2) **(Effective for taxes imposed for taxable years beginning before July 1, 2009.)** Single application required. — An owner of one or more of the following properties eligible to be exempted or excluded from taxation must file an application for exemption or exclusion to receive it. Once the application has been approved, the owner does not need to file an application in subsequent years unless new or additional property is acquired or improvements are added or removed, necessitating a change in the valuation of the property, or there is a change in the use of the property or the qualifications or eligibility of the taxpayer necessitating a review of the exemption or exclusion:
  a. Property exempted from taxation under G.S. 105-278.3, 105-278.4, 105-278.5, 105- 278.6, 105-278.7, or 105-278.8.
  b. Special classes of property excluded from taxation under G.S. 105-275(3), (7), (8), (12), (17), (18), (19), (20), (21), (35), (36), (38), (39), or (41) or under G.S. 131A-21.
  c. Special classes of property classified for taxation at a reduced valuation under G.S. 105-277(h), 105-277.1, 105-277.10, 105-277.13, 105-278.

G.S. 105-282.1(a)(2) is set out twice. See notes.

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d. Property owned by a nonprofit homeowners' association but where the value of the property is included in the appraisals of property owned by members of the association under G.S. 105-277.8.

(2) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2009.)** Single application required. — An owner of one or more of the following properties eligible for a property tax benefit must file an application for the benefit to receive it. Once the application has been approved, the owner does not need to file an application in subsequent years unless new or additional property is acquired or improvements are added or removed, necessitating a change in the valuation of the property, or there is a change in the use of the property or the qualifications or eligibility of the taxpayer necessitating a review of the benefit.

a. Property exempted from taxation under G.S. 105-278.3, 105-278.4, 105-278.5, 105-278.6, 105-278.7, or 105-278.8.

b. Special classes of property excluded from taxation under G.S. 105-275(3), (7), (8), (12), (17), (18), (19), (20), (21), (35), (36), (38), (39), or (41) or under G.S. 131A-21.

c. Special classes of property classified for taxation at a reduced valuation under G.S. 105-277(h), 105-277.1, 105-277.10, 105-277.13, 105-278.

d. Property owned by a nonprofit homeowners' association but where the value of the property is included in the appraisals of property owned by members of the association under G.S. 105-277.8.

e. Special classes of property eligible for tax relief under G.S. 105-277.1B.

(a1) Late Application. — Upon a showing of good cause by the applicant for failure to make a timely application, an application for exemption or exclusion filed after the close of the listing period may be approved by the Department of Revenue, the board of equalization and review, the board of county commissioners, or the governing body of a municipality, as appropriate. An untimely application for exemption or exclusion approved under this subsection applies only to property taxes levied by the county or municipality in the calendar year in which the untimely application is filed.

(b) Approval and Appeal Process. — The Department of Revenue or the assessor to whom an application for exemption or exclusion is submitted must review the application and either approve or deny the application. Approved applications shall be filed and made available to all taxing units in which the exempted or excluded property is situated. If the Department denies an application for exemption or exclusion, it shall notify the taxpayer, who may appeal the denial to the Property Tax Commission.

If an assessor denies an application for exemption or exclusion, the assessor must notify the owner of the decision and the owner may appeal the decision to the board of equalization and review or the board of county commissioners, as appropriate, and from the county board to the Property Tax Commission. If the notice of denial covers property located within a municipality, the assessor shall send a copy of the notice and a copy of the application to the governing body of the municipality. The municipal governing body shall then advise the owner whether it will adopt the decision of the county board or require the owner to file a separate appeal with the municipal governing body. In the event the owner is required to appeal to the municipal governing body and that body renders an adverse decision, the owner may appeal to the Property Tax Commission. Nothing in this subsection shall prevent the governing body of a municipality from denying an application which has been approved by the assessor or by the county board provided the owner's rights to notice and hearing are not abridged. Applications handled separately by a municipality shall be filed in the office of the person designated by the governing body, or in the absence of such designation, in the office of the chief fiscal officer of the municipality.

(c) Discovery of Property. — When an owner of property that may be eligible for exemption or exclusion neither lists the property nor files an application for exemption or exclusion, the assessor or the Department of Revenue, as appropriate, shall proceed to discover the property. If, upon appeal, the owner demonstrates that the property meets the conditions for exemption or exclusion, the body hearing the appeal may approve the exemption or exclusion. Discovery of the property by the Department or the county shall automatically constitute a discovery by any taxing unit in which the property has a taxable situs.

(d) Roster of Exempted and Excluded Property. — The assessor shall prepare and maintain a roster of all property in the county that is granted tax relief through classification or exemption. On or before November 1 of each year, the assessor must send a report to the Department of Revenue summarizing the information contained in the roster. The report must be in the format required by the Department. The assessor must also send the Department a copy of the roster upon the request of the Department. As to affected real and personal property, the roster shall set forth:

(1) The name of the owner of the property.
(2) A brief description of the property.
(3) A statement of the use to which the property is put.
(4) A statement of the value of the property.
(5) The total value of exempt property in the county and in each municipality therein.

(e) Annual Review of Exempted or Excluded Property. — Pursuant to G.S. 105-296(l), the assessor must annually review at least one-eighth of the parcels in the county exempted or excluded from taxation to verify that the parcels qualify for the exemption or exclusion. (1973, c. 695, s. 8; c. 1252; 1981, c. 54, ss. 2, 3; c. 86, s. 2; c. 915; 1985 (Reg. Sess., 1986), c. 982, s. 22; 1987, c. 45, s. 1; c. 295, ss. 5, 6; c. 680, ss. 1-3; c. 813, s. 13; 1989, c. 674, s. 2; c. 723, s. 2; 1991, c. 34, s. 1; 1991 (Reg. Sess., 1992), c. 975, s. 3; 1993, c. 459, s. 3; 1995, c. 41, s. 7; 1995 (Reg. Sess., 1996), c. 646, s. 16; 1997-23, s. 4; 2000-140, s. 72(b); 2001-139, s. 1; 2007-484, s. 43.7T(b); 2007-497, s. 2.4.)

Subdivision (a)(2) Set Out Twice. — The first version of subdivision (a)(2) is effective for taxes imposed for taxable years beginning before July 1, 2009. The second version of subdivision (a)(2) is effective for taxes imposed for taxable years beginning on or after July 1, 2009.

Editor's Note. — Session Laws 2001-17, which rewrote G.S. 105-278.6A, in s. 3, provides that, notwithstanding the provisions of G.S. 105-282.1(a), an application for the benefit provided in the act for the 2001-2002 tax year is timely if it is filed on or before September 1, 2001.

Effect of Amendments. — Session Laws 2007-497, s. 2.4, as amended by Session Laws 2007-484, s. 43.7T(b), effective for taxes imposed for taxable years beginning on or after July 1, 2009, in the introductory language of subdivision (a)(2), substituted "for a property tax benefit" for "to be exempted or excluded from taxation" and "the benefit" for "exemption or exclusion" in the first sentence, and substituted "benefit" for "exemption or exclusion" at the end of the last sentence; and added subdivision (a)(2)e.

CASE NOTES

Purpose. — The purpose of this section is to establish a uniform method of informing a county of a property owner's intent to claim a tax exemption. In re Valley Proteins, Inc., 128

N.C. App. 151, 494 S.E.2d 111 (1997).

A taxpayer does not have to cite or make reference to the applicable statute in order to claim the applicable exemption allowed by the section if the application shows facts which entitle the applicant to the exemption. In re R.J. Reynolds Tobacco Co., 74 N.C. App. 140, 327 S.E.2d 607, cert. denied, 314 N.C. 116, 332 S.E.2d 483 (1985).

Failure of a county to respond to an application for exemption does not require that it be deemed accepted for that year and the failure to respond to the application for exemption does not establish a presumption, rebuttable or otherwise, that the application for exemption has been granted. In re North Carolina Forestry Found., Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978), aff'd, 296 N.C. 330, 250 S.E.2d 236 (1979).

Notification of Challenge to Existing Exemption. — A county assessor has the power to challenge an exemption once granted by requiring the taxpayer to file a new application if he or she perceives that one of the changes in the property listed in subdivision (a)(3) has occurred. Under the plain language of this section, the application for the exemption must be made during the listing period; the county therefore is required to notify the taxpayer before the listing period that such an application will be required for the coming tax year. In re Church of Creator, 102 N.C. App. 507, 402 S.E.2d 874 (1991).

Substantial Compliance Found Where Exemption Filed on Wrong Form. — Where county was clearly aware of taxpayer's intent and received all of the relevant information it needed, taxpayer's application was timely filed in substantial compliance with the statute even though he did not file exemption on the proper form. In re Valley Proteins, Inc., 128 N.C. App. 151, 494 S.E.2d 111 (1997).

Right to Appeal. — The plain intent and thrust of subsection (b) of this section and G.S. 105-322 and former G.S. 105-324 is to permit a property owner, as a matter of right, to appeal to the Property Tax Commission upon a county or municipal board denying its application for an exemption. In re K-Mart Corp., 79 N.C. App. 725, 340 S.E.2d 752, aff'd in part, rev'd in part, 319 N.C. 378, 354 S.E.2d 468 (1987).

Although the decision of the county board to grant or deny an exemption is a discretionary one, it is reviewable by the Property Tax Commission. In re K-Mart Corp., 319 N.C. 378, 354 S.E.2d 468 (1987).

While it is true that the 1987 amendment to subsection (c) made the decisions of the county boards discretionary, it did not make those decisions unreviewable. Rather, the legislature has placed the duty upon the Property Tax Commission to hear appeals from decisions of the county boards arising under the provisions of G.S. 105-312 and other sections of Chapter 105. In re K-Mart Corp., 319 N.C. 378, 354 S.E.2d 468 (1987).

Taxpayer Has the Burden of Proof. — North Carolina Property Tax Commission's decision to deny a taxpayer, a non-accredited university, a tax exemption for a property that was renovated and operated as a restaurant by the taxpayer and its students was affirmed as the taxpayer failed to demonstrate that the property was used wholly and exclusively for an educational purpose by the taxpayer. In re Univ. for the Study of Human Goodness & Creative Group Work, 159 N.C. App. 85, 582 S.E.2d 645, 2003 N.C. App. LEXIS 1423 (2003).

Applied in In re Wesleyan Educ. Center, 68 N.C. App. 742, 316 S.E.2d 87 (1984).

Cited in In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981); In re Moravian Home, Inc., 95 N.C. App. 324, 382 S.E.2d 772 (1989).

§§ 105-282.2 through 105-282.6: Reserved for future codification purposes.

ARTICLE 12A.

Taxation of Lessees and Users of Tax-Exempt Cropland or Forestland.

§ 105-282.7. Taxation of lessees and users of tax-exempt cropland or forestland.

(a) When any cropland or forestland owned by the United States, the State, a county or a municipal corporation is leased, loaned or otherwise made available to and used by a person, as defined in G.S. 105-273(12), in connection with a business conducted for profit, the lessee or user of the property is subject to taxation to the same extent as if the lessee or user owned the property. As used in this section, "forestland" has the same meaning as in G.S. 105-277.2(2), and "cropland" means agricultural land and horticultural land as defined in G.S. 105-277.2(1) and (3) respectively.

(b) This section does not apply to cropland or forestland for which payments in lieu of taxes are made in amounts equivalent to the amount of tax that could otherwise be lawfully assessed.

(c) Taxes levied pursuant to this Article are levied on the privilege of leasing or otherwise using tax-exempt cropland or forestland in connection with a business conducted for profit. The purpose of these taxes is to eliminate the competitive advantage accruing to profit-making enterprises from the use of tax-exempt property. (1981, c. 819, s. 1.)

CASE NOTES

Constitutionality. — Contention that as to appellant this section was a retrospective tax in violation of N.C. Const., Art. I, § 16 was without merit, where the statute was ratified in 1981, and did not become effective until January 1, 1982, and appellant was not taxed under it for any period prior to the enactment. In re Champion Int'l Corp., 74 N.C. App. 639, 329 S.E.2d 691, cert. denied, 314 N.C. 540, 335 S.E.2d 15 (1985).

N.C. Const., Art. V, § 2(1) and 2(2), which require that taxation be done in a just and equitable manner and that no class of property be taxed except by uniform rule and that every classification be made by general law, are no bar to taxing lessee and users in forestlands owned by the State under this section "to the same extent as if the lessee or user owned the property," while other leasehold interests are taxed at true value. In re Champion Int'l Corp., 74 N.C. App. 639, 329 S.E.2d 691, cert. denied, 314 N.C. 540, 335 S.E.2d 15 (1985).

Taxing pursuant to this section of the interest of a corporation using forestlands owned by this State under leases granting user the right to cut timber therein until the year 2044 held not unconstitutional under N.C. Const., Art. V, § 2(3). In re Champion Int'l Corp., 74 N.C. App. 639, 329 S.E.2d 691, cert. denied, 314 N.C. 540, 335 S.E.2d 15 (1985).

Contention that this section was invalid because its effect was to tax only the appellant was without merit, as on its face the section uniformly operates without discrimination or distinction upon all persons composing the described class, and as even appellant's own evidence did not show that the law applied only to it, but established only that no one knew whether the statute had been applied to other taxpayers during the one year it had been in effect. In re Champion Int'l Corp., 74 N.C. App. 639, 329 S.E.2d 691, cert. denied, 314 N.C. 540, 335 S.E.2d 15 (1985).

Classifying for taxation under this section leasehold interests in government owned croplands and forestlands that are used in connection with a business conducted for profit seems eminently reasonable. In re Champion Int'l Corp., 74 N.C. App. 639, 329 S.E.2d 691, cert. denied, 314 N.C. 540, 335 S.E.2d 15 (1985).

This section is not unconstitutionally vague in taxing the "user of the property." In re Champion Int'l Corp., 74 N.C. App. 639, 329 S.E.2d 691, cert. denied, 314 N.C. 540, 335 S.E.2d 15 (1985).

Applicability. — This section applies to every party in the State that uses the property designated in connection with a business conducted for profit. In re Champion Int'l Corp., 74 N.C. App. 639, 329 S.E.2d 691, cert. denied, 314 N.C. 540, 335 S.E.2d 15 (1985).

§ 105-282.8. Assessment and collection.

The taxes levied under this Article shall be assessed to the lessee or user of the exempt property and shall be collected in the same manner and to the extent as if the lessee or user owned the property. The taxes are a debt due from the lessee or user to the taxing unit in which the property is located and are recoverable as other actions to collect a debt. (1981, c. 819, s. 1.)

ARTICLE 13.

Standards for Appraisal and Assessment.

§ 105-283. Uniform appraisal standards.

All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used. For the purposes of this section, the acquisition of an interest in land by an entity having the power of eminent domain with respect to the interest acquired shall not be considered competent evidence of the true value in money of comparable land. (1939, c. 310, s. 500; 1953, c. 970, s. 5; 1955, c. 1100, s. 2; 1959, c. 682; 1967, c. 892, s. 7; 1969, c. 945, s. 1; 1971, c. 806, s. 1; 1973, c. 695, s. 11; 1977, 2nd Sess., c. 1297.)

Legal Periodicals. — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

CASE NOTES

Determination by General Assembly. — The North Carolina General Assembly, and no one else, determines how property in this State should be valued for purposes of ad valorem taxation. In re Amp, Inc., 287 N.C. 547, 215 S.E.2d 752 (1975).

Property Appraised at Market Value. — In substance this section and G.S. 105-317.1 provide that all property shall be appraised at market value, and that all the various factors which enter into the market value of property are to be considered by the assessors in determining this market value for tax purposes. In re Bosley, 29 N.C. App. 468, 224 S.E.2d 686, cert. denied, 290 N.C. 551, 226 S.E.2d 509 (1976).

Valuation by Property Tax Commission. — The record supported the Property Tax Commission's valuation of taxpayer's plant, where the county conceded that its valuation method was arbitrary, and therefore, the Commission properly accorded no presumption of correctness to county's figures, but heard evidence and arrived at a value between those offered by the county and the taxpayer. In re Philip Morris U.S.A., 130 N.C. App. 529, 503 S.E.2d 679 (1998), cert. denied, 349 N.C. 359 (1998).

North Carolina Property Tax Commission properly employed an income approach to a business property in reducing the appraised value that was assigned to the business property by a county that used a cost approach, as the decision had a rational basis in the evidence. In re Weaver Inv. Co., 165 N.C. App. 198, 598 S.E.2d 591, 2004 N.C. App. LEXIS 1150 (2004), cert. denied, 359 N.C. 188, 606 S.E.2d 695 (2004).

Taxpayer did not show that county used an arbitrary and illegal valuation method or that the assessment of its personal property for a prior, six-year period substantially exceeded that property's true value in money; thus, the assessment was upheld because the taxpayer failed to meet its initial burden of presenting material, competent, and substantial evidence that the assessment was arbitrary and illegal. In re Appeal of Westmoreland-LG&E, 174 N.C. App. 692, 622 S.E.2d 124, 2005 N.C. App. LEXIS 2611 (2005).

Fundamental rule of valuation is actual market or fair cash value. Albemarle Elec. Membership Corp. v. Alexander, 282 N.C. 402, 192 S.E.2d 811 (1972).

There may be reasonable variations from market value in appraisals of property for tax purposes if these variations are uniform. In re Bosley, 29 N.C. App. 468, 224 S.E.2d 686, cert. denied, 290 N.C. 551, 226 S.E.2d 509 (1976).

The fair market value of real property for tax purposes is the same as that for condemnation purposes. In re Parsons, 123 N.C. App. 32, 472 S.E.2d 182 (1996).

Use of "Book Value". — There is no statutory authority that permits the county tax supervisor, as a per se rule, to equate "book value" with true value in money as a uniform measure of assessment for purposes of ad valorem tax valuation. In re Amp, Inc., 287 N.C. 547, 215 S.E.2d 752 (1975).

The North Carolina General Assembly has specifically rejected a per se rule that would equate inventory value as reported on State tax returns with the value of such inventory as reported for purposes of ad valorem taxation. Hence, in requiring the taxpayers of a county to list their property at the value reported on State tax returns (i.e., "book value"), a county tax supervisor acts contrary to the mandate of the North Carolina Machinery Act. In re Amp, Inc., 287 N.C. 547, 215 S.E.2d 752 (1975).

Use of Sales Price. — Neither this section nor G.S. 105-317(a) requires the commission to value property according to its sales price in a recent arm's length transaction when competent evidence of a different value is presented. In re Greensboro Office Partnership, 72 N.C. App. 635, 325 S.E.2d 24, cert. denied, 313 N.C. 602, 330 S.E.2d 610 (1985).

Where sale was not between a willing buyer and a willing seller, as contemplated by this section, sales price was not indicative of property's true value. In re Phoenix Ltd. Partnership, 134 N.C. App. 474, 517 S.E.2d 903 (1999).

Past and Future Income. — Section 105-317(a), in fixing the guide which assessors must use in valuing property for taxes, includes as a factor the past income therefrom, and its probable future income. But the income referred to is not necessarily actual income. The language is sufficient to include the income which could be obtained by the proper and efficient use of the property. To hold otherwise would be to penalize the competent and diligent and to reward the incompetent or indolent. In re Greensboro Office Partnership, 72 N.C. App. 635, 325 S.E.2d 24, cert. denied, 313 N.C. 602, 330 S.E.2d 610 (1985).

Property's Income Producing Ability. — The Machinery Act does not provide for consideration of property's income producing ability nor for the cost to conduct environmental remediation on the property in determining property value, although, a buyer would take them into account when deciding upon a price to offer for the property. In re Camel City Laundry Co., 115 N.C. App. 469, 444 S.E.2d 689 (1994).

Extrapolation Method. — The extrapolation method of valuation was appropriate, where the Property Tax Commission calculated the actual cost per square foot of the expansion, and then multiplied the square footage of the main building by that figure to estimate the cost of that building. In re Philip Morris U.S.A., 130 N.C. App. 529, 503 S.E.2d 679 (1998), cert. denied, 349 N.C. 359 (1998).

Cost Approach. — The county appraiser applied an appropriate version of the generally accepted cost method of appraisal in appraising the taxpayer's plant, where he used the actual cost of the plant expansion to estimate the cost of the main building, adjusted to remove personal property and excess costs, and added the results to determine the plant's total value. In re Philip Morris U.S.A., 130 N.C. App. 529, 503 S.E.2d 679 (1998), cert. denied, 349 N.C. 359 (1998).

Taxpayer's contention, that cost approach method of appraisal was not legal because it did not consider the 26 U.S.C.S. § 42 rent restrictions on the property, was insufficient to rebut the presumption that the appraisal was properly administered; the intermediate appellate court's ruling reversing a decision of the North Carolina Property Tax Commission was itself reversed. In re Greens of Pine Glen Ltd., 356 N.C. 642, 576 S.E.2d 316, 2003 N.C. LEXIS 27 (2003).

Income Approach. — The income approach should have been the primary method used to reach a value for the anchor store in a shopping mall; while the income approach is preferential, a combination of approaches may be used because of the inherent weaknesses in each approach, so long as the income approach is given greatest weight. In re Belk-Broome Co., 119 N.C. App. 470, 458 S.E.2d 921 (1995), aff'd, 342 N.C. 890, 467 S.E.2d 242 (1996).

Taxation to Be in Proportion to True Value of Property. — The purpose of the statutory requirement that all property be appraised at its true value in money is to assure, as far as practicable, a distribution of the burden of taxation in proportion to the true values of the respective taxpayers' property holdings, whether they be rural or urban. In re King, 281 N.C. 533, 189 S.E.2d 158 (1972).

Personal Property Expenses. — In arriving at the true value of corporate real property, the Property Tax Commission did not err by including personal property expenses as a portion of excess costs, which it then deducted from total cost figures. In re Philip Morris U.S.A., 130 N.C. App. 529, 503 S.E.2d 679 (1998), cert. denied, 349 N.C. 359 (1998).

Charitable Trusts. — Because of the valid and enforceable restraint on alienation, property of a charitable trust itself is unmarketable; therefore, to tax the property according to normal market assumptions would be unfair to the charitable trust, and in doing so, would seriously erode and ultimately defeat the public policy of this State in favor of charitable trusts. In re Perry-Griffin Found., 108 N.C. App. 383, 424 S.E.2d 212 (1993).

There is no distinction between owners of real and personal property as to their right to insist upon equality of valuation or as to their standing to pursue the remedies provided in the Machinery Act for error in the valuation of properties. In re Valuation of Property Located at 411-417 W. Fourth Street, 282 N.C. 71, 191 S.E.2d 692 (1972).

Ad valorem tax assessments are presumed to be correct, and when such assessments are challenged, the burden of proof is on the taxpayer to show that the assessment was erroneous. In re Bosley, 29 N.C. App. 468, 224 S.E.2d 686, cert. denied, 290 N.C. 551, 226 S.E.2d 509 (1976).

Ad valorem tax assessments are presumed correct. In order to rebut this presumption, the taxpayer must present evidence to show that an arbitrary method of valuation was used, or that an illegal method of valuation was used, and that the assessment substantially exceeded the true value in money of the property. In re Interstate Income Fund I, 126 N.C. App. 162, 484 S.E.2d 450 (1997).

County tax assessment valuation method held not arbitrary. See In re Wagstaff, 42 N.C. App. 47, 255 S.E.2d 754 (1979).

Actual value of a note, bond, or other evidence of debt is the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell; it is synonymous with the "market value," or the "true value." In re Alamance Mem. Park, 41 N.C. App. 278, 254 S.E.2d 671 (1979).

Economic Blight of Downtown Area to Be Considered in Revaluation. — The policy of equality in valuations compels the assessors and, upon an appeal, the State Board of Assessment to take economic blight of a downtown area into account when revaluing property for tax purposes. In re Valuation of Property Located at 411-417 W. Fourth Street, 282 N.C. 71, 191 S.E.2d 692 (1972).

To find the true value of property subject to conservation easements, the Commission must determine the market value prior to the granting of the easements and then reduce that value by applying a damage factor caused by the granting of the conservation easements. Determining the highest and best use of the property prior to the granting of the easement is a critical part of the appraisal process. Rainbow Springs Partnership v. County of Macon, 79 N.C. App. 335, 339 S.E.2d 681, cert. denied, 316 N.C. 736, 345 S.E.2d 392 (1986).

In order to obtain relief from valuations upon their property by the State Board of Assessment, appellant electric membership corporations must show that the methods used in determining true value were illegal and arbitrary, and that appellants were substantially injured by a resulting excessive valuation of their property. Albemarle Elec. Membership Corp. v. Alexander, 282 N.C. 402, 192 S.E.2d 811 (1972).

Failure to Make Factor Affecting True Value Known to County. — The Property Tax Commission did not err as a matter of law by not considering evidence of a factor allegedly affecting the "true value" of taxpayer's property for a given year where taxpayer failed to make the factor known to the County. MAO/Pines Assocs. v. New Hanover County Bd. of Equalization, 116 N.C. App. 551, 449 S.E.2d 196 (1994).

Appraisal Rebutted. — Taxpayers presented substantial evidence to rebut the presumption of correctness of county's appraisal of land; thus, the Property Tax Commission properly granted the taxpayers relief. In re Parsons, 123 N.C. App. 32, 472 S.E.2d 182 (1996).

Where the county's valuation of the taxpayer's property was significantly greater than the valuation offered by the taxpayer's expert witness, the tax commission did not err by failing to afford a presumption of correctness to the county's valuation using the comparable sales method of assessment, as the county did not offer additional evidence to meet its burden to show that its valuation was the true value. In re Lane Company-Hickory Chair Div., 153 N.C. App. 119, 571 S.E.2d 224, 2002 N.C. App. LEXIS 1083 (2002).

County's appraisal of a manufactured home did not arrive at its "true value" because the home was personal property located on leased land but was valued as if it had been real property, and the appraisal assigned a valuation to the home that was 90 percent higher than the previous year. In re Murray, — N.C. App. —, 635 S.E.2d 477, 2006 N.C. App. LEXIS 2157 (2006).

Applied in In re Duke Power Co., 82 N.C. App. 492, 347 S.E.2d 54 (1986); In re Westinghouse Elec. Corp., 93 N.C. App. 710, 379 S.E.2d 37 (1989); In re May Dep't Stores Co., 119 N.C. App. 596, 459 S.E.2d 274 (1995).

Cited in Brock v. North Carolina Property Tax Comm'n, 290 N.C. 731, 228 S.E.2d 254 (1976); In re Land & Mineral Co., 49 N.C. App. 608, 272 S.E.2d 878 (1980); In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981); Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981); In re Colonial Pipeline Co., 67 N.C. App. 388, 313 S.E.2d 819 (1984); In re Colonial Pipeline Co., 318 N.C. 224, 347 S.E.2d 382 (1986); Craven County v. Hall, 87 N.C. App. 256, 360 S.E.2d 479 (1987); In re Philip Morris U.S.A, 335 N.C. 227, 436 S.E.2d 828 (1993), cert. denied, 335 N.C. 466, 441 S.E.2d 118, 512 U.S. 1228, 114 S. Ct. 2726, 129 L. Ed. 2d 850 (1994); In re Stroh Brewery Co., 116 N.C. App. 178, 447 S.E.2d 803 (1994); In re Interstate Income Fund I, 126 N.C. App. 162, 484 S.E.2d 450 (1997); In re Owens, 132 N.C. App. 281, 511 S.E.2d 319 (1999); In re Allred, 351 N.C. 1, 519 S.E.2d 52 (1999); In re Winston-Salem Joint Venture, 144 N.C. App. 706, 551 S.E.2d 450, 2001 N.C. App. LEXIS 557 (2001).

§ 105-284. Uniform assessment standard.

(a) Except as otherwise provided in this section, all property, real and personal, shall be assessed for taxation at its true value or use value as determined under G.S. 105-283 or G.S. 105-277.6, and taxes levied by all counties and municipalities shall be levied uniformly on assessments determined in accordance with this section.

(b) The assessed value of public service company system property subject to appraisal by the Department of Revenue under G.S. 105-335(b)(1) shall be determined by applying to the allocation of such value to each county a percentage to be established by the Department of Revenue. The percentage to be applied shall be either:

(1) The median ratio established in sales assessment ratio studies of real property conducted by the Department of Revenue in the county in the year the county conducts a reappraisal of real property and in the fourth and seventh years thereafter; or

(2) A weighted average percentage based on the median ratio for real property established by the Department of Revenue as provided in subdivision (1) and a one hundred percent (100%) ratio for personal property. No percentage shall be applied in a year in which the median ratio for real property is ninety percent (90%) or greater.

If the median ratio for real property in any county is below ninety percent (90%) and if the county assessor has provided information satisfactory to the Department of Revenue that the county follows accepted guidelines and practices in the assessment of business personal property, the weighted average percentage shall be applied to public service company property. In calculating the weighted average percentage, the Department shall use the assessed value figures for real and personal property reported by the county to the Local Government Commission for the preceding year. In any county which fails to demonstrate that it follows accepted guidelines and practices, the percentage to be applied shall be the median ratio for real property. The percentage established in a year in which a sales assessment ratio study is conducted shall continue to be applied until another study is conducted by the Department of Revenue.

(c) Notice of the median ratio and the percentage to be applied for each county shall be given by the Department of Revenue to the chairman of the board of commissioners not later than April 15 of the year for which it is to be effective. Notice shall also be given at the same time to the public service companies whose property values are subject to adjustment under this section. Either the county or an affected public service company may challenge the real property ratio or the percentage established by the Department of Revenue by giving notice of exception within 30 days after the mailing of the Department's notice. Upon receipt of such notice of exception, the Department shall arrange a conference with the challenging party or parties to review the matter. Following the conference, the Department shall notify the challenging party or parties of its final determination in the matter. Either party may appeal the Department's determination to the Property Tax Commission by giving notice of appeal within 30 days after the mailing of the Department's decision.

(d) Property that is in a development financing district and that is subject to an agreement entered into pursuant to G.S. 159-108 shall be assessed at its true value or at the minimum value set out in the agreement, whichever is greater. (1939, c. 310, s. 500; 1953, c. 970, s. 5; 1955, c. 1100, s. 2; 1959, c. 682; 1967, c. 892, s. 7; 1969, c. 945, s. 1; 1971, c. 806, s. 1; 1973, c. 695, s. 12; 1985, c. 601, s. 1; 1987 (Reg. Sess., 1988), c. 1052, s. 1; 2003-403, s. 20.)

Editor's Note. — An amendment to this section, which would have added a new subsection (d), by Session Laws 1993, c. 497, s. 20, was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue financing bonds to be used to finance public activities associated with private economic development projects. This amendment was submitted to the people on November 2, 1993 and was defeated. The amendment to this section, therefore, never took effect.

Session Laws 2003-403, s. 25, made subsection (d), as added by Session Laws 2003-403, s. 20, effective upon certification of approval of the amendment to Article V, § 14 of the Constitution of North Carolina as proposed in Session Laws 2003-403, s. 1.

Session Laws 2003-403, ss. 24 and 25, provide: "The amendment set out in Section 1 of this act shall be submitted to the qualified voters of the State at the statewide general election in November 2004, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163 of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

"Constitutional amendment to promote local economic and community development projects by (i) permitting the General Assembly to enact general laws giving counties, cities, and towns the power to finance public improvements associated with qualified private economic and community improvements within development districts, as long as the financing is secured by the additional tax revenues resulting from the enhanced property value within the development district and is not secured by a pledge of the local government's faith and credit or general taxing authority, which financing is not subject to a referendum; and (ii) permitting the owners of property in the development district to agree to a minimum tax value for their property, which is binding on future owners as long as the development district is in existence.

"If a majority of votes cast on the question are in favor of the amendment set out in Section 1 of this act, the State Board of Elections shall certify the amendment to the Secretary of State. The amendment set out in Section 1 of this act and the amendments set out in Sections 2 through 21 of this act become effective upon this certification. The Secretary of State shall enroll the amendment so certified among the permanent records of that office. If a majority of votes cast on the question are not in favor of the amendment set out in Section 1 of this act, that amendment and the amendments set out in Sections 2 through 21 of this act do not go into effect."

The constitutional amendment adding N.C. Const. art. 5, § 14, as proposed in Session Laws 2003-403, s. 1, was adopted by vote of the people at the general election held on November 2, 2004.

Session Laws 2003-403, s. 22, provides that the act [Session Laws 2003-403], being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect these purposes.

Session Laws 2003-403, s. 23, is a severability clause.

CASE NOTES

N.C. Const., Art. II, § 23 Not Applicable to Session Laws 1987 (Reg. Sess., 1988), Chapter 1052. — North Carolina Const., Art. II, § 23 applies, inter alia, to laws enacted for the purpose of imposing a tax. Chapter 1052 of Session Laws 1987 (Reg. Sess., 1988) neither imposes a tax nor authorizes its imposition, and therefore, N.C. Const., Art. II, § 23 does not apply. North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

There is no doubt that the effect of Chapter 1052 of Session Laws 1987 (Reg. Sess., 1988) imposed a greater tax burden on plaintiff for 1988. However, N.C. Const., Art. II, § 23 focuses on the purpose of the statute (to impose a tax) and not the result of the statute (an increased tax burden). North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

Generally, property in this state is assessed at 100% of its appraised (true) value. Some statutes, however, provide for assessment at different rates for special classes of property. North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

Rebuttable Presumption of Correctness. — Ad valorem tax assessments are presumed correct. However, this presumption of correctness is only one of fact and is therefore rebuttable. In re Duke Power Co., 82 N.C. App. 492, 347 S.E.2d 54 (1986), cert. denied, 318 N.C. 694, 351 S.E.2d 744 (1987).

Taxpayer's contention, that cost approach method of appraisal was not legal because it did not consider the 26 U.S.C.S. § 42 rent restrictions on the property, was insufficient to rebut the presumption that the appraisal was properly administered; the intermediate appellate court's ruling reversing a decision of the North Carolina Property Tax Commission was itself reversed. In re Greens of Pine Glen Ltd., 356 N.C. 642, 576 S.E.2d 316, 2003 N.C. LEXIS 27 (2003).

Cited in Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981); In re Allred, 351 N.C. 1, 519 S.E.2d 52 (1999).

ARTICLE 14.

Time for Listing and Appraising Property for Taxation.

§ 105-285. Date as of which property is to be listed and appraised.

(a) Annual Listing Required. — All property subject to ad valorem taxation shall be listed annually.

(b) Personal Property; General Rule. — Except as otherwise provided in this Chapter, the value, ownership, and place of taxation of personal property, both tangible and intangible, shall be determined annually as of January 1.

(c) Repealed by Session Laws 1987, c. 813, s. 12.

(d) Real Property. — The value of real property shall be determined as of January 1 of the years prescribed by G.S. 105-286 and G.S. 105-287. The ownership of real property shall be determined annually as of January 1, except in the following situation: When any real property is acquired after January 1, but prior to July 1, and the property was not subject to taxation on January 1 on account of its exempt status, it shall be listed for taxation by the transferee as of the date of acquisition and shall be appraised in accordance with its true value as of January 1 preceding the date of acquisition; and the property shall be taxed for the fiscal year of the taxing unit beginning on July 1 of the year in which it is acquired. The person in whose name such property is listed shall have the right to appeal the listing, appraisal, and assessment of the property in the same manner as that provided for listings made as of January 1.

In the event real property exempt as of January 1 is, prior to July 1, acquired from a governmental unit that by contract is making payments in lieu of taxes to the taxing unit for the fiscal period beginning July 1 of the year in which the property is acquired, the tax on such property for the fiscal period beginning on July 1 immediately following acquisition shall be one half of the amount of the tax that would have been imposed if the property had been listed for taxation as of January 1. (1939, c. 310, s. 302; 1945, c. 973; 1971, c. 806, s. 1; 1973, c. 735; 1985, c. 656, s. 21; 1987, c. 813, s. 12; 1993, c. 485, s. 17.)

Legal Periodicals. — For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

CASE NOTES

Presumption Created. — G.S. 105-312 created a presumption that newly discovered property should have been listed by the taxpayer for the preceding five years unless the taxpayer showed otherwise. In re Precision Concepts, Inc., 305 B.R. 438, 2004 Bankr. LEXIS 325 (Bankr. M.D.N.C. 2004).

Legislature inadvertently omitted a comma between the words "mercantile" and "manufacturing" in former subsection (c) of this section when the statute was revised. In re Mitchell-Carolina Corp., 67 N.C. App. 450, 313 S.E.2d 816, cert. denied, 311 N.C. 401, 319 S.E.2d 272 (1984).

Discriminatory taxation of railroads by State held unlawful. Clinchfield R.R. v. Lynch, 700 F.2d 126 (4th Cir. 1983).

Application of North Carolina's ad valorem property tax to imported tobacco destined for domestic markets does not violate the import-export clause or the due process clause of the federal Constitution. R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986).

Consistent with the supremacy clause, a State may impose a nondiscriminatory ad valorem property tax on imported goods stored in a customs-bonded warehouse and destined for domestic manufacture and sale. R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986).

Effect of Listing on Ad Valorem Taxation. — The pivotal event in determining when a tax is incurred is the date that the property is listed by the owner thereof; the obligation to pay ad valorem property taxes in the State of North Carolina attaches at the time the property is listed, even though the amount of the tax has not yet been determined. Burns v. City of Winston-Salem, 991 F.2d 116 (4th Cir. 1993).

Priority in Bankruptcy. — When the Chapter 11 debtor failed to list its business personal property for taxation as required by G.S. 105-285, then the property taxes for the two years in issue were entitled to priority under 11 U.S.C.S. § 507(a)(8)(B). In re Precision Concepts, Inc., 305 B.R. 438, 2004 Bankr. LEXIS 325 (Bankr. M.D.N.C. 2004).

Applied in In re King, 281 N.C. 533, 189 S.E.2d 158 (1972); In re North Carolina Forestry Found., Inc., 296 N.C. 330, 250 S.E.2d 236 (1979); Computer Sales Int'l, Inc. v. Forsyth Mem. Hosp., 112 N.C. App. 633, 436 S.E.2d 263 (1993).

Cited in In re Bosley, 29 N.C. App. 468, 224 S.E.2d 686 (1976); Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981); Arkansas-Best Freight Sys. v. Lynch, 723 F.2d 365 (4th Cir. 1983); Cleland v. Children's Home, Inc., 64 N.C. App. 153, 306 S.E.2d 587 (1983); In re Bassett Furn. Indus., Inc., 79 N.C. App. 258, 339 S.E.2d 16 (1986); In re Dickey, 110 N.C. App. 823, 431 S.E.2d 203 (1993); County of Lenoir v. Moore, 114 N.C. App. 110, 441 S.E.2d 589 (1994), aff'd, 340 N.C. 104, 455 S.E.2d 158 (1995); Helton v. Good, 208 F. Supp. 2d 597, 2002 U.S. Dist. LEXIS 12436 (W.D.N.C. 2002).

§ 105-286. Time for general reappraisal of real property.

(a) Octennial Plan. — Unless the date shall be advanced as provided in subdivision (a)(2), below, each county of the State, as of January 1 of the year prescribed in the schedule set out in subdivision (a)(1), below, and every eighth year thereafter, shall reappraise all real property in accordance with the provisions of G.S. 105-283 and 105-317.

(1) Schedule of Initial Reappraisals. —

Division One — 1972: Avery, Camden, Cherokee, Cleveland, Cumberland, Guilford, Harnett, Haywood, Lee, Montgomery, Northampton, and Robeson.

Division Two — 1973: Caldwell, Carteret, Columbus, Currituck, Davidson, Gaston, Greene, Hyde, Lenoir, Madison, Orange, Pamlico, Pitt, Richmond, Swain, Transylvania, and Washington.

Division Three — 1974: Ashe, Buncombe, Chowan, Franklin, Henderson, Hoke, Jones, Pasquotank, Rowan, and Stokes.

Division Four — 1975: Alleghany, Bladen, Brunswick, Cabarrus, Catawba, Dare, Halifax, Macon, New Hanover, Surry, Tyrrell, and Yadkin.

Division Five — 1976: Bertie, Caswell, Forsyth, Iredell, Jackson, Lincoln, Onslow, Person, Perquimans, Rutherford, Union, Vance, Wake, Wilson, and Yancey.

Division Six — 1977: Alamance, Durham, Edgecombe, Gates, Martin, Mitchell, Nash, Polk, Randolph, Stanly, Warren, and Wilkes.

Division Seven — 1978: Alexander, Anson, Beaufort, Clay, Craven, Davie, Duplin, and Granville.

Division Eight — 1979: Burke, Chatham, Graham, Hertford, Johnston, McDowell, Mecklenburg, Moore, Pender, Rockingham, Sampson, Scotland, Watauga, and Wayne.

(2) Advancing Scheduled Octennial Reappraisal. — Any county desiring to conduct a reappraisal of real property earlier than required by this subsection (a) may do so upon adoption by the board of county commissioners of a resolution so providing. A copy of any such resolution shall be forwarded promptly to the Department of Revenue. If the scheduled date for reappraisal for any county is advanced as provided herein, real property in that county shall thereafter be reappraised every eighth year following the advanced date unless, in accordance with the provisions of this subdivision (a)(2), an earlier date shall be adopted by resolution of the board of county commissioners, in which event a new schedule of octennial reappraisals shall thereby be established for that county.

(b) Fourth-Year Horizontal Adjustments. — As of January 1 of the fourth year following a reappraisal of real property conducted under the provisions of subsection (a), above, each county shall review the appraised values of all real property and determine whether changes should be made to bring those values into line with then current true value. If it is determined that the appraised value of all real property or of defined types or categories of real property require such adjustment, the assessor shall revise the values accordingly by horizontal adjustments rather than by actual appraisal of individual properties: That is, by uniform application of percentages of increase or reduction to the appraised values of properties within defined types or categories or within defined geographic areas of the county.

(c) Value to Be Assigned Real Property When Not Subject to Appraisal. — In years in which real property within a county is not subject to appraisal or reappraisal under subsections (a) or (b), above, or under G.S. 105-287, it shall be listed at the value assigned when last appraised under this section or under G.S. 105-287. (1939, c. 310, s. 300; 1941, c. 282, ss. 1, 11/2; 1943, c. 634, s. 1; 1945, c. 5; 1947, c. 50; 1949, c. 109; 1951, c. 847; 1953, c. 395; 1955, c. 1273; 1957, c. 1453, s. 1; 1959, c. 704, s. 1; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1987, c. 45, s. 1.)

Local Modification. — Robeson: 2003-201, s. 1.

CASE NOTES

Burden of Proof on Taxpayer. — While there is an affirmative duty upon the taxing authority to reappraise property if statutorily enumerated circumstances exist, the burden of proof is on the taxpayer to establish the presence of such conditions. MAO/Pines Assocs. v. New Hanover County Bd. of Equalization, 116 N.C. App. 551, 449 S.E.2d 196 (1994).

Failure of Taxpayer to Make Factor Affecting Value Known to County. — The Property Tax Commission did not err as a matter of law by not considering evidence of a factor allegedly affecting the "true value" of taxpayer's property for a given year where taxpayer failed to make the factor known to the County. MAO/Pines Assocs. v. New Hanover County Bd. of Equalization, 116 N.C. App. 551, 449 S.E.2d 196 (1994).

A post-octennial valuation sale is not a statutorily permissive basis for adjusting a property's tax valuation. In re Allred, 351 N.C. 1, 519 S.E.2d 52 (1999).

Applied in In re King, 281 N.C. 533, 189 S.E.2d 158 (1972); In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Cited in Brock v. North Carolina Property Tax Comm'n, 290 N.C. 731, 228 S.E.2d 254 (1976); In re Bosley, 29 N.C. App. 468, 224 S.E.2d 686 (1976); In re North Carolina Forestry Found., Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978); In re Wagstaff, 42 N.C. App. 47, 255 S.E.2d 754 (1979); In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981); Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981); Arkansas-Best Freight Sys. v. Lynch, 723 F.2d 365 (4th Cir. 1983); Clinchfield R.R. v. Lynch, 700 F.2d 126 (4th Cir. 1983); In re Butler, 84 N.C. App. 213, 352 S.E.2d 232 (1987); In re Boos, 95 N.C. App. 386, 382 S.E.2d 769 (1989); In re Moravian Home, Inc., 95 N.C. App. 324, 382 S.E.2d 772 (1989); In re Camel City Laundry Co., 115 N.C. App. 469, 444 S.E.2d 689 (1994); In re Weaver Inv. Co., 165 N.C. App. 198, 598 S.E.2d 591, 2004 N.C. App. LEXIS 1150 (2004), cert. denied, 359 N.C. 188, 606 S.E.2d 695 (2004).

§ 105-287. Changing appraised value of real property in years in which general reappraisal or horizontal adjustment is not made.

(a) In a year in which a general reappraisal or horizontal adjustment of real property in the county is not made, the assessor shall increase or decrease the appraised value of real property, as determined under G.S. 105-286, to recognize a change in the property's value resulting from one or more of the reasons listed in this subsection. The reason necessitating a change in the property's value need not be under the control of or at the request of the owner of the affected property.

(1) Correct a clerical or mathematical error.

(2) Correct an appraisal error resulting from a misapplication of the schedules, standards, and rules used in the county's most recent general reappraisal or horizontal adjustment.

(2a) Recognize an increase or decrease in the value of the property resulting from a conservation or preservation agreement subject to Article 4 of Chapter 121 of the General Statutes, the Conservation and Historic Preservation Agreements Act.

(2b) Recognize an increase or decrease in the value of the property resulting from a physical change to the land or to the improvements on the land, other than a change listed in subsection (b) of this section.

(2c) Recognize an increase or decrease in the value of the property resulting from a change in the legally permitted use of the property.

(3) Recognize an increase or decrease in the value of the property resulting from a factor other than one listed in subsection (b).

(b) In a year in which a general reappraisal or horizontal adjustment of real property in the county is not made, the assessor may not increase or decrease the appraised value of real property, as determined under G.S. 105-286, to recognize a change in value caused by:

(1) Normal, physical depreciation of improvements;

(2) Inflation, deflation, or other economic changes affecting the county in general; or

(3) Betterments to the property made by:

  a. Repainting buildings or other structures;

  b. Terracing or other methods of soil conservation;

  c. Landscape gardening;

  d. Protecting forests against fire; or

  e. Impounding water on marshland for non-commercial purposes to preserve or enhance the natural habitat of wildlife.

(c) An increase or decrease in the appraised value of real property authorized by this section shall be made in accordance with the schedules, standards, and rules used in the county's most recent general reappraisal or horizontal adjustment. An increase or decrease in appraised value made under this section is effective as of January 1 of the year in which it is made and is not retroactive. This section does not modify or restrict the provisions of G.S. 105-312 concerning the appraisal of discovered property.

(d) Notwithstanding subsection (a), if a tract of land has been subdivided into lots and more than five acres of the tract remain unsold by the owner of the tract, the assessor may appraise the unsold portion as land acreage rather than as lots. A tract is considered subdivided into lots when the lots are located on streets laid out and open for travel and the lots have been sold or offered for sale as lots since the last appraisal of the property. (1939, c. 310, ss. 301, 500; 1953, c. 970, s. 5; 1955, c. 901; c. 1100, s. 2; 1959, c. 682; c. 704, s. 2; 1963, c. 414; 1967, c. 892, s. 7; 1969, c. 945, s. 1; 1971, c. 806, s. 1; 1973, c. 695, s. 10; c. 790, s. 2; 1987, c. 655; 1997-226, s. 4; 2001-139, s. 2.)

CASE NOTES

Purpose of Section. — The obvious purpose of the procedure in this section is to provide opportunity at the local level to deal with taxpayer-presented information and to modify appraisals as such information requires before any appeal need be heard by the Property Tax Commission. MAO/Pines Assocs. v. New Hanover County Bd. of Equalization, 116 N.C. App. 551, 449 S.E.2d 196 (1994).

This section imposes upon the county an affirmative duty to reappraise property in a non-appraisal year whenever it determines that any of the enumerated circumstances exists. In re Butler, 84 N.C. App. 213, 352 S.E.2d

232, cert. denied, 319 N.C. 673, 356 S.E.2d 775 (1987).

Economic Changes. — A decline in the value of downtown property and a change in federal tax laws are economic changes affecting the county in general. In re Hotel L'Europe, 116 N.C. App. 651, 448 S.E.2d 865 (1994), cert. denied, 339 N.C. 612, 454 S.E.2d 252 (1995).

Permissible Method of Valuation. — Where provisions of this section were triggered, it necessarily followed that the only statutorily permissible method of valuation was through the application of the county's schedules, standards and rules. In re Corbett, 355 N.C. 181, 558 S.E.2d 82, 2002 N.C. LEXIS 20 (2002).

A post-octennial valuation sale is not a statutorily permissive basis for adjusting a property's tax valuation. In re Allred, 351 N.C. 1, 519 S.E.2d 52 (1999).

State Tax Commission's reliance upon an independent appraiser's collateral determination of petitioners' property value, without challenge or correlation to the county's schedules of value or the application of those schedules to the property, was in violation of the statutory requirement of this section that any permissible increase or decrease in the appraised value of real property be calculated using the schedules and standards established by the county. In re Allred, 351 N.C. 1, 519 S.E.2d 52 (1999).

Correction of Unjust and Inequitable Assessment. — It is apparent that the legislature intended to authorize a county board of equalization and review, when requested so to do, to correct any unjust and inequitable assessment. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963) (decided under former similar provisions).

Only one of the nine grounds for reappraisal enumerated in this section need exist in order for a county to lawfully conduct a reappraisal in a non-appraisal year. In re Butler, 84 N.C. App. 213, 352 S.E.2d 232, cert. denied, 319 N.C. 673, 356 S.E.2d 775 (1987).

Burden of Proof on Taxpayer. — While there is an affirmative duty upon the taxing authority to reappraise property if statutorily enumerated circumstances exist, the burden of proof is on the taxpayer to establish the presence of such conditions. MAO/Pines Assocs. v. New Hanover County Bd. of Equalization, 116 N.C. App. 551, 449 S.E.2d 196 (1994).

Burden on Taxpayer to Prove Lack of Authority. — A county is not required to bear a particular burden of establishing its authority to reappraise in off years. To the contrary, the burden of proof is on the taxpayer. In re Butler, 84 N.C. App. 213, 352 S.E.2d 232, cert. denied, 319 N.C. 673, 356 S.E.2d 775 (1987).

There was a statutory mandate for an assessor to reappraise the property where circumstances caused an increase or decrease in valuation that was not specifically excluded from reappraisal as a result of being listed in this section. In re Corbett, 355 N.C. 181, 558 S.E.2d 82, 2002 N.C. LEXIS 20 (2002).

Taxpayer adequately stated a claim in asserting that assessment was erroneous because it substantially exceeded true value, failed to address factors impacting the value of real property under G.S. 105-317, was premised on certain clerical, mathematical and/or appraisal errors, and failed to properly adjust value of property based on its physical condition, layout and economic and functional obsolescence. In re Sterling Diagnostic Imaging, Inc., 132 N.C. App. 393, 511 S.E.2d 682 (1999).

Due Process Requirements Regarding Notice to Taxpayer. — Due process merely requires that notice to a taxpayer whose property is reappraised pursuant to this section, considering the time, the general wording, and the method of publication, be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. In re Butler, 84 N.C. App. 213, 352 S.E.2d 232, cert. denied, 319 N.C. 673, 356 S.E.2d 775 (1987).

Failure of Taxpayer to Notify County. — The Property Tax Commission did not err as a matter of law by not considering evidence of a factor allegedly affecting the "true value" of taxpayer's property for a given year where taxpayer failed to make the factor known to the County. MAO/Pines Assocs. v. New Hanover County Bd. of Equalization, 116 N.C. App. 551, 449 S.E.2d 196 (1994).

Adjustment for Inflationary Increases. — The taxpayer failed to show that the Property Tax Commission erred by not adjusting its expansion costs to the most recent reevaluation year, where witnesses for both parties agreed that total costs should be adjusted downward to account for inflation, and it was reasonable to assume that, in arriving at the value of the expansion, the Commission contemplated this necessity and included price escalations in its reduction of the expansion cost figure by fifty percent to reflect excess costs. In re Philip Morris U.S.A., 130 N.C. App. 529, 503 S.E.2d 679 (1998), cert. denied, 349 N.C. 359 (1998).

Notification by Taxpayer of Asbestos Contamination Untimely. — Statement regarding contamination given to the County's appraiser nearly sixteen months after the effective date of appraisal and almost four months following conclusion of the tax year in question, as well as the proffer of asbestos contamination evidence at hearing before the Property Tax Commission, came too late to qualify as proper and timely notification. MAO/Pines Assocs. v. New Hanover County Bd. of Equalization, 116 N.C. App. 551, 449 S.E.2d 196 (1994).

If county board of equalization and re-

view refuses to act, the taxpayer may appeal to the State Board of Assessment. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963).

Legislature never contemplated that injustice done a taxpayer must continue for a period of years merely because he failed at the first opportunity to bring the injustice to the attention of the authority having the power to correct. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963).

Reappraisal Supported By Substantial Evidence. — Under the "whole record" test, land pricing maps and other exhibits and the expert testimony of the appraisal supervisor provided competent, material, and substantial evidence in support of the commission's conclusion that county's reappraisal was lawful because a clerical error caused an undervaluation. In re Butler, 84 N.C. App. 213, 352 S.E.2d 232, cert. denied, 319 N.C. 673, 356 S.E.2d 775 (1987).

No Revaluation After Transfer. — The Property Tax Commission was without statutory authority to revalue a piece of land after the owners/tax payers gave a part of it to a third party. Although the division of the 1.91 acre tract into two tracts and the conveyance of one of the tracts "directly affected" the property, the division and transfer was within the sole authority of the taxpayers and, therefore, not a "factor" within the meaning of this section. In re Corbett, 138 N.C. App. 534, 530 S.E.2d 90, 2000 N.C. App. LEXIS 617 (2000).

Failure to Appraise Property or to Bill Owners. — This section, prohibiting retroactive increases in appraised property values, did not operate to preclude county tax assessor from levying challenged tax in 1990 (based on property tax commission finding that assessor appraised the house at $0 in 1989), where the assessor, due to an administrative error, simply failed to appraise the house or to bill the owners in 1989 for the taxes owned thereon. In re Dickey, 110 N.C. App. 823, 431 S.E.2d 203 (1993).

Nothing in this section's language made a distinction between an occurrence within the control of the owner and an occurrence outside the control of the owner; therefore, factors which allowed for an increase or decrease in the appraised value of real property in non-general reappraisal or horizontal adjustment years were not limited to occurrences affecting the specific property which fell outside the control of the owner. In re Corbett, 355 N.C. 181, 558 S.E.2d 82, 2002 N.C. LEXIS 20 (2002).

Applied in In re Johnson, 106 N.C. App. 61, 415 S.E.2d 108 (1992); In re Schwartz & Schwartz, Inc., 166 N.C. App. 744, 603 S.E.2d 852, 2004 N.C. App. LEXIS 2022 (2004).

Cited in In re North Carolina Forestry Found., Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978); In re Moravian Home, Inc., 95 N.C. App. 324, 382 S.E.2d 772 (1989); Thrash v. City of Asheville, 327 N.C. 251, 393 S.E.2d 842 (1990); Asheville Indus., Inc. v. City of Asheville, 112 N.C. App. 713, 436 S.E.2d 873 (1993); In re Allred, 128 N.C. App. 604, 496 S.E.2d 405 (1998).

Article 15.

Duties of Department and Property Tax Commission as to Assessments.

§ 105-288. Property Tax Commission.

(a) Creation and Membership. — The Property Tax Commission is created. It consists of five members, three of whom are appointed by the Governor and two of whom are appointed by the General Assembly. Of the two appointments by the General Assembly, one shall be made upon the recommendation of the Speaker of the House of Representatives and the other shall be made upon the recommendation of the President Pro Tempore of the Senate. The terms of the members are for four years and expire on June 30. The General Assembly shall make its appointments in accordance with G.S. 120-121 and shall fill a vacancy in accordance with G.S. 120-122. A vacancy occurs on the Commission when a member resigns, is removed, or dies. The person appointed to fill a vacancy shall serve for the balance of the unexpired term. The Governor may remove any member for misfeasance, malfeasance, or nonfeasance.

The Commission shall have a chair and a vice-chair. The Governor shall designate one of the Commission members as the chair, to serve at the pleasure of the Governor. The members of the Commission shall elect a vice-chair from among its membership. The vice-chair serves until the member's regularly appointed term expires.

(b) Duties. — The Property Tax Commission constitutes the State Board of Equalization and Review for the valuation and taxation of property in the State. It shall hear appeals from the appraisal and assessment of the property of public service companies as defined in G.S. 105-333. The Commission may adopt rules needed to fulfill its duties.

(c) Oath. — Each member of the Property Tax Commission, as the appointed holder of an office, shall take the oath required by Article VI, § 7 of the North Carolina Constitution with the following phrase added to it: "that I will not allow my actions as a member of the Property Tax Commission to be influenced by personal or political friendships or obligations,".

(d) Expenses. — The members of the Property Tax Commission shall receive travel and subsistence expenses in accordance with G.S. 138-5 and a salary as provided for by the Commission when hearing cases, meeting to decide cases, and attending training or continuing education classes on property taxes or judicial procedure. The Secretary of Revenue shall supply all the clerical and other services required by the Commission. All expenses of the Commission and the Department of Revenue in performing the duties enumerated in this Article shall be paid as provided in G.S. 105-501.

(e) Meetings. — The Property Tax Commission shall meet at least once in each quarter and may hold special meetings at any time and place within the State at the call of the Chair or upon the written request of at least three members. At least 15 days' notice shall be given to each member with respect to each special meeting. A majority of the Commission members constitutes a quorum for the transaction of business. (1939, c. 310, ss. 200, 201; 1941, c. 327, s. 6; 1947, c. 184; 1961, c. 547, s. 1; 1967, c. 1196, ss. 1, 2; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1991, c. 110, s. 1; 1991 (Reg. Sess., 1992), c. 1007, s. 20; c. 1016, s. 2; 1995, c. 41, s. 5; 2000-67, s. 7.11; 2005-276, s. 22.5(a); 2007-308, s. 1.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2005-276, s. 22.5(a), effective September 1, 2005, substituted "as provided for by the Commission" for "of two hundred dollars ($200.00) a day" in subsection (d).

Session Laws 2007-308, s. 1, effective July 28, 2007, and applicable to appointments made after July 1, 2007, substituted "The terms of the members are for four years and expire on June 30" for "The terms of the members appointed by the Governor and of the member appointed upon the recommendation of the President Pro Tempore of the Senate are for four years. Of the members appointed for four-year terms, two expire on June 30 of each odd-numbered year. The term of the member appointed upon the recommendation of the Speaker of the House of Representatives is for two years and it expires on June 30 of each odd-numbered year" in the first paragraph of subsection (a).

CASE NOTES

Duty to Weigh and Appraise Evidence. — The function of the Property Tax commission is to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts and to appraise conflicting and circumstantial evidence. In re S. Ry., 59 N.C. App. 119, 296 S.E.2d 463, rev'd on other grounds, 313 N.C. 177, 328 S.E.2d 235 (1985).

Discriminatory taxation of railroads by State held unlawful. Clinchfield R.R. v. Lynch, 700 F.2d 126 (4th Cir. 1983).

Function of the Property Tax Commission is to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts and to appraise conflicting and circumstantial evidence. In re Appeal of S. Ry., 59 N.C. App. 119, 296 S.E.2d 463 (1982), rev'd on other grounds, 313 N.C. 177, 328 S.E.2d 235 (1985), decided under former § 143B-222.

Sanctions for Failure to Follow Commission's Rules. — Dismissal of an appeal to the commission for failure to follow the rules of the commission for filing the appeal is an appropriate sanction. Without the implicit authority to enforce its rules by dismissal, the commission's effectiveness as a quasi-judicial body would be fatally compromised. In re Fayetteville Hotel Assocs., 117 N.C. App. 285, 450 S.E.2d 568 (1994), aff'd per curiam, 342 N.C. 405, 464 S.E.2d 298 (1995).

Order Entered After Expiration of Chairman's Term. — Order entered on November 4, 1991 by chairman of county tax commission after his term had expired as a commissioner on the property tax commission and his successor to the commission had been appointed was not a valid and binding order because the chairman did not have the authority to enter an order after the expiration of his term on the commission. In re N. Telecom, Inc., 112 N.C. App. 215, 435 S.E.2d 367 (1993).

Applied in In re Duke Power Co., 82 N.C. App. 492, 347 S.E.2d 54 (1986).

Cited in Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981); MAO/Pines Assocs. v. New Hanover County Bd. of Equalization, 116 N.C. App. 551, 449 S.E.2d 196 (1994).

§ 105-289. Duties of Department of Revenue.

(a) It is the duty of the Department of Revenue:

(1) To discharge the duties prescribed by law and to enforce the provisions of this Subchapter.

(2) To exercise general and specific supervision over the valuation and taxation of property by taxing units throughout the State.

(3) To appraise the property of public service companies.

(4) To keep full and accurate records of the Commission's official proceedings.

(5) To prepare and distribute annually to each assessor the manual developed by the Use-Value Advisory Board under G.S. 105-277.7 that establishes the cash rental rates for agricultural lands and horticultural lands and the net income ranges for forestland.

(6) To establish requirements for horticultural land, used to produce evergreens intended for use as Christmas trees, in lieu of a gross income requirement until evergreens are harvested from the land, and to establish a gross income requirement for this type horticultural land, that differs from the income requirement for other horticultural land, when evergreens are harvested from the land.

(7) To conduct studies of the cash rents for agricultural and horticultural lands on a county or a regional basis, such as the Major Land Resource Area map designated and developed by the U.S. Department of Agriculture. The results of the studies must be furnished to the North Carolina Use-Value Advisory Board. The studies may be conducted on any reasonable basis and timetable that will be reflective of rents and values for each local area based on the productivity of the land.

(b), (c) Repealed by Session Laws 1973, c. 476, s. 193.

(d) In exercising general and specific supervision over the valuation and taxation of property, the Department shall provide the following:

(1) A continuing program of education and training for local tax officials in the conduct of their duties;

(2) A program for testing the qualifications of an assessor and other persons engaged in the appraisal of property for a county or municipality;

(3) A certification program for an assessor and other persons engaged in the appraisal of property for a county or municipality; and

(4) Assistance to the county and/or the county attorney in developing the specifications for the proposed contract sent to the Department for review pursuant to G.S. 105-299.

The Department shall promulgate regulations to carry out its duties under this subsection.

(e) The Department of Revenue may furnish the following information to a local tax official:

(1) Information contained in a report to it or to any other State department; and

(2) Information the Department has in its possession that may assist a local tax official in securing complete tax listings, appraising or assessing taxable property, collecting taxes, or presenting information in administrative or judicial proceedings involving the listing, appraisal, or assessment of property.

A local tax official may use information obtained from the Department under this subsection only for the purposes stated in subdivision (2). A local tax official may not divulge or make public this information except as required in administrative or judicial proceedings under this Subchapter. A local tax official who makes improper use of or discloses information obtained from the Department under this subsection is punishable as provided in G.S. 153A-148.1 or G.S. 160A-208.1, as appropriate.

The Department may not furnish information to a local tax official pursuant to this subsection unless it has obtained a written certification from the official stating that the official is familiar with the provisions of this subsection and G.S. 153A-148.1 or G.S. 160A-208.1, as appropriate, and that information obtained from the Department under this subsection will be used only for the purposes stated in subdivision (2).

(f) To advise local tax officials of their duties concerning the listing, appraisal, and assessment of property and the levy and collection of property taxes.

(g) To see that proper proceedings are brought to enforce the statutes pertaining to taxation and the collection of penalties and liabilities imposed by law upon public officers, officers of corporations, and individuals who fail, refuse, or neglect to comply with the provisions of this Subchapter and other laws with respect to the taxation of property, and to call upon the Attorney General of this State or any prosecuting attorney of this State to assist in the execution of the powers conferred by the laws of this State with respect to the taxation of property.

(h) To make annual studies of the ratio of the appraised value of real property to its true value and to establish for each county the median ratio as determined by the studies for each calendar year. The studies for each calendar year shall be completed by April 15 of the following calendar year. The studies shall be conducted in accordance with generally accepted principles and procedures for sales assessment ratio studies.

(i) To maintain a register of appraisal firms, mapping firms and other persons or firms having expertise in one or more of the duties of the assessor; to review the qualifications and work of such persons or firms; and to advise county officials as to the professional and financial capabilities of such persons or firms to assist the assessor in carrying out his duties under this Subchapter. The register shall include a copy of the report filed by the counties pursuant to G.S. 105-322(g)(4). It shall also include the average median sales assessment ratio and the coefficient of dispersion achieved in each county for the first two years following the county's effective date of revaluation. To be registered with the Department of Revenue, such persons or firms shall annually file a report with the Department setting forth the following information:

(1) A statement of the firm's ownership,

(2) A statement of the firm's financial condition,

(3) A list of the firm's principal officers with a statement of their qualifications and experience,

(4) A list of the firm's employees with a statement of their education, training and experience, and

(5) A full and complete resume of each employee which the firm proposes to place in a supervisory position in any mapping or revaluation

project for a county in this State. (1939, c. 310, s. 202; 1955, c. 1350, s. 10; 1967, c. 1196, s. 3; 1969, c. 7, s. 1; 1971, c. 806, s. 1; 1973, c. 47, s. 2; c. 476, s. 193; 1975, c. 275, s. 9; c. 508, s. 1; 1981, c. 387, ss. 1, 2; 1983, c. 813, s. 1; 1985, c. 601, s. 3; c. 628, s. 3; 1987, c. 45, s. 1; c. 46, s. 1; c. 440, s. 1; c. 830, s. 84(a); 1987 (Reg. Sess., 1988), c. 1052, s. 1; 1989, c. 79, ss. 2, 4; c. 736, s. 3; 1991, c. 110, s. 2; 1993, c. 485, s. 35; 2002-184, s. 5; 2005-313, s. 6.)

Editor's Note. — Session Laws 2003-284, s. 7.6(j), provides: "Department of Revenue Reports. — The Department of Revenue shall provide to the Department of Public Instruction a preliminary report for the current fiscal year of the assessed value of the property tax base for each county prior to March 1 of each year and a final report prior to May 1 of each year. The reports shall include for each county the annual sales assessment ratio and the taxable values of (i) total real property, (ii) the portion of total real property represented by the present-use value of agricultural land, horticultural land, and forestland as defined in G.S. 105-277.2, (iii) property of public service companies determined in accordance with Article 23 of Chapter 105 of the General Statutes, and (iv) personal property."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5, is a severability clause.

Effect of Amendments. — Session Laws 2005-313, s. 6, effective for taxes imposed for taxable years beginning on or after July 1, 2005, inserted "and horticultural" near the beginning of the first sentence of subdivision (a)(7).

CASE NOTES

North Carolina Const., Art. II. § 23 Not Applicable to Session Laws 1987 (Reg. Sess., 1988), Chapter 1052. — North Carolina Const., Art. II, § 23 applies, inter alia, to laws enacted for the purpose of imposing a tax. Session Laws 1987 (Reg. Sess., 1988), c. 1052 neither imposes a tax nor authorizes its imposition, and therefore, N.C. Const., Art. II, § 23 does not apply. North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

There is no doubt that the effect of Session Laws 1987 (Reg. Sess., 1988), c. 1052 imposed a greater tax burden on plaintiff for 1988. However, N.C. Const., Art. II, § 23 focuses on the purpose of the statute (to impose a tax) and not the result of the statute (an increased tax burden). North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

Department of Revenue is given general supervisory power over the valuation and taxation of property throughout the State and authority to correct improper assessments. In re King, 281 N.C. 533, 189 S.E.2d 158 (1972).

§ **105-289.1:** Repealed by Session Laws 1987, c. 813, s. 12.

§ 105-290. Appeals to Property Tax Commission.

(a) Duty to Hear Appeals. — In its capacity as the State board of equalization and review, the Property Tax Commission shall hear and adjudicate appeals from boards of county commissioners and from county boards of equalization and review as provided in this section.

(b) Appeals from Appraisal and Listing Decisions. — The Property Tax Commission shall hear and decide appeals from decisions concerning the listing, appraisal, or assessment of property made by county boards of equalization and review and boards of county commissioners. Any property owner of the county may except to an order of the county board of equalization and review or the board of county commissioners concerning the listing, appraisal, or assessment of property and appeal the order to the Property Tax Commission.

(1) In these cases, taxpayers and persons having ownership interests in the property subject to taxation may file separate appeals or joint appeals at the election of one or more of the taxpayers. It is the intent of this provision that all owners of a single item of personal property or tract or parcel of real property be allowed to join in one appeal and also that any taxpayer be allowed to include in one appeal all objections timely presented regardless of the fact that the listing or valuation of more than one item of personal property or tract or parcel of real property is the subject of the appeal.

(2) When an appeal is filed, the Property Tax Commission shall provide a hearing before representatives of the Commission or the full Commission as specified in this subdivision.

a. Hearing by Commission Representatives. — The Commission may authorize one or more members of the Commission or employees of the Department of Revenue to hear an appeal, to make examinations and investigations, to have made from stenographic notes a full and complete record of the evidence offered at the hearing, and to make recommended findings of fact and conclusions of law. Should the Commission elect to follow this procedure, it shall fix the time and place at which its representatives will hear the appeal and, at least 10 days before the hearing, give written notice of the hearing to the appellant and to the clerk of the board of commissioners of the county from which the appeal is taken. At the hearing the Commission's representatives shall hear all evidence and affidavits offered by the appellant and appellee county and may exercise the authority granted by subsection (d), below, to obtain information pertinent to decision of the appeal. The representatives conducting the hearing shall submit to the Commission and to the appellant and appellee their recommended findings of fact and conclusions of law. Upon the request of any party, the representatives conducting the hearing shall also submit to the Commission and to the appellant and appellee a full record of the proceeding. The cost of providing the full record of the proceeding shall be borne by the party requesting it, unless the Commission determines for good cause that the cost should be borne by the Commission. The Commission shall review the record, the recommended findings of fact and conclusions of law, and any written arguments that may be submitted to the Commission by the appellant or appellee within 15 days following the date on which the findings and conclusions were submitted to the parties and shall take one of the following actions:

1. Accept the recommended findings of fact and conclusions of law and issue an appropriate order as provided in subdivision (b)(3), below.
2. Make new findings of fact or conclusions of law based upon the materials submitted by the Commission's representatives and issue an appropriate order as provided in subdivision (b)(3), below.
3. Rehear the appeal under the procedure provided in subdivision (b)(2)b, below, with respect to any portion of the record or recommended findings of fact or conclusions of law.

b. Hearing by Full Commission. — Should the Commission elect not to employ the procedure provided in subdivision (b)(2)a, above, it shall fix a time and place at which the Commission shall hear the appeal and, at least 10 days before the hearing, give written notice of the hearing to the appellant and to the clerk of the board of commissioners of the county from which the appeal is taken. At the hearing the Commission shall hear all evidence and affidavits offered by the appellant and appellee county and may exercise the authority granted by subsection (d), below, to obtain information pertinent to decision of the appeal. The Commission shall make findings of fact and conclusions of law and issue an appropriate order as provided in subdivision (b)(3), below.

(3) On the basis of the findings of fact and conclusions of law made after any hearing provided for by this subsection (b), the Property Tax Commission shall enter an order (incorporating the findings and conclusions) reducing, increasing, or confirming the valuation or valuations appealed or listing or removing from the tax lists the property whose listing has been appealed. A certified copy of the order shall be delivered to the appellant and to the clerk of the board of commissioners of the county from which the appeal was taken, and the abstracts and tax records of the county shall be corrected to reflect the Commission's order.

(4) Interest on Overpayments. — When an order of the Property Tax Commission reduces the valuation of property or removes the property from the tax lists and, based on the order, the taxpayer has paid more tax than is due on the property, the taxpayer is entitled to receive interest on the overpayment in accordance with this subdivision. An overpayment of tax bears interest at the rate set under G.S. 105-241.21 from the date the interest begins to accrue until a refund is paid. Interest accrues from the later of the date the tax was paid and the date the tax would have been considered delinquent under G.S. 105-360. A refund is considered paid on a date determined by the governing body of the taxing unit that is no sooner than five days after a refund check is mailed.

(c) Appeals from Adoption of Schedules, Standards, and Rules. — It shall be the duty of the Property Tax Commission to hear and to adjudicate appeals from orders of boards of county commissioners adopting schedules of values, standards, and rules under the provisions of G.S. 105-317 as prescribed in this subsection (c), and the adoption of such schedules, standards, and rules shall not be subject to appeal under any other provision of this Subchapter.

(1) A property owner of the county who, either separately or in conjunction with other property owners of the county, asserts that the schedules of values, standards, and rules adopted by order of the board of county commissioners do not meet the true value or present-use value appraisal standards established by G.S. 105-283 and G.S. 105-277.2(5), respectively, may appeal the order to the Property Tax Commission within 30 days of the date when the order adopting the schedules, standards, and rules was first published, as required by G.S. 105-317(c).

(2) Upon such an appeal the Property Tax Commission shall proceed to hear the appeal in accordance with the procedures provided in subdivisions (b)(1) and (b)(2), above, and in scheduling the hearing upon such an appeal, the Commission shall give it priority over appeals that may be pending before the Commission under the provisions of subsection (b), above. The decision of the Commission upon such an appeal shall be embodied in an order as provided in subdivision (c)(3), below.

(3) On the basis of the findings of fact and conclusions of law made after any hearing provided for by this subsection (c), the Property Tax

Commission shall enter an order (incorporating the findings and conclusions):

a. Modifying or confirming the order adopting the schedules, standards, and rules challenged, or

b. Requiring the board of county commissioners to revise or modify its order of adoption in accordance with the instructions of the Commission and to present the order as thus revised or modified for approval by the Commission under rules and regulations prescribed by the Commission.

(d) Witnesses and Documents. — Upon its own motion or upon the request of any party to an appeal, the Property Tax Commission, or any member of the Commission, or any employee of the Department of Revenue so authorized by the Commission shall examine witnesses under oath administered by any member of the Commission or any employee of the Department so authorized by the Commission, and examine the documents of any person if there is ground for believing that information contained in such documents is pertinent to the decision of any appeal pending before the Commission, regardless of whether such person is a party to the proceeding before the Commission. Witnesses and documents examined under the authority of this subsection (d) shall be examined only after service of a subpoena as provided in subdivision (d)(1), below. The travel expenses of any witness subpoenaed and the cost of serving any subpoena shall be borne by the party that requested the subpoena.

(1) The Property Tax Commission, a member of the Commission, or any employee of the Department of Revenue authorized by the Commission, is authorized and empowered to subpoena witnesses and to subpoena documents upon a subpoena to be signed by the chairman of the Commission directed to the witness or witnesses or to the person or persons having custody of the documents sought. Subpoenas issued under this subdivision may be served by any officer authorized to serve subpoenas.

(2) Any person who shall willfully fail or refuse to appear, to produce subpoenaed documents in response to a subpoena, or to testify as provided in this subsection (d) shall be guilty of a Class 1 misdemeanor.

(3) Upon a motion, the Property Tax Commission, or a member of the Commission may quash a subpoena if, after a hearing, the Commission finds any of the following:

a. The subpoena requires the production of evidence that does not relate to a matter in issue.

b. The subpoena fails to describe with sufficient particularity the evidence required to be produced.

c. The subpoena is subject to being quashed for any other reason sufficient in law.

(d1) Hearing on Motion to Quash Subpoena; Appeal. — A hearing on a motion to quash a subpoena pursuant to subdivision (d)(3) of this section shall be heard at least 10 days prior to the hearing for which the subpoena was issued. The denial of a motion to quash a subpoena is subject to immediate judicial review in the Superior Court of Wake County or in the superior court of the county where the person subject to the subpoena resides.

(e) Time Limits for Appeals. — A notice of appeal from an order of a board of county commissioners, other than an order adopting a uniform schedule of values, or from a board of equalization and review shall be filed with the Property Tax Commission within 30 days after the date the board mailed a notice of its decision to the property owner. A notice of appeal from an order adopting a schedule of values shall be filed within the time set in subsection (c).

(f) Notice of Appeal. — A notice of appeal filed with the Property Tax Commission shall be in writing and shall state the grounds for the appeal. A property owner who files a notice of appeal shall send a copy of the notice to the appropriate county assessor.

(g) What Constitutes Filing. — A notice of appeal submitted to the Property Tax Commission by a means other than United States mail is considered to be filed on the date it is received in the office of the Commission. A notice of appeal submitted to the Property Tax Commission by United States mail is considered to be filed on the date shown on the postmark stamped by the United States Postal Service. If an appeal submitted by United States mail is not postmarked or the postmark does not show the date of mailing, the appeal is considered to be filed on the date it is received in the office of the Commission. A property owner who files an appeal with the Commission has the burden of proving that the appeal is timely. (1939, c. 310, ss. 202, 1107, 1109; 1955, c. 1350, s. 10; 1967, c. 1196, s. 3; 1969, c. 7, ss. 1, 2; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1987, c. 295, ss. 3, 9; c. 680, ss. 4, 5; 1989 (Reg. Sess., 1990), c. 1005, ss. 1, 2; 1991 (Reg. Sess., 1992), c. 1016, s. 1; 1993, c. 539, s. 713; 1994, Ex. Sess., c. 24, s. 14(c); 1997-205, s. 1; 2007-251, ss. 3, 4; 2007-491, s. 44(1)a.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-251, ss. 3 and 4, effective July 20, 2007, added subdivision (d)(3) and subsection (d1).

Session Laws 2007-491, s. 44(1)a., effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in the second sentence of subdivision (b)(4). For applicability, see Editor's note.

Legal Periodicals. — For article on the need to reform North Carolina Property tax law, see 59 N.C.L. Rev. 675 (1981).

For 1997 legislative survey, see 20 Campbell L. Rev. 481.

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former similar provisions.*

Legislative Intent. — The Legislature intended the right of appeal in these cases to extend only to taxpayers or those persons who have ownership interests in the property subject to taxation. In re Appeal of Forsyth County, 104 N.C. App. 635, 410 S.E.2d 533 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

Filing of Notice of Appeal. — A notice of appeal submitted to the Commission via the Postal Service, but which does not bear a postmark stamped by the Service, is considered filed only upon receipt by the Commission. In re Bass Income Fund, 115 N.C. App. 703, 446 S.E.2d 594 (1994).

Entry of Judgment. — This section, rather than G.S. 1A-1, Rule 58, controlled appeal to the Property Tax Commission, including entry of judgment. In re Gen. Tire, Inc., 102 N.C. App. 38, 401 S.E.2d 391 (1991).

Property Tax Commission is given general supervisory power over the valuation and taxation of property throughout the State and authority to correct improper assessments. In re King, 281 N.C. 533, 189 S.E.2d 158 (1972).

Property Tax Commission Empowered to Make Final Valuation of Property. — The legislature's intent is that the agency designated to hear appeals in all matters pertaining to tax valuations should also be the one empowered to make the final valuation. The State Board of Assessment (now Property Tax Commission) — unlike the courts — has the staff, the specialized knowledge and expertise necessary to make informed decisions upon questions relating to the valuation and assessment of property. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

Limits on Commission's Powers. — State Property Tax Commission's authority to issue an order reducing, increasing or confirming the valuation or valuations appealed, or listing or removing from the tax lists the property which has been appealed, is subject to the same statutory parameters as assessors, county boards and county commissioners. In re Allred, 351 N.C. 1, 519 S.E.2d 52 (1999).

Decision Regarding Exemption. — Although the decision of the county board to grant or deny an exemption is a discretionary one, it is reviewable by the Property Tax Commission. In re K-Mart Corp., 319 N.C. 378, 354 S.E.2d 468 (1987).

Dismissal of Appeals to Commission. — A county board of equalization and review operates in a very informal manner. No record is kept and usually little hard evidence exists to indicate the procedures followed. Therefore, appeals to the Property Tax Commission should not be dismissed on technical grounds but only for clear noncompliance with statutory prerequisites. Brock v. North Carolina Property Tax Comm'n, 290 N.C. 731, 228 S.E.2d 254 (1976).

Taxpayer Must Exhaust Administrative Remedy Before Resorting to Courts. — The legislature has provided adequate means whereby the individual taxpayer may contest not only the valuation which the county commissioners have placed upon his own property but the entire tax list or assessment roll, and he must exhaust this administrative remedy before he can resort to the courts. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

The superior court has no authority to issue mandamus commanding the commissioners to revalue all real property in the county at its true value in money, since taxpayers must first exhaust the statutory administrative remedies in the county board of equalization and review and in the State Board of Assessment (now Property Tax Commission) before they can resort to the superior court. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

But Judicial Review Is Available. — Any person aggrieved by a final decision of the Property Tax Commission, and who has exhausted all administrative remedies available to him, is entitled to judicial review under G.S. 150A-43 (see now G.S. 150B-43) et seq. Brock v. North Carolina Property Tax Comm'n, 290 N.C. 731, 228 S.E.2d 254 (1976).

The administrative decisions of the Property Tax Commission, whether with respect to the schedule of values of the appraisal of property, are always subject to judicial review after administrative procedures have been exhausted. Brock v. North Carolina Property Tax Comm'n, 290 N.C. 731, 228 S.E.2d 254 (1976).

And Jurisdiction of State Board (now Property Tax Commission) Not Exclusive. — See In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

Jurisdiction Lacking. — Where County Tax Assessor attempted to appeal in his individual capacity a decision of the Board of Equalization and Review that he could not appeal in his official capacity as Tax Assessor he had no standing to appeal to the Property Tax Commission and the Commission had no jurisdiction to hear his appeal. In re Moses H. Cone Mem. Hosp., 113 N.C. App. 562, 439 S.E.2d 778 (1994), aff'd in part, cert. improvidently granted in part, 340 N.C. 93, 455 S.E.2d 431 (1995).

Weight of Findings of Commission upon Review. — When judicial review is sought in superior court on the record made before the Property Tax Commission, the court is bound by the findings if they are supported by competent, material and substantial evidence under G.S. 150A-51(5) (see now G.S. 150B-51(5)) in view of the entire record as submitted. Brock v. North Carolina Property Tax Comm'n, 290 N.C. 731, 228 S.E.2d 254 (1976).

When Case Remanded to Commission. — Where the findings of the Property Tax Commission are not supported according to the requirements of G.S. 150A-51(5) (see now G.S. 150B-51(5)), the case will be remanded for further proceedings. Brock v. North Carolina Property Tax Comm'n, 290 N.C. 731, 228 S.E.2d 254 (1976).

Steps in Obtaining Review of Valuation. — If the county commissioners have failed to value land at its true value in money — be the failure deliberate, an error in judgment, or caused by a misconception of the law — plaintiffs' initial step is to complain to the county board of equalization and review and request a hearing. If they are dissatisfied with the action taken by that board they may except to its order and appeal to the State Board (now Property Tax Commission). Thereafter, plaintiffs may resort to the courts, but only to obtain judicial review for errors of law or abuse of discretion by the State Board (now Property Tax Commission). King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

Burden of Proof on Taxpayer. — While there is an affirmative duty upon the taxing authority to reappraise property if statutorily enumerated circumstances exist, the burden of proof is on the taxpayer to establish the presence of such conditions. MAO/Pines Assocs. v. New Hanover County Bd. of Equalization, 116 N.C. App. 551, 449 S.E.2d 196 (1994).

Showing Required to Have Valuation Set Aside. — In order for a taxpayer to have valuation set aside, he must show more than a failure to follow the statutory procedures. It is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong; he must also show that the result arrived at is substantially greater than the true value in money of the property assessed, i.e., that the valuation was unreasonably high. In re Highlands Dev. Corp., 80 N.C. App. 544, 342 S.E.2d 588 (1986).

Where taxpayers failed to show how they were aggrieved by the valuation of other owners' property, the Commission properly refused to allow them to appeal those valuations as a class action. In re Highlands Dev. Corp., 80 N.C. App. 544, 342 S.E.2d 588 (1986).

Cited in In re Boos, 95 N.C. App. 386, 382 S.E.2d 769 (1989); In re N. Telecom, Inc., 112 N.C. App. 215, 435 S.E.2d 367 (1993); In re Moses H. Cone Mem. Hosp., 340 N.C. 93, 455 S.E.2d 431 (1995); In re Allred, 128 N.C. App. 604, 496 S.E.2d 405 (1998).

§ 105-291. Powers of Department and Commission.

(a) General Powers. — The Department of Revenue is authorized to exercise all powers reasonably necessary to perform the duties imposed upon it by this Subchapter and other laws of this State.

(b) Rule-Making Power. — The Department may adopt such rules and regulations, not inconsistent with law, as the Department may deem necessary to perform the duties or responsibilities of this Chapter.

(c) General Investigatory Authority. — In exercising general and specific supervision over the valuation and taxation of property, the Department or any authorized deputy shall have power to examine witnesses under oath administered by any member or authorized deputy and to examine the documents of any State department, county, city, town, or taxpayer if there is ground for believing that the witnesses have or that the documents contain information pertinent to the subject of the Department's inquiry. Witnesses and documents examined under the authority of this subsection (c) may be obtained through service of subpoenas as provided in subdivision (c)(1), below.

(1) To obtain the testimony of witnesses or to obtain access to the documents enumerated in this subsection (c), the Department or any authorized deputy is authorized and empowered to subpoena witnesses and to subpoena documents upon a subpoena to be signed by the Secretary of Revenue directed to the witness or to the person having custody of the documents sought, and to be served by any officer authorized to serve subpoenas.

(2) Any person who shall willfully fail or refuse to appear; to produce subpoenaed documents before the Department or authorized deputy in response to a subpoena; or to testify as provided in this subsection (c) shall be guilty of a Class 1 misdemeanor.

(d) Certification of Actions. — The Property Tax Commission shall have power to certify copies of its records, orders, and proceedings by attesting the copies with its official seal, and copies of records, orders, or proceedings so certified shall be received in evidence in all courts of this State with like effect as certified copies of other public records.

(e) Power to Require Reports. — In its discretion, the Department may require tax supervisors, clerks of boards of county commissioners, and county accountants to file with it, when called for, complete reports of the appraised and assessed value of all real and personal property in the counties, itemized as the Department may prescribe.

(f) Power to Prescribe Record Forms. — The Department may prescribe the forms, books, and records to be used in the listing, appraisal, and assessment of property and in the levying and collection of property taxes, and how the same shall be kept.

(g) Power to Recommend Appraisal Standards. — The Department may develop and recommend standards and rules to be used by tax supervisors and other responsible officials in the appraisal of specific kinds and categories of property for taxation. (1939, c. 310, s. 203; 1945, c. 955; 1951, c. 798; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1993, c. 539, s. 714; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Costs Included in Assessment. — County's discovery used to determine the valuation of the personal property of the business for a six-year period was not arbitrary and illegal for including the cost of water treatment plant that the taxpayer built, as the county was permitted to include under its own guidelines all costs incurred in obtaining property and making it ready for its intended use, which included the cost of the water treatment plant. In re Appeal of Westmoreland-LG&E, 174 N.C. App. 692, 622 S.E.2d 124, 2005 N.C. App. LEXIS 2611 (2005).

§§ 105-292, 105-293: Repealed by Session Laws 1973, c. 476, s. 193.

ARTICLE 16.

County Listing, Appraisal, and Assessing Officials.

§ 105-294. County assessor.

(a) Appointment. — Persons occupying the position of county assessor on July 1, 1983, shall continue in office until the first Monday in July, 1983. At its first regular meeting in July, 1983, and every two years or four years thereafter, as appropriate, the board of county commissioners of each county shall appoint a county assessor to serve a term of not less than two nor more than four years; provided, however, that no person shall be eligible for initial appointment to a term of more than two years unless such person is deemed to be qualified as provided in subsection (b) of this section or has been certified by the Department of Revenue as provided in subsection (c) of this section. The board of commissioners may remove the assessor from office during his term for good cause after giving him notice in writing and an opportunity to appear and be heard at a public session of the board. Whenever a vacancy occurs in this office, the board of county commissioners shall appoint a qualified person to serve as county assessor for the period of the unexpired term.

(b) Persons who held the position of assessor on July 1, 1971, and continue to hold the position, and persons who have been certified for appointment as assessor by the Department of Revenue between July 1, 1971, and July 1, 1983, are deemed to be qualified to serve as county assessor. Any other person selected to serve as county assessor must meet the following requirements:

(1) Be at least 21 years of age as of the date of appointment;
(2) Hold a high school diploma or certificate of equivalency, or in the alternative, have five years employment experience in a vocation which is reasonably related to the duties of a county assessor;
(3) Within two years of the date of appointment, achieve a passing score in courses of instruction approved by the Department of Revenue covering the following topics:
    a. The laws of North Carolina governing the listing, appraisal, and assessment of property for taxation;
    b. The theory and practice of estimating the fair market value of real property for ad valorem tax purposes;
    c. The theory and practice of estimating the fair market value of personal property for ad valorem tax purposes; and
    d. Property assessment administration.
(4) Upon completion of the required four courses, achieve a passing grade in a comprehensive examination in property tax administration conducted by the Department of Revenue.

(c) Certification. — Persons meeting all of the requirements of this section shall be certified by the Department of Revenue. From the date of appointment until the date of certification, persons appointed to serve as county assessor are deemed to be serving in an acting capacity. Any person who fails to qualify within two years after the date of initial appointment shall not be eligible for reappointment until all of the requirements have been met.

(d) In order to retain the position of county assessor, every person serving as county assessor, including those persons deemed to be qualified under the provisions of this act, shall, in each period of 24 months, attend at least 30 hours of instruction in the appraisal or assessment of property as provided in regulations of the Department of Revenue.

(e) The compensation and expenses of the county assessor shall be determined by the board of county commissioners.

(f) Alternative to separate office of county assessor. — Pursuant to Act [Article] VI, Section 9 of the North Carolina Constitution, the office of county assessor is hereby declared to be an office that may be held concurrently with any other appointive or elective office except that of member of the board of county commissioners. (1939, c. 310, ss. 400, 401; 1953, c. 970, ss. 1, 2; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1983, c. 813, s. 2; 1987, c. 45, ss. 1, 2; 1997-23, s. 5.)

Editor's Note. — In subsection (f), the word "Article" has been inserted in brackets following "Act" since the intended reference was to N.C. Const., Art. VI, § 9.

§ 105-295. Oath of office for assessor.

The assessor, as the holder of an appointed office, shall take the oath required by Article VI, § 7 of the North Carolina Constitution with the following phrase added to it: "that I will not allow my actions as assessor to be influenced by personal or political friendships or obligations,". The oath must be filed with the clerk of the board of county commissioners. (1939, c. 310, s. 402; 1971, c. 806, s. 1; 1987, c. 45, s. 1; 1991, c. 110, s. 4; 1991 (Reg. Sess., 1992), c. 1007, s. 21.)

§ 105-296. Powers and duties of assessor.

(a) The county assessor shall have general charge of the listing, appraisal, and assessment of all property in the county in accordance with the provisions of law. He shall perform the duties imposed upon him by law, and he shall have and exercise all powers reasonably necessary in the performance of his duties not inconsistent with the Constitution or the laws of this State.

(b) Within budgeted appropriations, he shall employ listers, appraisers, and clerical assistants necessary to carry out the listing, appraisal, assessing, and billing functions required by law. The assessor may allocate responsibility among such employees by territory, by subject matter, or on any other reasonable basis. Each person employed by the assessor as a real property appraiser or personal property appraiser shall during the first year of employment and at least every other year thereafter attend a course of instruction in his area of work. At the end of the first year of their employment, such persons shall also achieve a passing score on a comprehensive examination in property tax administration conducted by the Department of Revenue.

(c) At least 10 days before the date as of which property is to be listed, he shall advertise in a newspaper having general circulation in the county and post in at least five public places in each township in the county a notice containing at least the following:

(1) The date as of which property is to be listed.
(2) The date on which listing will begin.
(3) The date on which listing will end.

(4) The times between the date mentioned in subdivision (c)(2), above, and the date mentioned in subdivision (c)(3), above, during which lists will be accepted.

(5) The place or places at which lists will be accepted at the times established under subdivision (c)(4), above.

(6) A statement that all persons who, on the date as of which property is to be listed, own property subject to taxation must list such property within the period set forth in the notice and that any person who fails to do so will be subject to the penalties prescribed by law.

If the listing period is extended in any county by the board of county commissioners, the assessor shall advertise in the newspaper in which the original notice was published and post in the same places a notice of the extension and of the times during which and the place or places at which lists will be accepted during the extended period.

(d) through (f) Repealed by Session Laws 1987, c. 43, s. 2.

(g) He shall have power to subpoena any person for examination under oath and to subpoena documents whenever he has reasonable grounds for the belief that such person has knowledge or that such documents contain information that is pertinent to the discovery or valuation of any property subject to taxation in the county or that is necessary for compliance with the requirements as to what the tax list shall contain. The subpoena shall be signed by the chairman of the board of equalization and review if that board is in session; otherwise, it shall be signed by the chairman of the board of county commissioners. It shall be served by an officer qualified to serve subpoenas. Any person who shall wilfully fail or refuse to appear, produce subpoenaed documents, or testify concerning the subject of the inquiry shall be guilty of a Class 1 misdemeanor.

(h) Only after the abstract has been carefully reviewed can the assessor require any person operating a business enterprise in the county to submit a detailed inventory, statement of assets and liabilities, or other similar information pertinent to the discovery or appraisal of property taxable in the county. Inventories, statements of assets and liabilities, or other information secured by the assessor under the terms of this subsection, but not expressly required by this Subchapter to be shown on the abstract itself, shall not be open to public inspection but shall be made available, upon request, to representatives of the Department of Revenue or of the Employment Security Commission. Any assessor or other official or employee disclosing information so obtained, except as may be necessary in listing or appraising property in the performance of official duties, or in the administrative or judicial proceedings relating to listing, appraising, or other official duties, shall be guilty of a Class 3 misdemeanor and punishable only by a fine not exceeding fifty dollars ($50.00).

(i) Prior to the first meeting of the board of equalization and review, the assessor may, for good cause, change the appraisal of any property subject to assessment for the current year. Written notice of a change in assessment shall be given to the taxpayer at his last known address prior to the first meeting of the board of equalization and review.

(j) The assessor must annually review at least one eighth of the parcels in the county classified for taxation at present-use value to verify that these parcels qualify for the classification. By this method, the assessor must review the eligibility of all parcels classified for taxation at present-use value in an eight-year period. The period of the review process is based on the average of the preceding three years' data. The assessor may request assistance from the Farm Service Agency, the Cooperative Extension Service, the Division of Forest Resources of the Department of Environment and Natural Resources, or other similar organizations.

The assessor may require the owner of classified property to submit any information, including sound management plans for forestland, needed by the assessor to verify that the property continues to qualify for present-use value taxation. The owner has 60 days from the date a written request for the information is made to submit the information to the assessor. If the assessor determines the owner failed to make the information requested available in the time required without good cause, the property loses its present-use value classification and the property's deferred taxes become due and payable as provided in G.S. 105-277.4(c). If the property loses its present-use value classification for failure to provide the requested information, the assessor must reinstate the property's present-use value classification when the owner submits the requested information within 60 days after the disqualification unless the information discloses that the property no longer qualifies for present-use value classification. When a property's present-use value classification is reinstated, it is reinstated retroactive to the date the classification was revoked and any deferred taxes that were paid as a result of the revocation must be refunded to the property owner. The owner may appeal the final decision of the assessor to the county board of equalization and review as provided in G.S. 105-277.4(b1).

In determining whether property is operating under a sound management program, the assessor must consider any weather conditions or other acts of nature that prevent the growing or harvesting of crops or the realization of income from cattle, swine, or poultry operations. The assessor must also allow the property owner to submit additional information before making this determination.

(k) He shall furnish information to the Department of Revenue as required by the Department to conduct studies in accordance with G.S. 105-289(h).

(*l*) The assessor shall annually review at least one-eighth of the parcels in the county exempted or excluded from taxation to verify that these parcels qualify for the exemption or exclusion. By this method, the assessor shall review the eligibility of all parcels exempted or excluded from taxation in an eight-year period. The assessor may require the owner of exempt or excluded property to make available for inspection any information reasonably needed by the assessor to verify that the property continues to qualify for the exemption or exclusion. The owner has 60 days from the date a written request for the information is made to submit the information to the assessor. If the assessor determines that the owner failed to make the information requested available in the time required without good cause, then the property loses its exemption or exclusion. If the property loses its exemption or exclusion for failure to provide the requested information, the assessor must reinstate the property's exemption or exclusion when the owner makes the requested information available within 60 days after the disqualification unless the information discloses that the property is no longer eligible for the exemption or exclusion.

(m) The assessor shall annually review the transportation corridor official maps and amendments to them filed with the register of deeds pursuant to Article 2E of Chapter 136 of the General Statutes. The assessor must indicate on all tax maps maintained by the county or city that portion of the properties embraced within a transportation corridor and must note any variance granted for the property for such period as the designation remains in effect. The assessor must tax the property within a transportation corridor as required under G.S. 105-277.9. (1939, c. 310, ss. 403, 404; 1953, c. 970, s. 3; 1955, c. 1012, s. 1; 1957, c. 202; 1959, c. 740, s. 3; 1963, c. 302; 1971, c. 806, s. 1; 1973, c. 560; 1983, c. 813, s. 3; 1985, c. 518, s. 2; 1987, c. 43, s. 2; c. 45, ss. 1, 2; c. 830, s. 84(b); 1987 (Reg. Sess., 1988), c. 1044, s. 13; 1991, c. 34, s. 2; c. 77, s. 1; 1993, c. 539, ss. 715, 716; 1994, Ex. Sess., c. 24, s. 14(c); 2001-139, ss. 3-5; 2002-184, s. 6; 2005-313, s. 7; 2005-386, s. 1.4.)

Effect of Amendments. — Session Laws 2005-313, s. 7, effective for taxes imposed for taxable years beginning on or after July 1, 2005, inserted "if the property loses its present-use value classification for failure to provide the requested information" and "within 60 days after the disqualification" in the fourth sentence of the second paragraph of (j) and in the last sentence of (*l*); and added the last sentence to the second paragraph of (j).

Session Laws 2005-386, s. 1.4, effective September 13, 2005, substituted "Division of Forest Resources" for "Forest Resources Division" in the first paragraph of subsection (j).

Legal Periodicals. — For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

CASE NOTES

Cited in In re Bassett Furn. Indus., Inc., 79 N.C. App. 258, 339 S.E.2d 16 (1986).

§ 105-297. Assistant assessors.

The board of county commissioners may, upon the recommendation of the assessor, appoint one or more assistant assessors. The board may delegate to assistant assessors appointed under this section responsibility for the appraisal of real property, the listing and appraisal of business property, or such other duties as the board deems advisable. Pursuant to Article VI, Sec. 9, of the North Carolina Constitution, the office of assistant assessor is hereby declared to be an office that may be held concurrently with any other appointive office. (1939, c. 310, s. 409; 1955, c. 866; 1963, c. 625; 1967, cc. 59, 293; 1971, c. 802, s. 11; c. 806, s. 1; 1987, c. 45, s. 1.)

§ 105-298: Repealed by Session Laws 1987, c. 43, s. 3.

§ 105-299. Employment of experts.

The board of county commissioners may employ appraisal firms, mapping firms or other persons or firms having expertise in one or more of the duties of the assessor to assist the assessor in the performance of these duties. The county may also assign to county agencies, or contract with State or federal agencies for, any duties involved with the approval or auditing of use-value accounts. The county may make available to these persons any information it has that will facilitate the performance of a contract entered into pursuant to this section. Persons receiving this information are subject to the provisions of G.S. 105-289(e) and G.S. 105-259 regarding the use and disclosure of information provided to them by the county. Any person employed by an appraisal firm whose duties include the appraisal of property for the county must be required to demonstrate that he or she is qualified to carry out these duties by achieving a passing grade on a comprehensive examination in the appraisal of property administered by the Department of Revenue. In the employment of these firms, primary consideration must be given to the firms registered with the Department of Revenue pursuant to G.S. 105-289(i). A copy of the specifications to be submitted to potential bidders and a copy of the proposed contract may be sent by the board to the Department of Revenue for review before the invitation or acceptance of any bids. Contracts for the employment of these firms or persons are contracts for personal services and are not subject to the provisions of Article 8, Chapter 143, of the General Statutes. (1939, c. 310, s. 408; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1975, c. 508, s. 2; 1983, c. 813, s. 4; 1985, c. 601, s. 2; 1989, c. 79; 2002-184, s. 7; 2003-416, s. 9.)

CASE NOTES

Private Auditors. — The General Assembly had specifically authorized each county to employ private auditors, and a power incidental to that grant of authority is the power to decide the basis upon which the private auditors are to be employed. In re Philip Morris U.S.A, 335 N.C. 227, 436 S.E.2d 828 (1993), cert. denied, 335 N.C. 466, 441 S.E.2d 118, 512 U.S. 1228, 114 S. Ct. 2726, 129 L. Ed. 2d 850 (1994).

Contingent fee contracts for private tax auditor's services are not contrary to public policy. In re Philip Morris U.S.A, 335 N.C. 227, 436 S.E.2d 828 (1993), cert. denied, 335 N.C. 466, 441 S.E.2d 118, 512 U.S. 1228, 114 S. Ct. 2726, 129 L. Ed. 2d 850 (1994).

§ 105-300. Tax commission.

In all counties having a tax commission or comparable agency, the commission or agency shall, except for levying taxes, perform all the duties required by this Subchapter to be performed by the board of equalization and review and the board of county commissioners. All expenses incurred by the tax commission or agency or its appointees in accordance with this Subchapter shall be paid by the county. Pursuant to Article VI, Sec. 9, of the North Carolina Constitution, the office of member of a tax commission or comparable agency is hereby declared to be an office that may not be held concurrently with any other elective or appointive office. (1939, c. 310, s. 410; 1971, c. 806, s. 1.)

Article 17.

Administration of Listing.

§ 105-301. Place for listing real property.

All taxable real property that is not required by this Subchapter to be appraised originally by the Department of Revenue shall be listed in the county in which it is situated. If all or part of the real property is situated within the boundaries of a municipal corporation, this fact shall be specified on the abstract as required by G.S. 105-309. Nothing in this section shall be construed to conflict with the provisions of G.S. 105-326 through 105-328. (1939, c. 310, s. 700; 1971, c. 806, s. 1; 1973, c. 476, s. 193.)

CASE NOTES

Where Corporate Owner Must List Property. — A corporate owner is not authorized to list its property anywhere except the situs of its home office. In re Appeal of McLean Trucking Co., 283 N.C. 650, 197 S.E.2d 520 (1973), decided under former provisions of § 105-302.

OPINIONS OF ATTORNEY GENERAL

Where tract of land lies within two townships so much of tract as lies within each township must be listed in that township. See opinion of Attorney General to Mr. J.E. Rains, Randolph County Tax Supervisor, 40 N.C.A.G. 824 (1969), issued under former similar provisions.

§ 105-302. In whose name real property is to be listed.

(a) Taxable real property shall be listed in the name of the owner, and it shall be the owner's duty to list it unless the board of county commissioners shall have adopted a permanent listing system as provided in G.S. 105-303(b). For purposes of this section, the board of county commissioners may require that real property be listed in the name of the owner of record as of the day as of which property is to be listed under G.S. 105-285.

(b) If real property is listed in the name of one other than the person in whose name it should be listed, and the name of the proper person is later ascertained, the abstract and tax records shall be corrected to list the property in the name of the person in whose name it should have been listed. The corrected listing shall have the same force and effect as if the real property had been listed in the name of the proper person in the first instance.

(c) For purposes of this Subchapter:

(1) The owner of the equity of redemption in real property subject to a mortgage or deed of trust shall be considered the owner of the property, and such real property shall be listed in the name of the owner of the equity of redemption.

(2) Real property owned by a corporation shall be listed in the name of the corporation.

(3) Real property owned by an unincorporated association shall be listed in the name of the association.

(4) Real property owned by a partnership shall be listed in the name of the partnership.

(5) Real property held in connection with a sole proprietorship shall be listed in the name of the owner, and the name and address of the proprietorship shall be noted on the abstract.

(6) Real property of which a decedent died possessed, if not under the control of an executor or administrator, shall be listed in the names of the heirs or devisees if known, but such property may be listed as property of "the heirs" or "the devisees" of the decedent, without naming them, until they have given the assessor notice of their names and of the division of the estate. It shall be the duty of an executor or administrator having control of real property to list it in his fiduciary capacity, as required by subdivision (c)(7), below, until he is divested of control of the property. However, the right of an administrator or executor of a deceased person to petition for the sale of real property to make assets shall not be considered control of the real property for the purposes of this subdivision.

(7) Real property, the title to which is held by a trustee, guardian, or other fiduciary, shall be listed by the fiduciary in his fiduciary capacity except as otherwise provided in this section.

(8) A life tenant or tenant for the life of another shall be considered the owner of real property, and it shall be his duty to list the property for taxation, indicating on the abstract that he is a life tenant or tenant for the life of another named individual.

(9) Upon request to and with the approval of the assessor, undivided interests in real property owned by tenants in common who are not copartners may be listed by the respective owners in accordance with their respective undivided interests. Otherwise, real property held by tenants in common shall be listed in the names of all the owners.

(10) Real property owned by husband and wife as tenants by the entirety shall be listed on a single abstract in the names of both tenants, and the nature of their ownership shall be indicated thereon.

(11) When land is owned by one party and improvements thereon or special rights (such as mineral, timber, quarry, waterpower, or similar rights) therein are owned by another party, the parties shall list their interests separately unless, in accordance with contractual relations between them, both the land and the improvements and special rights are listed in the name of the owner of the land.

(12) If the person in whose name real property should be listed is unknown, or if title to real property is in dispute, the property shall be

listed in the name of the occupant or, if there be no occupant, in the name of "unknown owner." Such a listing shall not affect the validity of the lien for taxes created by G.S. 105-355. When the name of the owner is later ascertained, the provisions of subsection (b), above, shall apply.

(13) Real property, owned under a time-sharing arrangement but managed by a homeowners association or other managing entity, shall be listed in the name of the managing entity. (1939, c. 310, s. 701; 1971, c. 806, s. 1; 1983, c. 785, s. 1; 1987, c. 45, s. 1.)

Legal Periodicals. — For note on procedural developments in the discovery of property unlisted for purposes of ad valorem taxation, see 51 N.C.L. Rev. 531 (1973).

For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

CASE NOTES

Doctrine of instantaneous seizin does not serve to override a clear statutory provision that the owner of the equity of redemption is considered the owner of the real estate for the purpose of assessing taxes. Powell v. County of Haywood, 15 N.C. App. 109, 189 S.E.2d 785 (1972).

When Husband and Wife Regarded as Separate Persons. — The wife is the "taxpayer" with reference to taxes levied on account of property owned by her alone, and the husband is the "taxpayer" with reference to taxes levied on account of property owned by him alone. State v. Tant, 16 N.C. App. 113, 191 S.E.2d 387, cert. denied, 282 N.C. 429, 192 S.E.2d 839 (1972), 414 U.S. 938, 94 S. Ct. 240, 38 L. Ed. 2d 165 (1973).

The husband and wife are, in contemplation of the law, a separate person from either with reference to land owned by them as tenants by the entirety. State v. Tant, 16 N.C. App. 113, 191 S.E.2d 387, cert. denied, 282 N.C. 429, 192 S.E.2d 839 (1972), 414 U.S. 938, 94 S. Ct. 240, 38 L. Ed. 2d 165 (1973).

Life tenant has the obligation to list and pay the taxes on the property. Thompson v. Watkins, 285 N.C. 616, 207 S.E.2d 740 (1974).

Life tenant cannot defeat the estate of the remainderman by allowing the land to be sold for taxes and taking title in himself by purchase at the tax sale. Thompson v. Watkins, 285 N.C. 616, 207 S.E.2d 740 (1974).

Life tenant's purchase at tax sale is regarded as payment of tax, and the owner of the future interest is regarded as still holding under his original title. Thompson v. Watkins, 285 N.C. 616, 207 S.E.2d 740 (1974).

Improper Listing as Affecting Purchaser's Title. — See Morrison v. McLauchlin, 88 N.C. 251 (1883); Stone v. Phillips, 176 N.C. 457, 97 S.E. 375 (1918); Wake County v. Faison, 204 N.C. 55, 167 S.E. 391 (1933).

Where Entry Copied from Former Tax Book. — Where neither the owner nor his agent had given in the land, and list taker had copied the entry from the former tax book, the land was not rightfully on the tax list, and a sale for taxes pursuant thereto was invalid. Rexford v. Phillips, 176 N.C. 457, 74 S.E. 337 (1918); Stone v. Phillips, 176 N.C. 457, 97 S.E. 375 (1918).

Applied in Powell v. Town of Canton, 15 N.C. App. 113, 189 S.E.2d 784 (1972).

Cited in Henderson County v. Osteen, 292 N.C. 692, 235 S.E.2d 166 (1977); City of Charlotte v. Little McMahan Properties, Inc., 52 N.C. App. 464, 279 S.E.2d 104 (1981).

§ 105-302.1. Reports on properties listed in name of unknown owner.

In order to promote the discovery of "State lands" as defined by G.S. 146-64(6), it shall be the duty of all assessors upon request to furnish the State of North Carolina a report on all properties listed in the name of "unknown owner" pursuant to G.S. 105-302(c)(12) in their respective tax jurisdictions. Such report shall be forwarded to the Secretary of the North Carolina Department of Administration. The report shall contain all information available to the assessor concerning the location and identification of the properties in question. (1979, c. 45, s. 1; 1987, c. 45, s. 1.)

§ 105-303. Obtaining information on real property transfers; permanent listing.

(a) To facilitate the accurate listing of real property for taxation, the board of county commissioners may require the register of deeds to comply with the provisions of subdivision (a)(1), below, or it may require him to comply with the provisions of subdivision (a)(2), below:

(1) When any conveyance of real property (other than a deed of trust or mortgage) is recorded, the board of county commissioners may require the register of deeds to certify to the assessor:
   a. The name of the person conveying the property.
   b. The name and address of the person to whom the property is being conveyed.
   c. A description of the property sufficient to locate and identify it.
   d. A statement as to whether the parcel is conveyed in whole or in part.

(2) When any conveyance of real property (other than a deed of trust or mortgage) is submitted for recordation, the board of county commissioners may require the register of deeds to refuse to record it unless it has been presented to the assessor and the assessor has noted thereon that he has obtained the information he desires from the conveyance and from the person recording it.

(b) The board of commissioners of each county must install a permanent listing system. Each county must obtain the approval of the Department of Revenue for its permanent listing system. Under such a system the provisions of subdivisions (b)(1) through (b)(4) of this subsection apply.

(1) The assessor is responsible for listing all real property on the abstracts and tax records each year in the name of the owner of record as of the day as of which property is to be listed under G.S. 105-285.

(2) Persons whose duty it is to list real property under the provisions of G.S. 105-302 are relieved of that duty, but annually, during the listing period established by G.S. 105-307, these persons must furnish the assessor with the information concerning improvements on and separate rights in real property required by G.S. 105-309(c)(3) through (c)(5).

(3) The penalties imposed by G.S. 105-308 and 105-312 do not apply to failure to list real property for taxation, but they apply to failure to comply with the provisions of subdivision (b)(2) of this subsection with respect to reporting the construction or acquisition of improvements on and separate rights in real property. In such a case, the penalty prescribed by G.S. 105-312 shall be computed on the basis of the tax imposed on the improvements and separate rights.

(4) The Department of Revenue may authorize the board of county commissioners to make additional modifications of the listing requirements of this Subchapter, as long as the modifications do not conflict with subdivisions (b)(1) through (b)(3) of this subsection. (1939, c. 310, s. 701; 1971, c. 806, s. 1; 1973, c. 476, s. 193; c. 789; 1987, c. 43, s. 4; c. 45, s. 1; 1999-297, s. 3.)

Editor's Note. — Session Laws 1999-297, s. 1 provides that it is the intent of the General Assembly to encourage all counties to adopt a permanent property tax listing system in accordance with G.S. 105-303(b), as a permanent listing is more convenient for taxpayers and more efficient for counties; that to encourage counties to adopt permanent listing in the next few years, Session Laws 1999-297, s. 2, which amends G.S. 105-312, prohibits counties that have not adopted such a system from charging late listing penalties in certain circumstances; and that Session Laws 1999-297, s. 3, which amends G.S. 105-303, requires all counties to adopt permanent listing systems by the 2004 tax year.

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Cited in In re North Carolina Forestry Found., Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978); North Carolina Forestry Found., Inc., 296 N.C. 330, 250 S.E.2d 236 (1979).

§ 105-304. Place for listing tangible personal property.

(a) Listing Instructions. — This section applies to all taxable tangible personal property that has a tax situs in this State and that is not required by this Subchapter to be appraised originally by the Department of Revenue. The place in this State at which this property is taxable is determined according to the rules provided in this section. The person whose duty it is to list property must list it in the county in which the place of taxation is located, indicating on the abstract the information required by G.S. 105-309(d). If the place of taxation lies within a city or town that requires separate listing under G.S. 105-326(a), the person whose duty it is to list must also list the property for taxation in the city or town.

(a1) Electronic Listing. — The board of county commissioners may, by resolution, provide for electronic listing of personal property in accordance with procedures prescribed by the board. If the board of county commissioners allows electronic listing of personal property, the assessor must publish this information, including the timetable and procedures for electronic listing, in the notice required by G.S. 105-296(c).

(b) Definitions. — The following definitions apply in this section:

(1) Situated. — More or less permanently located.

(2) Business premises. — The term includes, for purposes of illustration, the following: Store, mill, dockyard, piling ground, shop, office, mine, farm, factory, warehouse, rental real estate, place for the sale of property (including the premises of a consignee), and place for storage (including a public warehouse).

(3) Electronic. — Defined in G.S. 66-312.

(c) General Rule. — Except as otherwise provided in subsections (d) through (h) of this section, tangible personal property is taxable at the residence of the owner. For purposes of this section:

(1) The residence of an individual person who has two or more places in this State at which the individual occasionally dwells is the place at which the individual dwelt for the longest period of time during the calendar year immediately preceding the date as of which property is to be listed for taxation.

(2) The residence of a domestic or foreign taxpayer other than an individual person is the place at which its principal North Carolina place of business is located.

(d) Property of Taxpayers With No Fixed Residence in This State. —

(1) Tangible personal property owned by an individual nonresident of this State is taxable at the place in this State at which the property is situated.

(2) Tangible personal property owned by a domestic or foreign taxpayer (other than an individual person) that has no principal office in this State is taxable at the place in this State at which the property is situated.

(e) Farm Products. — Farm products produced in this State, if owned by their producer, are taxable at the place in this State at which they were produced.

(f) Property Situated or Commonly Used at Premises Other Than Owner's Residence. — Subject to the provisions of subsection (e) of this section:

(1) Tangible personal property situated at or commonly used in connection with a temporary or seasonal dwelling owned or leased by the

owner of the personal property is taxable at the place at which the temporary or seasonal dwelling is situated.

(2) Tangible personal property situated at or commonly used in connection with a business premises hired, occupied, or used by the owner of the personal property (or by the owner's agent or employee) is taxable at the place at which the business premises is situated. Tangible personal property that may be used by the public generally or that is used to sell or vend merchandise to the public falls within the provisions of this subdivision.

(3) Tangible personal property situated at or commonly used in connection with a premise owned, hired, occupied, or used by a person who is in possession of the personal property under a business agreement with the property's owner is taxable at the place at which the possessor's premise is situated. For purposes of this subdivision, the term "business agreement means a commercial lease, a bailment for hire, a consignment, or a similar business arrangement.

(4) In applying the provisions of subdivisions (1), (2), and (3) of this subsection, the temporary absence of tangible personal property from the place at which it is taxable under one of those subdivisions on the day as of which property is to be listed does not affect the application of the rules established in those subdivisions. The presence of tangible personal property at a location specified in subdivision (1), (2), or (3) of this subsection on the day as of which property is to be listed is prima facie evidence that it is situated at or commonly used in connection with that location.

(g) Decedents. — The tangible personal property of a decedent whose estate is in the process of administration or has not been distributed is taxable at the place at which it would be taxable if the decedent were still alive and still residing at the place at which the decedent resided at the time of death.

(h) Beneficial Ownership. — Tangible personal property within the jurisdiction of the State held by a resident or nonresident trustee, guardian, or other fiduciary having legal title to the property is taxable in accordance with the following rules:

(1) If any beneficiary is a resident of the State, an amount representing that beneficiary's portion of the property is taxable at the place at which it would be taxable if the beneficiary owned that portion.

(2) If any beneficiary is a nonresident of the State, an amount representing that beneficiary's portion of the property is taxable at the place at which it would be taxable if the fiduciary were the beneficial owner of the property. (1939, c. 310, s. 800; 1947, c. 836; 1951, c. 1102, s. 1; 1955, c. 1012, ss. 2, 3; 1969, c. 940; 1971, c. 806, s. 1; 1973, c. 476, s. 193; c. 1180; 2001-279, s. 1; 2006-30, s. 1.)

Effect of Amendments. — Session Laws 2006-30, s. 1, effective June 29, 2006, deleted "business" preceding "personal property" in the first and second sentences of subsection (a1).

Legal Periodicals. — For survey of 1974 case law on taxation of personal property owned by nonresidents, see 53 N.C.L. Rev. 1132 (1975).

For article, "State Jurisdiction To Tax Tangible Personal Property," see 56 N.C.L. Rev. No. 807 (1978).

CASE NOTES

I. General Consideration.
II. "Situated."
III. Situs.
  A. In General.
  B. Corporations.
  C. Property Located Outside State.

I. GENERAL CONSIDERATION.

Editor's Note. *— Some of the cases cited below were decided under former similar provisions.*

The theory of taxation is that the right to tax is derived from the protection afforded to the subject upon which it is imposed. The actual situs and control of the property within this State, and the fact that it enjoys the protection of the laws here, are conditions which subject it to taxation here. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

Uniform Rule Established. — The rules and regulations fixed by the "Revenue Act" and the "Machinery Act" for the guidance of the officers charged with the listing and assessment of property for purposes of State taxation govern and control the action of county and other municipal officers charged with the listing and assessment of property for municipal taxation. The conclusion, therefore, is that the legislature has adopted a "uniform rule" which must be observed. Wiley v. Commissioners of Salisbury, 111 N.C. 397, 16 S.E. 542 (1892).

Cited in Powell v. County of Haywood, 15 N.C. App. 109, 189 S.E.2d 785 (1972); Szabo Food Serv., Inc. v. Balentine's, Inc., 285 N.C. 452, 206 S.E.2d 242 (1974).

II. "SITUATED."

"Situated" connotes a more or less permanent location. It does not mean a mere temporary presence. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

Words "more or less permanently" exclude necessity of establishing unqualified permanency such as actual and continuous presence in the State. In re Hanes Dye & Finishing Co., 285 N.C. 598, 207 S.E.2d 729 (1974).

As to origin of term "more or less permanently located," see In re Hanes Dye & Finishing Co., 285 N.C. 598, 207 S.E.2d 729 (1974).

More Than Temporary Presence for Specific Service Required. — Any degree of permanency would seem to require more than a temporary presence of limited duration within the State for a specific service pursuant to a scheduled arrangement as to time of entrance and departure. In re Hanes Dye & Finishing Co., 285 N.C. 598, 207 S.E.2d 729 (1974).

Cloth materials of nonresident converters shipped from outside the State to textile finishing company for processing and reshipment to these converters or to their customers at designated places outside the State are not "situated" or "more or less permanently located" in the county in which the finishing company is located on January 1, of the year in question, and, therefore, do have a tax situs in that county. In re Hanes Dye & Finishing Co., 285 N.C. 598, 207 S.E.2d 729 (1974).

III. SITUS.

A. In General.

Situs is an absolute essential for tax exaction. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Taxable tangible personal property must have acquired a tax situs in this State, for situs is an absolute essential for tax exaction. In re Bassett Furn. Indus., Inc., 79 N.C. App. 258, 339 S.E.2d 16, appeal dismissed, 316 N.C. 553, 344 S.E.2d 4 (1986).

As no state may tax anything not within her jurisdiction without violating U.S. Const., Amend. XIV. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

State of Domicile May Tax Property Which Has Not Acquired Situs Elsewhere. — The state of domicile may tax the full value of a taxpayer's tangible personal property for which no tax situs beyond the domicile has been established so that the property may not be said to have "acquired an actual situs elsewhere." Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Actual situs of taxable property turns on uninterrupted presence of the property within the taxing jurisdiction. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

When Personal Property of Nonresident May Be Taxed. — When personal property belonging to a nonresident has acquired a taxable situs in this State, this State may tax that nonresident's property without violating the provisions of U.S. Const., Amend. XIV. In re Bassett Furn. Indus., Inc., 79 N.C. App. 258, 339 S.E.2d 16, appeal dismissed, 316 N.C. 553, 344 S.E.2d 4 (1986).

It is for the legislature to determine situs of personal property for purposes of taxation, and it may provide different rules for different kinds of property, and change them from time to time, and the courts may not, for consideration of expediency, disregard the legislative will. Planters Bank & Trust Co. v. Town of Lumberton, 179 N.C. 409, 102 S.E. 629 (1920).

The situs of personal property for purposes of taxation is determined by the legislature, and the legislature may provide different rules for different kinds of property and may change the rules from time to time. In re Bassett Furn. Indus., Inc., 79 N.C. App. 258, 339 S.E.2d 16, appeal dismissed, 316 N.C. 553, 344 S.E.2d 4 (1986).

Nature of Property Considered in Determining Situs. — Any determination of the tax situs of tangible personal property must take into account the nature of the property involved. In re Appeal of Hanes Dye & Finishing Co., 285 N.C. 598, 207 S.E.2d 729 (1974).

Different Kinds of Personalty Subject to Different Rules. — As to the situs of realty there can be no doubt, but the situs of personalty for purposes of taxation from time immemorial has been a matter for the law-making power, which has provided different rules for different kinds of personalty, and has changed them from time to time. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

Situs of Personalty Is Ordinarily Owner's Domicile. — The situs of personal property for purposes of taxation is ordinarily the domicile of the owner. Where, however, the owner maintains said property in a jurisdiction other than that of his domicile, in the conduct of his business within such jurisdiction, the situs of said property for purposes of taxation is its actual situs, and not that of his domicile. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

Taxation of Movable Personal Property. — A state can impose upon a plaintiff's movable personal property the same tax imposed upon similar property used in like manner by its own citizens, and such tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

A jet aircraft hangared in Rockingham County, North Carolina, for approximately one year by a nonresident corporation having no principal place of business in this State, under the stipulated facts and evidence, was "situated" or "more or less permanently located" in Rockingham County on January 1, 1984, and therefore had a tax situs in Rockingham County on that date. The fact that the airplane happened to be physically located at a Virginia airport on January 1, 1984, did not defeat taxation by Rockingham County. In re Bassett Furn. Indus., Inc., 79 N.C. App. 258, 339 S.E.2d 16, appeal dismissed, 316 N.C. 553, 344 S.E.2d 4 (1986).

Property Held by Executors and Trustees. — Where a testator appointed executors of his will who were also therein named as trustees for certain beneficiaries, who moved to another town, after the matters of executorship had been closed, leaving those of the trusteeship continuing, it was held, under a former statute, that the personal property should have been listed at the place of residence of the beneficiaries; and the taxes not having been listed at all, it was proper for the commissioners of the town of residence of the beneficiaries to cause the personalty to be listed there and impose the penalty prescribed by law. Smith v. Town of Dunn, 160 N.C. 174, 76 S.E. 242 (1912).

As to residence and domicile under former laws, see Town of Roanoke Rapids v. Patterson, 184 N.C. 135, 113 S.E. 603 (1922); Ransom v. Board of Comm'rs, 194 N.C. 237, 139 S.E. 232 (1927).

Temporary Absence of Property. — Subdivision (f)(4) of this section clearly provides that the temporary absence of tangible personal property from the place at which it is normally taxable shall not affect the rule of taxation. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

Absence on Tax Date for Processing Outside State. — A foreign corporation which was a broker of high fashion jeans acquired a business situs in Mecklenburg County so as to subject its property (piece goods and finished goods) to ad valorem taxation by Mecklenburg County where its only warehouse for assembling and shipping its inventory was located in Mecklenburg County, and the tax situs of such property remained in Mecklenburg County while it was outside North Carolina on the tax date being stitched or laundered. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

B. Corporations.

"Business Situs" Defined. — Business situs means a situs acquired for tax purposes by one who has carried on a business in the State more or less permanent in its nature. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

Generally, Personalty of Corporation Has Situs at Principal Office. — Except for its property which has acquired a business situs elsewhere, the legislature has fixed the tax situs of the personalty of a corporation at the place of its principal office in the State. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

The legislature has fixed the tax situs of a corporation's tangible personal property subject to North Carolina's taxing jurisdiction at the place of its principal office in North Carolina unless such property or a part thereof has a tax situs elsewhere and thus is not within the taxing jurisdiction of this State. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

The tax situs of a corporation's tangible personal property within the jurisdiction of the State is at the place of its principal office in North Carolina. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

Although Part of Personalty Located

Elsewhere. — Where a corporation had its place of business and principal office in one town, with a part of the personal property located in another town, such property was only taxable in the town where the place of business and principal office were located. The same was said to be true of a partnership. City of Winston v. City of Salem, 131 N.C. 404, 42 S.E. 889 (1902).

Corporations Engaged in Interstate Operations. — The state of domicile may constitutionally subject its own corporations to nondiscriminatory property taxes even though they are engaged in interstate commerce. It is only multiple taxation of interstate operations that violates the Commerce Clause. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Subdivision (d)(2) Contemplates Property in Transient Condition. — Subdivision (d)(2) of this section contemplates a situation in which a corporation has no principal office in this State, and its property is in a transient condition through the state. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

C. Property Located Outside State.

Property Permanently Located Outside State May Not Be Taxed. — The state of domicile may not levy an ad valorem tax on tangible personal property of its citizens which is permanently located in some other state throughout the tax year. This is forbidden by the due process clause of U.S. Const., Amend. XIV. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Tangible personal property permanently located in other states and employed there in the prosecution of plaintiff's business is not subject to taxation in another state. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Taxation by Apportionment. — When a defined part of the domiciliary corpus has acquired a taxable situs in one or more nondomiciliary states, it may be taxed by those states on an apportionment basis; and taxation by apportionment precludes taxation of all of the property by the state of the domicile. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

When an apportionment tax is imposed by a nondomiciliary state (a) it must be just and equitable; (b) it must bear a reasonable relation in its practical operation to the opportunities, the benefits, and the protection afforded by the taxing jurisdiction; and (c) the opportunities, benefits and protection must be available throughout the tax year. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Goods owned by nonresident converters but in a textile finishing company's possession on January 1, purchased from North Carolina greige mills and shipped to the finishing company for processing and reshipment to the converter or its customer at a destination outside of North Carolina, are subject to ad valorem taxation by the county in which the finishing company is located. In re Hanes Dye & Finishing Co., 285 N.C. 598, 207 S.E.2d 729 (1974).

In respect of a North Carolina corporation, its tangible personal property located in North Carolina on January 1 is subject to ad valorem taxation without reference to whether it is in the custody of a textile finishing company or in the actual custody of the North Carolina corporation. Whether such property is taxable in the county where the principal office and place of business are located or the county where the property is physically situated is a matter for determination by the Department of Revenue. In re Hanes Dye & Finishing Co., 285 N.C. 598, 207 S.E.2d 729 (1974).

Tax Situs of Fleet of Vehicles Operated Through State. — When a fleet of vehicles is operated into, through, and out of a nondomiciliary state, a "tax situs" sufficient to satisfy constitutional requirements is acquired if (a) the vehicles are operated along fixed routes and on regular schedules, or (b) the vehicles are habitually situated and employed within the nondomiciliary jurisdiction throughout the tax year. In that event, their continuous presence supports imposition of an ad valorem tax based upon the average number continuously present in the taxing state regardless of routes and schedules. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Burden Is on Taxpayer to Prove Tax Situs Is in Another Jurisdiction. — The burden is on the taxpayer who contends that some portion of his tangible personal property is not within the taxing jurisdiction of his domiciliary state to prove that the same property has acquired a tax situs in another jurisdiction. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

And Evidence That Part of Property Is Absent from State Is Not Sufficient. — Continuous presence of the property throughout the tax year in a nondomiciliary state is not shown by evidence which merely proves that some determinable fraction of its property is absent from the state for part of the tax year. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Mere general showing of continuous use of tangible movable property in other states is insufficient to exclude the taxing power of the state of domicile. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

OPINIONS OF ATTORNEY GENERAL

Personalty located in county may be taxed by county when, before January 1, owner marries serviceman not domiciled in State but stationed in same county and she continues to reside in that county. See opinion of Attorney General to Mr. Fred P. Parker, Jr., Wayne County Attorney, 40 N.C.A.G. 825 (1969).

Ferries owned by a corporation were properly taxed in the village listed as the corporation's principal place of business, notwithstanding that they were docked each night in a different village from which their first runs in the morning originated, and that other village could not also tax the ferries. See opinion of Attorney General to Michael R. Isenburg, Fairley, Jess, Isenberg & Green, 2001 N.C. AG LEXIS 27 (11/9/01).

§ 105-305. Place for listing intangible personal property.

(a) Listing Instructions. — This section applies to all taxable intangible personal property that has a tax situs in this State and is not required by this Subchapter to be appraised originally by the Department of Revenue. The place in this State at which this property is taxable shall be determined as provided in this section. The person whose duty it is to list property shall list it in the county in which the place of taxation is located, indicating on the abstract the information required by G.S. 105-309(d). If the place of taxation lies within a city or town that requires separate listing under G.S. 105-326(a), the person whose duty it is to list shall also list the property for taxation in the city or town.

(b) Repealed by Session Laws 1997-456, s. 43(a).

(c) Intangible personal property representing an interest or interests in real property that is situated in this State shall be taxable in the place in which the represented real property is located.

(d), (e) Repealed by Session Laws 1997-456, s. 43(a). (1939, c. 310, s. 801; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1995, c. 41, s. 8; 1997-456, s. 43(a).)

§ 105-306. In whose name personal property is to be listed.

(a) Taxable personal property shall be listed in the name of the owner on the day as of which property is to be listed for taxation, and it shall be the duty of the owner to list the property.

(b) If personal property is listed in the name of a person other than the one in whose name it should be listed, and the name of the proper person is later ascertained, the abstract and tax records shall be corrected to list the property in the name in which it should have been listed. The corrected listing shall have the same force and effect as if the personal property had been listed in the name of the proper person in the first instance.

(c) For purposes of this Subchapter:

(1) The owner of the equity of redemption in personal property subject to a chattel mortgage shall be considered the owner of the property.

(2) The vendee of personal property under a conditional bill of sale, or under any other sale contract through which title to the property is retained by the vender as security for the payment of the purchase price, shall be considered the owner of the property if he has possession of or the right to use the property.

(3) Personal property owned by a corporation, partnership, or unincorporated association shall be listed in the name of the corporation, partnership, or unincorporated association.

(4) Personal property held in connection with a sole proprietorship shall be listed in the name of the owner, and the name and address of the proprietorship shall be noted on the abstract.

(5) Personal property of which a decedent died possessed, if not under the control of an executor or administrator, shall be listed in the names of the next of kin or legatees if known, but such property may be listed as property of "the next of kin" or "the legatees" of the decedent, without naming them, until they have given the assessor notice of their names and of the division of the estate. It shall be the duty of an executor or administrator having control of personal property to list it in his fiduciary capacity, as required by subdivision (c)(6), below, until he is divested of control of the property.

(6) Personal property, the title to which is held by a trustee, guardian, or other fiduciary, shall be listed by the fiduciary in his fiduciary capacity except as otherwise provided in this section.

(7) If personal property is owned by two or more persons who are joint owners, each owner shall list the value of his interest. However, if the joint owners are husband and wife, the property owned jointly shall be listed on a single abstract in the names of both the husband and the wife.

(8) If the person in whose name personal property should be listed is unknown, or if the ownership of the property is in dispute, the property shall be listed in the name of the person in possession of the property, or if there appears to be no person in possession, in the name of "unknown owner." When the name of the owner is later ascertained, the provisions of subsection (b), above, shall apply.

(9) Personal property, owned under a time-sharing arrangement but managed by a homeowners association or other managing entity, shall be listed in the name of the managing entity. (1939, c. 310, s. 802; 1971, c. 806, s. 1; 1983, c. 785, s. 2; 1987, c. 45, s. 1.)

CASE NOTES

Cited in Szabo Food Serv., Inc. v. Balentine's, Inc., 285 N.C. 452, 206 S.E.2d 242 (1974); In re Hanes Dye & Finishing Co., 285 N.C. 598, 207 S.E.2d 729 (1974).

OPINIONS OF ATTORNEY GENERAL

Floor Plan Financing Arrangement Property to Be Listed for Ad Valorem Tax Purposes in Name of Owner. — See opinion of Attorney General to Mr. Bonner R. Lee, Hyde County Accountant, 41 N.C.A.G. 42 (1970), issued under former similar provisions.

§ 105-307. Length of listing period; extension; preliminary work.

(a) Listing Period. — Unless extended as provided in this section, the period during which property is to be listed for taxation each year begins on the first business day of January and ends on January 31.

(b) General Extensions. — The board of county commissioners may, by resolution, extend the time during which property is to be listed for taxation as provided in this subsection. Any action by the board of county commissioners extending the listing period must be recorded in the minutes of the board, and notice of the extensions must be published as required by G.S. 105-296(c). The entire period for listing, including any extension of time granted, is considered the regular listing period for the particular year within the meaning of this Subchapter.

(1) In nonrevaluation years, the listing period may be extended for up to 30 additional days.
(2) In years of octennial appraisal of real property, the listing period may be extended for up to 60 additional days.
(3) If the county has provided for electronic listing of personal property under G.S. 105-304, the period for electronic listing of business personal property may be extended up to June 1.

(c) Individual Extensions. — The board of county commissioners shall grant individual extensions of time for the listing of real and personal property upon written request and for good cause shown. The request must be filed with the assessor no later than the ending date of the regular listing period. The board may delegate the authority to grant extensions to the assessor. Extensions granted under this subsection shall not extend beyond April 15. If the county has provided for electronic listing of personal property under G.S. 105-304, the period for electronic listing of business personal property is as provided in subsection (b) of this section.

(d) Preliminary Work. — The assessor may conduct preparatory work before the listing period begins, but may not make a final appraisal of property before the day as of which the value of the property is to be determined under G.S. 105-285. (1939, c. 310, s. 905; 1971, c. 806, s. 1; 1973, cc. 141, 706; 1975, c. 49; 1977, c. 360; 1987, c. 43, s. 5; c. 45, s. 1; 2001-279, s. 2; 2006-30, s. 2.)

Support Troops Participating in Operations Enduring Freedom and Noble Eagle. — Session Laws 2001-508, ss. 3 to 5(b), provide: "Section 3. Definitions. — As used in this act:

"(1) (Military personnel) includes both of the following:

"a. A member of the armed forces or the armed forces reserves of the United States on active duty in support of Operation Enduring Freedom or Operation Noble Eagle on or after September 11, 2001.

"b. A member of the North Carolina Army National Guard or the North Carolina Air National Guard called to active duty in support of Operation Enduring Freedom or Operation Noble Eagle on or after September 11, 2001.

"A copy of the soldier's military orders specifying deployment is conclusive evidence of the soldier's deployment.

"(2) (Operation Enduring Freedom) or (Operation Noble Eagle) include any other operations with differing names arising out of the same occurrence.

"Section 4. Waiver of Deadlines, Fees, and Penalties. — Except as prohibited by the Constitution, the Governor may extend deadlines and waive penalties or fees as is necessary to alleviate hardship created for deployed military personnel serving in either Operation Enduring Freedom or Operation Noble Eagle. Such authority includes, but is not limited to, the authority to:

"(1) Extend for up to 90 days from the end of deployment the validity of a permanent or temporary drivers license issued under G.S. 20-7 to deployed military personnel;

"(2) Waive civil penalties and restoration fees under G.S. 20-309 for any deployed military personnel whose motor vehicle liability insurance lapsed during the period of deployment or within 90 days after the soldier returned to North Carolina if the soldier certifies to the Division of Motor Vehicles that the motor vehicle was not driven on the highway by anyone during the period in which the motor vehicle was uninsured and that the owner now has liability insurance on the motor vehicle;

"(3) Allow up to 90 days from the end of deployment for any deployed military personnel to renew a license as defined in G.S. 93B-1. During the period of deployment or active duty and until the expiration of the 90-day period provided for in this subsection, expired licenses that are within the scope of this act [Session Laws 2001-508] shall remain valid, as if they had not expired; and

"(4) Require that any renewal fee applicable to the renewal of a license under subdivision (3) of this section [s. 4 of Session Laws 2001-508] be prorated over the period covered by the license and reduced in proportion to the period of time that the licensee was deployed outside the State.

"Section 5.(a) Property Taxes. — Notwithstanding G.S. 105-360 or G.S. 105-330.4, deployed military personnel are allowed 90 days after the end of the individual's deployment to pay property taxes at par, for any property taxes that became due or delinquent during the term of the deployment. For these individuals, the taxes for the relevant tax year do not become delinquent until after the end of the 90-day period provided in this section [s. 5 of Session Laws 2001-508], and an individual who pays the property taxes before the end of the 90-day period is not liable for interest on the taxes for the relevant tax year. If the individual does not pay the taxes before the end of the 90-day period, interest shall accrue on the taxes according to the schedule provided in G.S. 105-360 or G.S. 105-330.4, as applicable, as though the taxes were unpaid as of the date the taxes would have become delinquent if not for this section [s. 5 of Session Laws 2001-508].

"Section 5.(b). Notwithstanding G.S. 105-307, deployed military personnel required to list property for taxation while deployed are allowed 90 days after the end of the deployment to list the property. For these individuals, the listing period for the relevant tax year is extended until the end of the 90-day period provided in this act [Session Laws 2001-508], and an individual who lists the property before the end of the 90-day period is not subject to civil or criminal penalties for failure to list the property required to be listed during deployment."

Extension of Deadline for Payment of Property Taxes for Deployed Military Personnel. — Session Laws 2003-300, ss. 1, 2, and 4, provide: "Deployed Military Personnel Defined. — As used in this act, the term 'deployed military personnel' includes both of the following:

"(1) A member of the armed forces or the armed forces reserves of the United States on active duty in support of Operation Iraqi Freedom on or after January 1, 2003.

"(2) A member of the North Carolina Army National Guard or the North Carolina Air National Guard called to active duty in support of Operation Iraqi Freedom on or after January 1, 2003.

"Proof. — Verification by the military member's command specifying deployment is conclusive evidence of the military member's deployment.

"Property Taxes. — Notwithstanding G.S. 105-360 or G.S. 105-330.4, deployed military personnel are allowed 90 days after the end of their deployment to pay property taxes at par, for any property taxes that became due or delinquent during the term of the deployment. For these individuals, the taxes for the relevant tax year do not become delinquent until after the end of the 90-day period provided in this section, and an individual who pays the property taxes before the end of the 90-day period is not liable for interest on the taxes for the relevant tax year. If the individual does not pay the taxes before the end of the 90-day period, interest accrues on the taxes according to the schedule provided in G.S. 105-360 or G.S. 105-330.4, as applicable, as though the taxes were unpaid as of the date the taxes would have become delinquent if not for this section.

"Notwithstanding G.S. 105-307, deployed military personnel required to list property for taxation while deployed are allowed 90 days after the end of the deployment to list the property. For these individuals, the listing period for the relevant tax year is extended until the end of the 90-day period provided in this act, and an individual who lists the property before the end of the 90-day period is not subject to civil or criminal penalties for failure to list the property required to be listed during deployment."

Effect of Amendments. — Session Laws 2006-30, s. 2, effective June 29, 2006, in subdivision (b)(3) and subsection (c), deleted "business" preceding "personal property under G.S. 105-304, the period for electronic listing" and added "of business personal property" thereafter.

CASE NOTES

Cited in In re Church of Creator, 102 N.C. App. 507, 402 S.E.2d 874 (1991); In re Dickey, 110 N.C. App. 823, 431 S.E.2d 203 (1993); State v. Childers, 154 N.C. App. 375, 572 S.E.2d 207, 2002 N.C. App. LEXIS 1472 (2002), cert. denied, 356 N.C. 682, 577 S.E.2d 899 (2003).

§ 105-308. Duty to list; penalty for failure.

Every person in whose name any property is to be listed under the terms of this Subchapter shall list the property with the assessor within the time allowed by law on an abstract setting forth the information required by this Subchapter.

In addition to all other penalties prescribed by law, any person whose duty it is to list any property who willfully fails or refuses to list the same within the time prescribed by law shall be guilty of a Class 2 misdemeanor. The failure to list shall be prima facie evidence that the failure was willful.

Any person who willfully attempts, or who willfully aids or abets any person to attempt, in any manner to evade or defeat the taxes imposed under this Subchapter, whether by removal or concealment of property or otherwise, shall be guilty of a Class 2 misdemeanor. (1939, c. 310, s. 901; 1957, c. 848; 1971, c.

806, s. 1; 1977, c. 92; 1987, c. 43, s. 4; c. 45, s. 1; 1993, c. 539, s. 717; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

§ 105-309. What the abstract shall contain.

(a) Each person whose duty it is to list property for taxation shall file each year with the assessor a tax list or abstract showing, as of the date prescribed by G.S. 105-285(b), the information required by this section. Subject to the provisions of subdivisions (a)(1) and (a)(2), below, each person whose duty it is to list property for taxation shall file a separate abstract.

(1) Tenants by the entirety shall file a single abstract listing the real property so held, together with all personal property they own jointly.

(2) Tenants in common shall file a single abstract listing the real property so held, together with all personal property that they own jointly, unless, as provided in G.S. 105-302(c)(9), the assessor allows them to list their undivided interests in the real property on separate abstracts.

(b) Each abstract shall show the taxpayer's name; residence address; and, if required by the assessor, business address.

(1) An individual trading under a firm name shall show his name and address and also the name and address of his business firm.

(2) An unincorporated association shall show both the name and address of the association and the names and addresses of its principal officers.

(3) A partnership shall show both the name and address of the partnership and the names and addresses of its full partners.

(c) Each tract, parcel, or lot of real property owned or controlled in the county shall be listed in accordance with the following instructions:

(1) Real property not divided into lots shall be described by giving:
  a. The township in which located.
  b. The total number of acres in the tract, or, if smaller than one acre, the dimensions of the parcel.
  c. The tract name (if any), the names of at least two adjoining landowners, a reference to the tract's designation on any map maintained in the office of the assessor or on file in the office of the register of deeds, or some other description sufficient to identify and locate the property by parol testimony.
  d. If applicable, the number of acres of:
    1. Cleared land;
    2. Woods and timberland;
    3. Land containing mineral or quarry deposits;
    4. Land susceptible of development for waterpower;
    5. Wasteland.
  e. The portion of the tract or parcel located within the boundaries of any municipality.

(2) Real property divided into lots shall be described by giving:
  a. The township in which located.
  b. The dimensions of the lot.
  c. The location of the lot, including its street number (if any).
  d. The lot's designation on any map maintained in the office of the assessor or on file in the office of the register of deeds, or some description sufficient to identify and locate the property by parol testimony.

G.S. 105-309(f) is set out twice. See notes.

e. The portion of the lot located within the boundaries of any municipality.

(3) In conjunction with the listing of any real property under subdivisions (c)(1) and (c)(2), above, there shall be given a short description of any buildings and other improvements thereon that belong to the owner of the land.

(4) Buildings and other improvements having a value in excess of one hundred dollars ($100.00) that have been acquired, begun, erected, damaged, or destroyed since the time of the last appraisal of property shall be described.

(5) If some person other than the owner of a tract, parcel, or lot shall own any buildings or other improvements thereon or separate rights (such as mineral, quarry, timber, waterpower, or other rights) therein, that fact shall be specified on the abstract on which the land is listed, together with the name and address of the owner of the buildings, other improvements, or rights.

a. Buildings, other improvements, and separate rights owned by a taxpayer with respect to the lands of another shall be listed separately and identified so as to indicate the name of the owner thereof and the tract, parcel, or lot on which the buildings or other improvements are situated or to which the separate rights appertain.

b. In accordance with the provisions of G.S. 105-302(c)(11), buildings or other improvements or separate rights owned by a taxpayer with respect to the lands of another may be listed either in the name of the owner of the buildings, other improvements, or rights, or in the name of the owner of the land.

(d) Personal property shall be listed to indicate the township and municipality, if any, in which it is taxable and shall be itemized by the taxpayer in such detail as may be prescribed by an abstract form approved by the Department of Revenue. Personal property shall also be listed to indicate which property, if any, is subject to a tax credit under G.S. 105-151.21.

(1) If the assessor considers it necessary to obtain a complete listing of personal property, the assessor may require a taxpayer to submit additional information, inventories, or itemized lists of personal property.

(2) At the request of the assessor, the taxpayer shall furnish any information the taxpayer has with respect to the true value of the personal property the taxpayer is required to list.

(e) At the end of the abstract each person whose duty it is to list property for taxation shall sign the affirmation required by G.S. 105-310.

(f) **(Effective for taxes imposed for taxable years beginning before July 1, 2009)** The notice set out below must appear on each abstract or on an information sheet distributed with the abstract. The abstract or sheet must include the address and telephone number of the assessor below the notice:

"PROPERTY TAX HOMESTEAD EXCLUSION FOR ELDERLY OR PERMANENTLY DISABLED PERSONS.

North Carolina excludes from property taxes a portion of the appraised value of a permanent residence owned and occupied by North Carolina residents aged 65 or older or totally and permanently disabled whose income does not exceed (assessor insert amount). The amount of the appraised value of the residence that may be excluded from taxation is the greater of twenty thousand dollars ($20,000) or fifty percent (50%) of the appraised value of the residence. Income means the owner's adjusted gross income as determined for federal income tax purposes, plus all moneys received other than gifts or inheritances received from a spouse, lineal ancestor or lineal descendant.

If you received this exclusion in (assessor insert previous year), you do not need to apply again unless you have changed your permanent residence. If you received the exclusion in (assessor insert previous year) and your income in (assessor insert previous year) was above (assessor insert amount), you must notify the assessor. If you received the exclusion in (assessor insert previous year) because you were totally and permanently disabled and you are no longer totally and permanently disabled, you must notify the assessor. If the person receiving the exclusion in (assessor insert previous year) has died, the person required by law to list the property must notify the assessor. Failure to make any of the notices required by this paragraph before June 1 will result in penalties and interest.

If you did not receive the exclusion in (assessor insert previous year) but are now eligible, you may obtain a copy of an application from the assessor. It must be filed by June 1."

(f) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2009)** The assessor must print a homestead tax relief notice on each abstract or on an information sheet distributed with the abstract. The abstract or sheet must include the address and telephone number of the assessor below the notice required by this section. The notice must be in the form required by the Department of Revenue designed to notify the taxpayer of his or her rights and responsibilities under the homestead property tax exclusion provided in G.S. 105-277.1 and the property tax homestead circuit breaker provided in G.S. 105-277.1B.

(g) Any person who fails to give the notice required by G.S. 105-309(f) shall not only be subject to loss of the exemption, but also to the penalties provided by G.S. 105-312, and also if willful to the penalty provided in G.S. 105-310. For the purpose of determining whether a penalty is levied, whenever a taxpayer has received an exemption under G.S. 105-277.1 for one taxable year but the property of taxpayer is not eligible for the exemption the next year, notice given of that fact to the assessor on or before April 15 shall be considered as timely filed. (1939, c. 310, s. 900; 1941, c. 221, s. 1; 1953, c. 970, s. 6; 1955, c. 34; 1971, c. 806, s. 1; 1973, c. 448, s. 2; c. 476, s. 193; 1975, c. 881, s. 3; 1977, c. 666, s. 2; 1979, c. 846, s. 2; 1981, c. 54, ss. 4-6; c. 1052, s. 1; 1985, c. 656, ss. 47, 51; 1985 (Reg. Sess., 1986), c. 947, s. 9; c. 982, s. 23; 1987, c. 43, s. 6; c. 45, s. 1; 1993, c. 360, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 15.1(b); 1998-98, s. 111; 2001-308, s. 2; 2007-484, s. 43.7T(b); 2007-497, s. 2.5.)

Effect of Amendments. — Session Laws 2007-497, s. 2.5, as amended by Session Laws 484, s. 43.7T(b), effective for taxes imposed for taxable years beginning on or after July 1, 2009, in subdivision (f), substituted "assessor must print a homestead tax relief notice" for "notice set out below must appear" in the first sentence, substituted "notice required by this section" for "notice" at the end of the second sentence, added the last sentence, and deleted the former statutory notice provision.

CASE NOTES

Classification Irrelevant. — All taxpayers are required to list taxable property for ad valorem taxes regardless of its classification. Edward Valves, Inc. v. Wake County, 117 N.C. App. 484, 451 S.E.2d 641 (1995), rev'd in part, aff'd in part, 343 N.C. 426, 471 S.E.2d 342 (1996), cert. denied, 519 U.S. 1112, 117 S. Ct. 952, 136 L. Ed. 2d 839 (1997).

Compliance with Statutory Procedure Essential. — The listing of property must be done in the manner prescribed by the statute. Rexford v. Phillips, 159 N.C. 213, 74 S.E. 337 (1912).

This means that listing must be done by owner or his duly accredited agent in cases where listing by an agent is permissible. Stone v. Phillips, 176 N.C. 457, 97 S.E. 375 (1918).

Time of Making List. — Under an earlier statute it was held that property can be listed for taxation only in the year, and for the year, in which taxes are due. North Carolina R.R. v. Commissioners of Alamance, 77 N.C. 4 (1877); Johnson v. Royster, 88 N.C. 194 (1883).

Sufficiency of Description. — The listing of land as a certain number of acres lying in a named township was held too vague to support a valid assessment, the land being insufficiently described. Rexford v. Phillips, 159 N.C. 213, 74 S.E. 337 (1912).

A description on a tax list made under the direction of the taxpayer in the words, "Tax list in No. 2 township, C. county, for the year 1893," was held sufficient, as between the taxpayer and a purchaser of his land at a tax sale, where it was the only land owned by the former in the township. Fulcher v. Fulcher, 122 N.C. 101, 29 S.E. 91 (1898).

Cited in In re Valuation of Property Located at 411-417 W. Fourth St., 282 N.C. 71, 191 S.E.2d 692 (1972).

§ 105-310. Affirmation; penalty for false affirmation.

There shall be annexed to the abstract on which the taxpayer's property is listed the following affirmation, which shall be signed by an individual qualified under the provisions of G.S. 105-311:

Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief this listing, including any accompanying statements, inventories, schedules, and other information, is true and complete. (If this affirmation is signed by an individual other than the taxpayer, he affirms that he is familiar with the extent and true value of all the taxpayer's property subject to taxation in this county and that his affirmation is based on all the information of which he has any knowledge.)

Any individual who willfully makes and subscribes an abstract listing required by this Subchapter which he does not believe to be true and correct as to every material matter shall be guilty of a Class 2 misdemeanor. (1939, c. 310, s. 902; 1971, c. 806, s. 1; 1993, c. 539, s. 718; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 105-311. Duty to appear for purposes of listing and signing affirmation; use of agents and mail.

(a) Except as otherwise provided in this section, the person whose duty it is to list property for taxation shall appear before the assessor for purposes of listing and shall sign the affirmation required by G.S. 105-310 to be annexed to the completed abstract on which the property is listed.

(1) In the case of an individual taxpayer who is unable to list his property, a guardian, authorized agent, or other person having knowledge of and charged with the care of the person and property of the taxpayer shall appear for purposes of listing and shall sign the required affirmation in the name of the taxpayer, noting thereon the capacity in which he signs.

(2) In the case of a corporation, partnership, or unincorporated association, a person specified in subdivision a or subdivision b, below, shall appear for purposes of listing the taxpayer's property and shall sign the required affirmation in the name of the taxpayer, noting thereon the capacity in which he signs, and no other agent shall be permitted to sign the affirmation required on such a taxpayer's abstract:

a. A principal officer of the taxpayer or

b. A full-time employee of the taxpayer who has been officially empowered by a principal officer of the taxpayer in his behalf to list the taxpayer's property for taxation in the county and to sign the affirmation annexed to the abstract or abstracts on which its property is listed.

(3) In the case of an individual who is not a resident of the county in which his property is to be listed, the taxpayer shall sign the affirmation required on the abstract on which his property is listed, but he may submit the completed abstract by mail or by an authorized agent.

(b) Any abstract submitted by mail may be accepted or rejected by the assessor in the assessor's discretion. However, the board of county commissioners, with the approval of the Department of Revenue, may by resolution provide for the general acceptance of completed abstracts submitted by mail or submitted electronically. In no event shall an abstract submitted by mail be accepted unless the affirmation on the abstract is signed by the individual prescribed in subsection (a) of this section. An electronic listing may be signed electronically in accordance with the Electronic Commerce Act, Article 11A of Chapter 66 of the General Statutes.

For the purpose of this Subchapter, abstracts submitted by mail are considered filed as of the date shown on the postmark affixed by the United States Postal Service. If no date is shown on the postmark, or if the postmark is not affixed by the United States Postal Service, the abstract is considered filed when received in the office of the assessor. Abstracts submitted by electronic listing are considered filed when received in the office of the assessor. In any dispute arising under this Subchapter, the burden of proof is on the taxpayer to show that the abstract was timely filed. (1939, c. 310, ss. 901, 903, 904; 1957, c. 848; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1977, c. 327, s. 1; 1987, c. 43, s. 7; c. 45, s. 1; 2001-279, s. 3; 2001-487, s. 70.)

CASE NOTES

This section must be read narrowly because of its incorporation into G.S. 105-312, a penalty statute. Winston-Salem Joint Venture v. City of Winston-Salem, 54 N.C. App. 202, 282 S.E.2d 509 (1981), cert. denied, 304 N.C. 728, 288 S.E.2d 803 (1982).

Word "when" in the second paragraph of subsection (b) of this section refers to a time, not a contingency, necessarily requiring receipt as a prerequisite to application of this section. Winston-Salem Joint Venture v. City of Winston-Salem, 54 N.C. App. 202, 282 S.E.2d 509 (1981), cert. denied, 304 N.C. 728, 288 S.E.2d 803 (1982).

Second paragraph of subsection (b) of this section merely creates logical preferences for determination of timeliness where there has been delivery to the tax supervisor by mail. Winston-Salem Joint Venture v. City of Winston-Salem, 54 N.C. App. 202, 282 S.E.2d 509 (1981), cert. denied, 304 N.C. 728, 288 S.E.2d 803 (1982).

And Applies Only Where Abstract Is Received and Envelope Is Available. — Second paragraph of subsection (b) of this section applies only where an abstract has actually been received and the envelope is available for scrutiny. Winston-Salem Joint Venture v. City of Winston-Salem, 54 N.C. App. 202, 282 S.E.2d 509 (1981), cert. denied, 304 N.C. 728, 288 S.E.2d 803 (1982).

And Not Where Receipt Is Denied. — Where property owner alleged he mailed tax listing before deadline, but receipt of the listing was denied by the taxing authority, second paragraph of subsection (b) of this section was not dispositive. Winston-Salem Joint Venture v. City of Winston-Salem, 54 N.C. App. 202, 282 S.E.2d 509 (1981), cert. denied, 304 N.C. 728, 288 S.E.2d 803 (1982).

§ 105-312. Discovered property; appraisal; penalty.

(a) Repealed by Session Laws 1991, c. 34, s. 4.

(b) Duty to Discover and Assess Unlisted Property. — It shall be the duty of the assessor to see that all property not properly listed during the regular listing period be listed, assessed and taxed as provided in this Subchapter. The assessor shall file reports of such discoveries with the board of commissioners in such manner as the board may require.

(c) Carrying Forward Real Property. — At the close of the regular listing period each year, the assessor shall compare the tax lists submitted during the listing period just ended with the lists for the preceding year, and he shall carry forward to the lists of the current year all real property that was listed in the preceding year but that was not listed for the current year. When carried forward, the real property shall be listed in the name of the taxpayer who listed it in the preceding year unless, under the provisions of G.S. 105-302, it must be listed in the name of another taxpayer. Real property carried forward in this manner shall be deemed to be discovered property, and the procedures prescribed in subsection (d), below, shall be followed unless the property discovered is listed in the name of the taxpayer who listed it for the preceding year and the property is not subject to appraisal under either G.S. 105-286 or G.S. 105-287 in which case no notice of the listing and valuation need be sent to the taxpayer.

(d) Procedure for Listing, Appraising, and Assessing Discovered Property. — Subject to the provisions of subsection (c), above, and the presumptions established by subsection (f), below, discovered property shall be listed by the assessor in the name of the person required by G.S. 105-302 or G.S. 105-306. The discovery shall be deemed to be made on the date that the abstract is made or corrected pursuant to subsection (e) of this section. The assessor shall also make a tentative appraisal of the discovered property in accordance with the best information available to him.

When a discovery is made, the assessor shall mail a notice to the person in whose name the discovered property has been listed. The notice shall contain the following information:

(1) The name and address of the person in whose name the property is listed;
(2) A brief description of the property;
(3) A tentative appraisal of the property;
(4) A statement to the effect that the listing and appraisal will become final unless written exception thereto is filed with the assessor within 30 days from date of the notice.

Upon receipt of a timely exception to the notice of discovery, the assessor shall arrange a conference with the taxpayer to afford him the opportunity to present any evidence or argument he may have regarding the discovery. Within 15 days after the conference, the assessor shall give written notice to the taxpayer of his final decision. Written notice shall not be required, however, if the taxpayer signs an agreement accepting the listing and appraisal. In cases in which agreement is not reached, the taxpayer shall have 15 days from the date of the notice to request review of the decision of the assessor by the board of equalization and review or, if that board is not in session, by the board of commissioners. Unless the request for review by the county board is given at the conference, it shall be made in writing to the assessor. Upon receipt of a timely request for review, the provisions of G.S. 105-322 or G.S. 105-325, as appropriate, shall be followed.

(e) Record of Discovered Property. — When property is discovered, the taxpayer's original abstract (if one was submitted) may be corrected or a new abstract may be prepared to reflect the discovery. If a new abstract is prepared, it may be filed with the abstracts that were submitted during the regular listing period, or it may be filed separately with abstracts designated "Late Listings." Regardless of how filed, the listing shall have the same force and effect as if it had been submitted during the regular listing period.

(f) Presumptions. — When property is discovered and listed to a taxpayer in any year, it shall be presumed that it should have been listed by the same taxpayer for the preceding five years unless the taxpayer shall produce satisfactory evidence that the property was not in existence, that it was actually listed for taxation, or that it was not his duty to list the property during those years or some of them under the provisions of G.S. 105-302 and G.S. 105-306. If it is shown that the property should have been listed by some other taxpayer during some or all of the preceding years, the property shall be listed in the name of the appropriate taxpayer for the proper years, but the discovery shall still be deemed to have been made as of the date that the assessor first listed it.

(g) Taxation of Discovered Property. — When property is discovered, it shall be taxed for the year in which discovered and for any of the preceding five years during which it escaped taxation in accordance with the assessed value it should have been assigned in each of the years for which it is to be taxed and the rate of tax imposed in each such year. The penalties prescribed by subsection (h) of this section shall be computed and imposed regardless of the name in which the discovered property is listed. If the discovery is based upon an understatement of value, quantity, or other measurement rather than an omission from the tax list, the tax shall be computed on the additional valuation fixed upon the property, and the penalties prescribed by subsection (h) of this section shall be computed on the basis of the additional tax.

(h) Computation of Penalties. — Having computed each year's taxes separately as provided in subsection (g), above, there shall be added a penalty of ten percent (10%) of the amount of the tax for the earliest year in which the property was not listed, plus an additional ten percent (10%) of the same amount for each subsequent listing period that elapsed before the property was discovered. This penalty shall be computed separately for each year in which a failure to list occurred; and the year, the amount of the tax for that year, and the total of penalties for failure to list in that year shall be shown separately on the tax records; but the taxes and penalties for all years in which there was a failure to list shall be then totalled on a single tax receipt.

(h1) Repealed by Session Laws 1991, c. 624, s. 8.

(i) Collection. — For purposes of tax collection and foreclosure, the total figure obtained and recorded as provided in subsection (h) of this section shall be deemed to be a tax for the fiscal year beginning on July 1 of the calendar year in which the property was discovered. The schedule of discounts for prepayment and interest for late payment applicable to taxes for the fiscal year referred to in the preceding sentence shall apply when the total figure on the single tax receipt is paid. Notwithstanding the time limitations contained in G.S. 105-381, any property owner who is required to pay taxes on discovered property as herein provided shall be entitled to a refund of any taxes erroneously paid on the same property to other taxing jurisdictions in North Carolina. Claim for refund shall be filed in the county where such tax was erroneously paid as provided by G.S. 105-381.

(j) Tax Receipts Charged to Collector. — Tax receipts prepared as required by subsections (h) and (i) of this section for the taxes and penalties imposed upon discovered property shall be delivered to the tax collector, and he shall be charged with their collection. Such receipts shall have the same force and effect as if they had been delivered to the collector at the time of the delivery of the regular tax receipts for the current year, and the taxes charged in the receipts shall be a lien upon the property in accordance with the provisions of G.S. 105-355.

(k) Power to Compromise. — After a tax receipt computed and prepared as required by subsections (g) and (h) of this section has been delivered and charged to the tax collector as prescribed in subsection (j), above, the board of county commissioners, upon the petition of the taxpayer, may compromise, settle, or adjust the county's claim for taxes arising therefrom. The board of commissioners may, by resolution, delegate the authority granted by this subsection to the board of equalization and review, including any board created by resolution pursuant to G.S. 105-322(a) and any special board established by local act.

(*l*) Municipal Corporations. — The provisions of this section shall apply to all cities, towns, and other municipal corporations having the power to tax property. Such governmental units shall designate an appropriate municipal officer to exercise the powers and duties assigned by this section to the assessor, and the powers and duties assigned to the board of county commissioners shall be exercised by the governing body of the unit. When the assessor discovers property having a taxable situs in a municipal corporation, he shall send a copy of the notice of discovery required by subsection (d) to the governing body of the municipality together with such other information as may be necessary to enable the municipality to proceed. The governing board of a municipality may, by resolution, delegate the power to compromise, settle, or adjust tax claims granted by this subsection and by subsection (k) of this section to the county board of equalization and review, including any board created by resolution pursuant to G.S. 105-322(a) and any special board established by local act. (1939, c. 310, s. 1109; 1971, c. 806, s. 1; 1973, c. 476, s. 193; c. 787; 1977, c. 864; 1981, c. 623, ss. 1, 2; 1987, c. 45, s. 1; c. 743, ss. 1, 2; 1989, c. 522; 1991, c. 34, s. 4; c. 624, s. 8; 1991 (Reg. Sess., 1992), c. 961, s. 12 1999-297, s. 2.)

Cross References. — For definitions applicable to this Subchapter, see G.S. 105-273.

Editor's Note. — Session Laws 1999-297, s. 4, provides that Session Laws 1999-297, s. 2, which amended subsection (h) of this section, is repealed effective for taxes imposed for taxable years beginning on or after July 1, 2004.

Session Laws 1999-297, s. 1 provides that it is the intent of the General Assembly to encourage all counties to adopt a permanent property tax listing system in accordance with G.S. 105-303(b), as a permanent listing is more convenient for taxpayers and more efficient for counties; that to encourage counties to adopt permanent listing in the next few years, Session Laws 1999-297, s. 2, which amends G.S. 105-312, prohibits counties that have not adopted such a system from charging late listing penalties in certain circumstances; and that Session Laws 1999-297, s. 3, which amends G.S. 105-303, requires all counties to adopt permanent listing systems by the 2004 tax year.

Legal Periodicals. — For note on procedural developments in the discovery of property unlisted for purposes of ad valorem taxation, see 51 N.C.L. Rev. 531 (1973).

For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former similar provisions.*

Construed as Whole. — Public Laws 1927, c. 71, s. 73, relating to the same subject matter as this section, must be construed as a whole, not piecemeal. Madison County v. Coxe, 204 N.C. 58, 167 S.E. 486 (1933).

Construction with Other Statutes. — Defendant could not use the time period in G.S. 105-312(3), dealing with valuation of gaming machines, to defeat his conviction for possessing illegal gambling machines under G.S. 14-306.1(a)(1); the trial court did not err in instructing the jury on the illegal gaming machine charge and in refusing defendant's requested charge where there was sufficient evidence that defendant's warrantless arrest was proper. State v. Childers, 154 N.C. App. 375, 572 S.E.2d 207, 2002 N.C. App. LEXIS 1472 (2002), cert. denied, 356 N.C. 682, 577 S.E.2d 899 (2003).

Retroactive Effect. — The intention of the legislature to give the new Machinery Act of 1971 retroactive effect is expressly declared in G.S. 105-395. In re Pilot Freight Carriers, Inc., 28 N.C. App. 400, 221 S.E.2d 378 (1976).

Discovery and Listing of Omitted Property. — The statute provides for discovery of taxable property not listed, by certain tax authorities, and listing same. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N.C. 69, 185 S.E. 449 (1936).

The language of subdivision (a)(3) of this section makes it clear that property can only be discovered if it is not listed. In re Wesleyan Educ. Center, 68 N.C. App. 742, 316 S.E.2d 87 (1984).

"Listed in the Name of the Taxpayer," etc., as Used in Subsection (c). — In light of the definition of "discovered property" in subdivision (a)(1), the phrase "listed in the name of the taxpayer who listed it for the preceding year" as used in subsection (c) of this section includes a listing of property in the name of the taxpayer both when listed personally by the taxpayer and when listed in the taxpayer's name by "any other person," according to law, for the preceding year. In re North Carolina Forestry Found., Inc., 35 N.C. App. 414, 242

S.E.2d 492 (1978), aff'd, 296 N.C. 330, 250 S.E.2d 236 (1979).

Purpose of notice requirement is to inform the taxpayer that his property is subject to ad valorem taxation. In re North Carolina Forestry Found., Inc., 296 N.C. 330, 250 S.E.2d 236 (1979).

Immaterial irregularities in notice do not invalidate taxes imposed. In re Pilot Freight Carriers, Inc., 28 N.C. App. 400, 221 S.E.2d 378 (1976).

Failure of Owner to Appear to Receive Lists. — Under the Act of 1784, if the owner failed to attend at the time and place appointed to receive the lists of taxable property, the justice could make out a list for himself to the best of his knowledge. Tores v. Justices of County Court, 6 N.C. 167 (1812).

Rebuttal of Presumption. — The presumption created by statute, that the person in possession of personal property was the owner and in possession of said property on the taxing dates of the five preceding years, was held rebutted by the facts of the case. Coltrane v. Donnell, 203 N.C. 515, 166 S.E. 397 (1932).

Compromise Settlement Is Binding Unless Made in Bad Faith. — In the absence of a finding that the board of commissioners acted in bad faith in making a compromise settlement of a tax, or abused its discretion in so doing, mandamus to compel the commissioners to list and assess will be denied. Stone v. Board of Comm'rs, 210 N.C. 226, 186 S.E. 342 (1936).

City has right to impose taxes on discovered property for preceding five years or for any of them in which the property escaped taxation. In re McLean Trucking Co., 283 N.C. 650, 197 S.E.2d 520 (1973).

Right to Review. — While it is true that the 1987 amendment to G.S. 150-282.1(c) made the decisions of the county boards discretionary, it did not make those decisions unreviewable. Rather, the legislature has placed the duty upon the Property Tax Commission to hear appeals from decisions of the county boards arising under the provisions of this section and other sections of Chapter 105. In re K-Mart Corp., 319 N.C. 378, 354 S.E.2d 468 (1987).

Application of Former Discovered-Property Statute. — See In re McLean Trucking Co., 283 N.C. 650, 197 S.E.2d 520 (1973).

Definition of Phrase "Discovered Property" as Used Under Former Law. — See In re McLean Trucking Co., 283 N.C. 650, 197 S.E.2d 520 (1973).

Applied in In re Notice of Attachment & Garnishment Issued by Catawba County Tax Collector, 59 N.C. App. 332, 296 S.E.2d 499 (1982); In re Dickey, 110 N.C. App. 823, 431 S.E.2d 203 (1993).

Cited in Winston-Salem Joint Venture v. City of Winston-Salem, 54 N.C. App. 202, 282 S.E.2d 509 (1981); In re Moravian Home, Inc., 95 N.C. App. 324, 382 S.E.2d 772 (1989); Kinro, Inc. v. Randolph County, 108 N.C. App. 334, 423 S.E.2d 513 (1992).

OPINIONS OF ATTORNEY GENERAL

County May Not Impose Late Payment Penalty or Administrative Fee Upon Delinquent Property Tax Accounts. — Because the statutes authorizing property taxes provide for interest and/or penalties, a county may not, by ordinance, impose a late payment penalty or administrative fee upon delinquent property tax accounts. See opinion of Attorney General to Lloyd C. Smith, Jr., Pritchett & Burch, PLLC, 2001 N.C. AG LEXIS 6 (3/6/2001).

ARTICLE 18.

Reports in Aid of Listing.

§ 105-313. Report of property by multi-county business.

A taxpayer who is engaged in business in more than one county in this State and who owns real property or tangible personal property in connection with his multi-county business shall, upon the request of the Department of Revenue or the assessor of a county in which part of this business property is situated, file a report with the Department of Revenue stating, as of the dates specified in G.S. 105-285 of any year, the following information:

(1) The counties in this State in which the taxpayer's business property is situated;

(2) The taxpayer's investment, on a county by county basis, in his business property situated in this State, categorized as the Department of Revenue or the assessor may require; and

(3) The taxpayer's total investment in his business property situated in this State, categorized as the Department of Revenue or the assessor may require.

This report shall be subscribed and sworn to by the owner of the property. If the owner is a corporation, partnership, or unincorporated association, the report shall be subscribed and sworn to by a principal officer of the owner who has knowledge of the facts contained in the report. (1971, c. 806, s. 1; 1973, c. 476, s. 193; 1987, c. 777, s. 3.)

Local Modification. — (As to Article 18) Forsyth and Pasquotank: 1979 (2nd Sess., 1980), c. 1110; 1987, c. 602, s. 3.

§ 105-314: Repealed by Session Laws 1993, c. 761, s. 37.4.

§ 105-315. Reports by persons having custody of tangible personal property of others.

(a) As of January 1, every person having custody of taxable tangible personal property that has been entrusted to him by another for storage, sale, renting, or any other business purpose shall furnish the appropriate assessor the reports required by subdivision (a)(2), below:

(1) Repealed by Session Laws 1987, c. 813, s. 14.

(2) For all tangible personal property, except inventories exempt under G.S. 105-275(33) and (34), there shall be furnished to the assessor of the county in which the property is situated a statement showing the name of the owner of the property, a description of the property, the quantity of the property, and the amount of money, if any, advanced against the property by the person having custody of it.

(3) For purposes of illustration, but not by way of limitation, the term "person having custody of taxable tangible personal property" as used in this subsection (a) shall include warehouses, cooperative growers' and marketing associations, consignees, factors, commission merchants, and brokers.

(b) Any person who fails to make the reports required by subsection (a), above, by January 15 in any year shall be liable to the counties in which the property is taxable for a penalty to be measured by any portion of the tax on the property that has not been paid at the time the action to collect this penalty is brought plus two hundred fifty dollars ($250.00). This penalty may be recovered in a civil action in the appropriate division of the General Court of Justice of the county in which the property is taxable. Upon recovery of this penalty, the tax on the property shall be deemed to be paid. (1939, c. 310, ss. 1001, 1002; 1955, c. 1069, ss. 2, 3; 1965, c. 592; 1971, c. 806, s. 1; 1987, c. 45, s. 1; c. 813, s. 14.)

Legal Periodicals. — For survey of 1974 case law on taxation of personal property owned by nonresidents, see 53 N.C.L. Rev. 1132 (1975).

CASE NOTES

Purpose of Section. — See Davenport v. Ralph N. Peters & Co., 386 F.2d 199 (4th Cir. 1967), decided under former similar provisions.

Person discharges his legal obligation upon filing report prescribed in subsection (a) of this section. In re Hanes Dye & Finishing Co., 285 N.C. 598, 207 S.E.2d 729 (1974).

Effect of Tax Assessed on Textile Goods

Shipped to North Carolina Company for Finishing. — See In re Hanes Dye & Finishing Co., 285 N.C. 598, 207 S.E.2d 729 (1974).

§ 105-316. Reports by house trailer park, marina, and aircraft storage facility operators.

(a) As of January 1 each year:

(1) Every operator of a park or storage lot renting or leasing space for three or more house trailers or mobile homes shall furnish to the assessor of the county in which the park or lot is located the name of the owner of and a description of each house trailer or mobile home situated thereon.

(2) Every operator of a marina or comparable facility renting, leasing, or otherwise providing dockage or storage space for three or more boats, vessels, floating homes, or floating structures shall furnish to the assessor of the county in which the marina or comparable facility is located the name of the owner of and a description of each boat, vessel, floating home, or floating structure for which dockage or storage space is rented, leased, or otherwise provided.

(3) Every operator of a storage facility renting or leasing space for three or more airplanes or other aircraft shall furnish to the assessor of the county in which the storage facility is located the name of the owner of and a description of each airplane or aircraft for which space is rented or leased.

(b) Any person who fails to make any report required by subsection (a), above, by January 15 of any year shall be liable to the county in which the house trailers, mobile homes, boats, vessels, floating homes, floating structures, or airplanes are taxable for a penalty to be measured by any portion of the tax on the personal property that has not been paid at the time the action to collect this penalty is brought, plus two hundred fifty dollars ($250.00). This penalty may be recovered in a civil action in the appropriate division of the General Court of Justice of the county in which the personal property is taxable. Upon recovery of this penalty, the tax on the personal property shall be deemed to be paid. (1939, c. 310, s. 1002; 1955, c. 1069, s. 3; 1965, c. 592; 1971, c. 806, s. 1; 1985, c. 378, ss. 1, 2; 1987, c. 45, s. 1.)

§ 105-316.1. Tax permit required to move mobile home.

(a) In order to protect the local taxing units of this State against the nonpayment of ad valorem taxes on mobile homes, it is hereby declared to be unlawful for any person other than a mobile home manufacturer or retailer to remove or cause to be removed any mobile home situated at a premises in this State without first obtaining a tax permit from the tax collector of the county in which the mobile home is situated. The tax permit shall be conspicuously displayed near the license tag on the rear of the mobile home at all times during its transportation. Permits required by G.S. 105-316.1 through 105-316.8 may be obtained at the office of the county tax collector during normal business hours.

(b) Except as provided in G.S. 105-316.4, manufacturers, retailers and licensed carriers of mobile homes shall not be required to obtain the tax permits required by this section. Persons or firms transporting mobile homes shall, however, be responsible for seeing that a proper license tag, and when required under this section, a tax permit, are properly displayed thereon at all times during their transportation. (1975, c. 881, s. 1; 1977, 2nd Sess., c. 1187, ss. 1, 2.)

§ 105-316.2. Requirements for obtaining permit.

(a) In order to obtain the permits herein provided, persons other than manufacturers and retailers of mobile homes shall be required to (i) pay all taxes due to be paid by the owner to the county or to any other taxing unit therein; or (ii) show proof to the tax collector that no taxes are due to be paid; or (iii) demonstrate to the tax collector that the removal of the mobile home will not jeopardize the collection of any taxes due or to become due to the county or to any taxing unit therein.

(b) In addition to complying with the provisions of subsection (a) above, owners of mobile homes required to obtain the permits herein provided shall also furnish the following information to the tax collector:

(1) The name and address of the owner,
(2) The address or location of the premises from which the mobile home is to be moved,
(3) The address or location of the place to which the mobile home is to be moved, and
(4) The name and address of the carrier who is to transport the mobile home. (1975, c. 881, s. 1.)

§ 105-316.3. Issuance of permits.

(a) Except as otherwise provided in G.S. 105-316.2 above, no permit required by G.S. 105-316.1 through 105-316.8 shall be issued by the tax collector unless and until all taxes due to be paid by the owner to the county or to any other taxing unit therein, including any penalties or interest thereon, have been paid. Any taxes which have not yet been computed but which will become due during the current calendar year shall be determined as in the case of prepayments.

(b) Upon compliance with the provisions of G.S. 105-316.1 through 105-316.8, the tax collector shall issue, without charge, a permit authorizing the removal of the mobile home. He shall also maintain a record of all permits issued. (1975, c. 881, s. 1.)

§ 105-316.4. Issuance of permits under repossession.

Notwithstanding the provisions of G.S. 105-316.2(a) and 105-316.3(a), above, any person who intends to take possession of a mobile home, whether by judicial or nonjudicial authority, as a holder of a lien on said mobile home shall apply for, and be issued, the permit herein provided without paying all taxes due to be paid by the owner of the mobile home being repossessed, upon notifying the tax collector of the location in North Carolina to which the mobile home is to be taken. At the time of notification the tax collector shall render to the holder of the lien a statement of taxes due against only the mobile home. Within seven days of the issuance of the permit the applicant shall pay to the tax collector the taxes due as set forth in the statement.

Notwithstanding the foregoing, any applicant who is a nonresident of North Carolina must pay the taxes due as set forth above at the time of notification to the tax collector and application for the permit.

Upon issuance of the permit and the payment of any taxes as prescribed herein, the mobile home shall no longer be subject to levy or attachment of any lien for any other taxes then owed by the owner thereof, whether or not previously determined. (1975, c. 881, s. 1; 1977, 2nd Sess., c. 1187, s. 3.)

§ 105-316.5. Form of permit.

The permit shall be in substantially the following form:

TAX PERMIT

County of ______________ Permit Number ______________________________
State of North Carolina Date of Issuance ____________________________
Permission is hereby granted to: ____________________________________
(Name & address of owner)
____
(Name & address of carrier)
to remove the following described mobile home:
____
(Make, model, size, serial number, etc.)
From: ____
(Address)
To: ____
(Address)

This permit is issued in accordance with the provisions of G.S. 105-316.1 through G.S. 105-316.8 of the General Statutes of North Carolina.

(Signed) ______________________________
Tax Collector
(or Deputy Tax Collector)
County of ______________________________

(1975, c. 881, s. 1; 1977, 2nd Sess., c. 1187, s. 1.)

§ 105-316.6. Penalties for violations.

(a) Any person required by G.S. 105-316.1 through 105-316.8 to obtain a tax permit who fails to do so or who fails to properly display same shall be guilty of a Class 3 misdemeanor. This penalty shall be in addition to any penalties imposed for failure to list property for taxation and interest for failure to pay taxes provided by the general laws of this State.

(b) Any manufacturer or retailer of mobile homes who aids or abets any owner covered by G.S. 105-316.1 through 105-316.8 to defeat in any manner the purpose of G.S. 105-316.1 through 105-316.8 shall be guilty of a Class 3 misdemeanor.

(c) Any person who transports a mobile home from a location in this State for an owner other than a manufacturer or retailer of mobile homes without having properly displayed thereon the tax permit required by G.S. 105-316.1 through 105-316.8 shall be guilty of a Class 3 misdemeanor.

(d) Any law-enforcement officer of this State who apprehends any person violating the provisions of G.S. 105-316.1 through 105-316.8 shall detain such person and mobile home until satisfactory arrangements have been made to meet the requirements of G.S. 105-316.1 through 105-316.8. (1975, c. 881, s. 1; 1977, 2nd Sess., c. 1187, ss. 1, 4, 5; 1993, c. 539, s. 719; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 105-316.7. Mobile home defined.

For the purpose of G.S. 105-316.1 through 105-316.8, “mobile home” means a structure that (i) is designed, constructed, and intended for use as a dwelling house, office, place of business, or similar place of habitation and (ii) is capable of being transported from place to place on wheels attached to its frame. It also means a manufactured home as described in G.S. 105-273(13). This definition does not include trailers and vehicles required to be registered annually pursuant to Part 3, Article 3 of Chapter 20 of the General Statutes. (1975, c. 881, s. 1; 1987, c. 805, s. 4.)

§ 105-316.8. Taxable situs not presumed.

Nothing in G.S. 105-316.1 through 105-316.8 shall be interpreted so as to subject to taxation any mobile home which does not have a taxable situs within this State under the general rules of law appropriate to such a determination. (1975, c. 881, s. 1.)

ARTICLE 19.

Administration of Real and Personal Property Appraisal.

§ 105-317. Appraisal of real property; adoption of schedules, standards, and rules.

(a) Whenever any real property is appraised it shall be the duty of the persons making appraisals:

(1) In determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; water privileges; dedication as a nature preserve; conservation or preservation agreements; mineral, quarry, or other valuable deposits; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value except growing crops of a seasonal or annual nature.

(2) In determining the true value of a building or other improvement, to consider at least its location; type of construction; age; replacement cost; cost; adaptability for residence, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value.

(3) To appraise partially completed buildings in accordance with the degree of completion on January 1.

(b) In preparation for each revaluation of real property required by G.S. 105-286, it shall be the duty of the assessor to see that:

(1) Uniform schedules of values, standards, and rules to be used in appraising real property at its true value and at its present-use value are prepared and are sufficiently detailed to enable those making appraisals to adhere to them in appraising real property.

(2) Repealed by Session Laws 1981, c. 678, s. 1.

(3) A separate property record be prepared for each tract, parcel, lot, or group of contiguous lots, which record shall show the information required for compliance with the provisions of G.S. 105-309 insofar as they deal with real property, as well as that required by this section. (The purpose of this subdivision is to require that individual property records be maintained in sufficient detail to enable property owners to ascertain the method, rules, and standards of value by which property is appraised.)

(4) The property characteristics considered in appraising each lot, parcel, tract, building, structure and improvement, in accordance with the schedules of values, standards, and rules, be accurately recorded on the appropriate property record.

(5) Upon the request of the owner, the board of equalization and review, or the board of county commissioners, any particular lot, parcel, tract, building, structure or improvement be actually visited and observed to verify the accuracy of property characteristics on record for that property.

(6) Each lot, parcel, tract, building, structure and improvement be separately appraised by a competent appraiser, either one appointed under the provisions of G.S. 105-296 or one employed under the provisions of G.S. 105-299.

(7) Notice is given in writing to the owner that he is entitled to have an actual visitation and observation of his property to verify the accuracy of property characteristics on record for that property.

(c) The values, standards, and rules required by subdivision (b)(1) shall be reviewed and approved by the board of county commissioners before January 1 of the year they are applied. The board of county commissioners may approve the schedules of values, standards, and rules to be used in appraising real property at its true value and at its present-use value either separately or simultaneously. Notice of the receipt and adoption by the board of county commissioners of either or both the true value and present-use value schedules, standards, and rules, and notice of a property owner's right to comment on and contest the schedules, standards, and rules shall be given as follows:

(1) The assessor shall submit the proposed schedules, standards, and rules to the board of county commissioners not less than 21 days before the meeting at which they will be considered by the board. On the same day that they are submitted to the board for its consideration, the assessor shall file a copy of the proposed schedules, standards, and rules in his office where they shall remain available for public inspection.

(2) Upon receipt of the proposed schedules, standards, and rules, the board of commissioners shall publish a statement in a newspaper having general circulation in the county stating:

a. That the proposed schedules, standards, and rules to be used in appraising real property in the county have been submitted to the board of county commissioners and are available for public inspection in the assessor's office; and

b. The time and place of a public hearing on the proposed schedules, standards, and rules that shall be held by the board of county commissioners at least seven days before adopting the final schedules, standards, and rules.

(3) When the board of county commissioners approves the final schedules, standards, and rules, it shall issue an order adopting them. Notice of this order shall be published once a week for four successive weeks in a newspaper having general circulation in the county, with the last publication being not less than seven days before the last day for challenging the validity of the schedules, standards, and rules by appeal to the Property Tax Commission. The notice shall state:

a. That the schedules, standards, and rules to be used in the next scheduled reappraisal of real property in the county have been adopted and are open to examination in the office of the assessor; and

b. That a property owner who asserts that the schedules, standards, and rules are invalid may except to the order and appeal therefrom to the Property Tax Commission within 30 days of the date when the notice of the order adopting the schedules, standards, and rules was first published.

(d) Before the board of county commissioners adopts the schedules of values, standards, and rules, the assessor may collect data needed to apply the schedules, standards, and rules to each parcel in the county. (1939, c. 310, s. 501; 1959, c. 704, s. 4; 1967, c. 944; 1971, c. 806, s. 1; 1973, c. 476, s. 193; c. 695, s. 5; 1981, c. 224; c. 678, s. 1; 1985, c. 216, s. 2; c. 628, s. 4; 1987, c. 45, s. 1; c. 295, s. 1; 1997-226, s. 5.)

Legal Periodicals. — For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former similar provisions.*

This section, generally speaking, is directory. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

Ad valorem tax assessments are presumed correct. In order to rebut this presumption, the taxpayer must present evidence to show that an arbitrary method of valuation was used, or that an illegal method of valuation was used, and that the assessment substantially exceeded the true value in money of the property. In re Interstate Income Fund I, 126 N.C. App. 162, 484 S.E.2d 450 (1997).

Procedural Due Process. — Under G.S. 105-317(b), taxpayers' constitutional rights to procedural due process were not violated where they were given multiple opportunities to present evidence to the North Carolina Property Tax Commission advocating their proposed method of valuing their properties. In re Owens, 144 N.C. App. 349, 547 S.E.2d 827, 2001 N.C. App. LEXIS 415 (2001).

Failure to consider each and every indicia of value recited in this section does not vitiate the appraisal. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

Subdivision (a)(1) of this section is directory, and failure to consider each and every indicia of value recited in the statute does not vitiate the appraisal. In re Highlands Dev. Corp., 80 N.C. App. 544, 342 S.E.2d 588 (1986).

Commission Properly Used Income Rather Than County's Cost Approach. — North Carolina Property Tax Commission properly employed an income approach to a business property in reducing the appraised value that was assigned to the business property by a county that used a cost approach, as the decision had a rational basis in the evidence. In re Weaver Inv. Co., 165 N.C. App. 198, 598 S.E.2d 591, 2004 N.C. App. LEXIS 1150 (2004), cert. denied, 359 N.C. 188, 606 S.E.2d 695 (2004).

Commission May Decline to Use Highest and Best Use Valuation. — There is no statutory proscription against the Tax Commission's declining to use the highest and best use valuation provided it has considered both the specifically enumerated factors of subsection (a) of this section and any other factors that may affect the land's value. In re Perry-Griffin Found., 108 N.C. App. 383, 424 S.E.2d 212 (1993).

Subsection (a), in fixing the guide which assessors must use in valuing property for taxes, includes as a factor the past income therefrom, and its probable future income. But the income referred to is not necessarily actual income. The language is sufficient to include the income which could be obtained by the proper and efficient use of the property. To hold otherwise would be to penalize the competent and diligent and to reward the incompetent or indolent. In re Greensboro Office Partnership, 72 N.C. App. 635, 325 S.E.2d 24, cert. denied, 313 N.C. 602, 330 S.E.2d 610 (1985).

Neither § 105-283 nor subsection (a) of this section require the commission to value property according to its sales price in a recent arm's length transaction when competent evidence of a different value is presented. In re Greensboro Office Partnership, 72 N.C. App. 635, 325 S.E.2d 24, cert. denied, 313 N.C. 602, 330 S.E.2d 610 (1985).

The fair market value of real property for tax purposes is the same as that for condemnation purposes. In re Parsons, 123 N.C. App. 32, 472 S.E.2d 182 (1996).

Net income produced is an element which may properly be considered in determining value, but it is only one element. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963); In re Valuation of Property Located at 411-417 W. Fourth St., 282 N.C. 71, 191 S.E.2d 692 (1972).

Bankruptcy Stigma as Appraisal Factor. — Taxpayer's contention that expert witness ignored the impact of bankruptcy stigma in valuing a property held without merit. In re Phoenix Ltd. Partnership, 134 N.C. App. 474, 517 S.E.2d 903 (1999).

The income approach should have been the primary method used to reach a value for the anchor store in a shopping mall; while the income approach is preferential a combination of approaches may be used because of the inherent weaknesses in each approach, so long as the income approach is given greatest weight. In re Belk-Broome Co., 119 N.C. App. 470, 458 S.E.2d 921 (1995), aff'd, 342 N.C. 890, 467 S.E.2d 242 (1996).

But Fact-Finding Board May Also Consider Earning Capacity. — If it appears that the income actually received is less than the fair earning capacity of the property, the earning capacity should be substituted as a factor rather than the actual earnings. The fact-finding board can properly consider both. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963); In re Valuation of Property Located at 411-417 W. Fourth St., 282 N.C. 71, 191 S.E.2d 692 (1972).

The former language in this section, "the past income therefrom, its probable future income," was not necessarily actual income. The language was sufficient to include the income which could be obtained by the proper and efficient use of the property. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963).

Advantages and Disadvantages in Location to Be Considered. — Consideration of advantages inherent in the location of the property necessarily requires consideration of any disadvantages inherent in such location. In re Valuation of Property Located at 411-417 W. Fourth St., 282 N.C. 71, 191 S.E.2d 692 (1972).

Factors in Subsection (a) Irrelevant to Valuation Under § 105-277.2. — Clear legislative intent under G.S. 105-277.2 is that property be valued on the basis of its ability to produce income in the manner of its present use; all other uses for which the property might be employed, and the many factors enunciated in subsection (a) of this section, are irrelevant and immaterial. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

To find the true value of property subject to conservation easements, the Commission must determine the market value prior to the granting of the easements and then reduce that value by applying a damage factor caused by the granting of the conservation easements. Determining the highest and best use of the property prior to the granting of the easement is a critical part of the appraisal process. Rainbow Springs Partnership v. County of Macon, 79 N.C. App. 335, 339 S.E.2d 681 (1986), cert. denied, 316 N.C. 736, 345 S.E.2d 392 (1986).

Equalization of Property Improper. — It was not the Commission's place to equalize property values between anchor store property and the surrounding property in a shopping mall; in doing so, the Commission exceeded its authority and committed an error of law. In re Belk-Broome Co., 119 N.C. App. 470, 458 S.E.2d 921 (1995), aff'd, 342 N.C. 890, 467 S.E.2d 242 (1996).

Charitable Trusts. — Because of the valid and enforceable restraint on alienation, property of a charitable trust itself is unmarketable; therefore, to tax the property according to normal market assumptions would be unfair to the charitable trust and in doing so, would seriously erode and ultimately defeat the public policy of this State in favor of charitable trusts. In re Perry-Griffin Found., 108 N.C. App. 383, 424 S.E.2d 212 (1993).

Potential Uses and Income Held Adequately Considered. — Where county appraisers considered soil quality and whether the land was cropland, pasture, or woodland, and set varying land values on this basis, and also took into consideration that part of the land was swampland, the potential uses and income of the land were adequately considered. In re Wagstaff, 42 N.C. App. 47, 255 S.E.2d 754 (1979).

Presumption of Correctness of Appraisal Not Rebutted. — Taxpayer's contention that cost approach method of appraisal was not legal because it did not consider the 26 U.S.C.S. § 42 rent restrictions on the property was insufficient to rebut the presumption that the appraisal was properly administered; the intermediate appellate court's ruling reversing a decision of the North Carolina Property Tax Commission was itself reversed. In re Greens of Pine Glen Ltd., 356 N.C. 642, 576 S.E.2d 316, 2003 N.C. LEXIS 27 (2003).

Presumption of Correctness of Appraisal Rebutted. — Taxpayers presented substantial evidence to rebut the presumption of correctness of county's appraisal of land; thus, the Property Tax Commission properly granted the taxpayers relief. In re Parsons, 123 N.C. App. 32, 472 S.E.2d 182 (1996).

County Tax Assessment Valuation Method Held Arbitrary. — Where there was no evidence that the county considered the advantages or disadvantages of the location; availability of water; or the nature of the mineral, quarry or other valuable deposits, consideration of which, among other facts, is required by this section, and where there was no evidence that any county representative ever visited or observed any portion of the tract in question as required by this section, the county's valuation method was held to be arbitrary. In re Land & Mineral Co., 49 N.C. App. 608, 272 S.E.2d 878 (1980), cert. denied, 302 N.C. 397, 279 S.E.2d 351 (1981).

Appraisal of real property was governed by G.S. 105-317, making it the duty of the assessor to use a uniform schedule of values, standards, and rules, under G.S. 105-317(b) and (c), while in contrast the appraisal of personal property was governed by G.S. 105-317.1 and provided specific elements for consideration, which were sale price of similar property, replacement cost, age, physical condition, and remaining life of the property, productivity and economic utility, effect of obsolescence, and any other factor that might affect the value of the property under G.S. 105-317.1(a), so it was illegal for a county to value personal property manufactured homes in the same manner as real property manufactured homes. In re Murray, — N.C. App. —, 635 S.E.2d 477, 2006 N.C. App. LEXIS 2157 (2006).

Appraisal 27 Months Prior to Effective Date Held Arbitrary. — Decision to conduct an appraisal in a time of less than two months, and to complete it some 27 months prior to its effective date, does not comport with the realities of the economic world, and is plainly arbitrary under subdivision (a)(3) of this section, which requires that partially completed buildings be appraised "in accordance with the degree of completion on January 1." In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Tobacco Allotments as Element of Value. — Mandamus would lie to compel the board of county commissioners to include tobacco allotments as an element of value in the appraisal and assessment of county real property for ad valorem taxes. Stocks v. Thompson, 1 N.C. App. 201, 161 S.E.2d 149 (1968).

Tobacco allotments must be considered as an element of value in appraising all tracts of real property. In re Whittington, 129 N.C. App. 259, 498 S.E.2d 194 (1998).

Applied in Brock v. North Carolina Property Tax Comm'n, 290 N.C. 731, 228 S.E.2d 254 (1976); In re Land & Mineral Co., 49 N.C. App. 529, 272 S.E.2d 6 (1980); In re McElwee, 51 N.C. App. 163, 275 S.E.2d 865 (1981); In re Westinghouse Elec. Corp., 93 N.C. App. 710, 379 S.E.2d 37 (1989).

Cited in In re King, 281 N.C. 533, 189 S.E.2d 158 (1972); In re Odom, 56 N.C. App. 412, 289 S.E.2d 83 (1982); In re Parker, 76 N.C. App. 477, 333 S.E.2d 749 (1985); In re Butler, 84 N.C. App. 213, 352 S.E.2d 232 (1987); In re Camel City Laundry Co., 115 N.C. App. 469, 444 S.E.2d 689 (1994); In re Stroh Brewery Co., 116 N.C. App. 178, 447 S.E.2d 803 (1994); MAO/Pines Assocs. v. New Hanover County Bd. of Equalization, 116 N.C. App. 551, 449 S.E.2d 196 (1994); In re Interstate Income Fund I, 126 N.C. App. 162, 484 S.E.2d 450 (1997); In re Owens, 132 N.C. App. 281, 511 S.E.2d 319 (1999); In re Sterling Diagnostic Imaging, Inc., 132 N.C. App. 393, 511 S.E.2d 682 (1999); In re Winston-Salem Joint Venture, 144 N.C. App. 706, 551 S.E.2d 450, 2001 N.C. App. LEXIS 557 (2001).

§ 105-317.1. Appraisal of personal property; elements to be considered.

(a) Whenever any personal property is appraised it shall be the duty of the persons making appraisals to consider the following as to each item (or lot of similar items):

(1) The replacement cost of the property;
(2) The sale price of similar property;
(3) The age of the property;
(4) The physical condition of the property;
(5) The productivity of the property;
(6) The remaining life of the property;
(7) The effect of obsolescence on the property;
(8) The economic utility of the property, that is, its usability and adaptability for industrial, commercial, or other purposes; and
(9) Any other factor that may affect the value of the property.

(b) In determining the true value of taxable tangible personal property held and used in connection with the mercantile, manufacturing, producing, processing, or other business enterprise of any taxpayer, the persons making the appraisal shall consider any information as reflected by the taxpayer's records and as reported by the taxpayer to the North Carolina Department of Revenue and to the Internal Revenue Service for income tax purposes, taking into account the accuracy of the taxpayer's records, the taxpayer's method of accounting, and the level of trade at which the taxpayer does business.

(c) A taxpayer who owns personal property taxable in the county may appeal the value, situs, or taxability of the property within 30 days after the date of the initial notice of value. If the assessor does not give separate written notice of the value to the taxpayer at the taxpayer's last known address, then the tax bill serves as notice of the value of the personal property. The notice must contain a statement that the taxpayer may appeal the value, situs, or taxability of the property within 30 days after the date of the notice. Upon receipt of a timely appeal, the assessor must arrange a conference with the taxpayer to afford the taxpayer the opportunity to present any evidence or argument regarding the value, situs, or taxability of the property. Within 30 days after the conference, the assessor must give written notice to the taxpayer of the assessor's final decision. Written notice of the decision is not required if the taxpayer signs an agreement accepting the value, situs, or taxability of the property. If an agreement is not reached, the taxpayer has 30 days from the date of the notice of the assessor's final decision to request review of that decision by the board of equalization and review or, if that board is not in session, by the board of county commissioners. Unless the request for review is given at the conference, it must be made in writing to the assessor. Upon receipt of a timely request for review, the provisions of G.S. 105-322 or G.S. 105-325, as appropriate, must be followed. (1971, c. 806, s. 1; 1987, c. 813, s. 15; 2002-156, s. 2.)

CASE NOTES

In substance this section and § 105-283 provide that all property shall be appraised at market value, and that all the various factors which enter into the market value of property are to be considered by the assessors in determining this market value for tax purposes. In re Bosley, 29 N.C. App. 468, 224 S.E.2d 686, cert. denied, 290 N.C. 551, 226 S.E.2d 509 (1976).

There may be reasonable variations from market value in appraisals of property for tax purposes if these variations are uniform. In re Bosley, 29 N.C. App. 468, 224 S.E.2d 686, cert. denied, 290 N.C. 551, 226 S.E.2d 509 (1976).

County Tax Assessment Valuation Method Held Arbitrary. — Appraisal of real property was governed by G.S. 105-317, making it the duty of the assessor to use a uniform schedule of values, standards, and rules, under G.S. 105-317(b) and (c), while in contrast the appraisal of personal property was governed by G.S. 105-317.1 and provided specific elements for consideration, which were sale price of similar property, replacement cost, age, physical condition, and remaining life of the property, productivity and economic utility, effect of obsolescence, and any other factor that might affect the value of the property under G.S. 105-317.1(a), so it was illegal for a county to value personal property manufactured homes in the same manner as real property manufactured homes. In re Murray, — N.C. App. —, 635 S.E.2d 477, 2006 N.C. App. LEXIS 2157 (2006).

Ad valorem tax assessments are presumed to be correct, and when such assessments are challenged, the burden of proof is on the taxpayer to show that the assessment was erroneous. In re Bosley, 29 N.C. App. 468, 224 S.E.2d 686, cert. denied, 290 N.C. 551, 226 S.E.2d 509 (1976).

Arbitrary Method of Valuing Taxpayer's Property. — When a county assessed the value of a mobile home located on leased land without taking into consideration the personal property elements in G.S. 105-317.1, its appraisal arbitrarily or illegally under G.S. 105-345.2(b) appraised the home as if it were real property and assigned it a value that substantially exceeded its true value, because G.S. 105-273(13) expressly defined differences between real property and tangible personal property as it pertained to manufactured homes. In re Murray, — N.C. App. —, 635 S.E.2d 477, 2006 N.C. App. LEXIS 2157 (2006).

Cited in In re Mitchell-Carolina Corp., 67 N.C. App. 450, 313 S.E.2d 816 (1984); In re Philip Morris U.S.A, 335 N.C. 227, 436 S.E.2d 828 (1993), cert. denied, 335 N.C. 466, 441 S.E.2d 118, 512 U.S. 1228, 114 S. Ct. 2726, 129 L. Ed. 2d 850 (1994).

Article 20.

Approval, Preparation, Disposition of Records.

§ 105-318. Forms for listing, appraising, and assessing property.

The Department of Revenue may design and prescribe the books and forms to be used throughout the State in the listing, appraising, and assessing of property for taxation. If the board exercises the authority granted by the preceding sentence, it is authorized to make arrangements for the purchase and distribution of approved books and forms through the Division of Purchase and Contract, the cost thereof to be billed to the counties. If the Department does not exercise the authority granted by the first sentence of this section, each county and municipality shall submit the books and forms it proposes to adopt for these purposes to the Department for approval before they are employed. (1939, c. 310, s. 907; 1971, c. 806, s. 1; 1973, c. 476, s. 193.)

§ 105-319. Tax records; preparation of scroll and tax book.

(a) For each year there shall be prepared for each county and tax-levying municipality a scroll (showing property valuations) and a tax book (showing the amount of taxes due) or a combined record (showing both property valuation and taxes due). The governing body of the county or municipality shall have authority to determine whether the tax records shall be prepared in combined form or in a separate scroll and tax book. When used in this Subchapter, the term "tax records" shall mean the scroll, tax book, and combined record. No tax records shall be adopted by any county or municipality until they have been approved by the Department of Revenue.

(b) County tax records shall, unless otherwise authorized by the board of county commissioners, be prepared separately for each township. The tax records of both counties and municipalities shall, unless otherwise authorized by the unit governing body, be divided into two parts:

(1) Individual taxpayers (including corporate fiduciaries when, in their fiduciary capacity, they list the property of individuals).
(2) Corporations, partnerships, other business firms, unincorporated associations, and all other taxpayers other than individual persons.

(c) The tax records shall show at least the following information:

(1) In alphabetical order, the name of each taxpayer whose property is listed and assessed for taxation.
(2) The assessment of each taxpayer's real property listed for unit-wide taxation (divided into as many categories as the Department of Revenue may prescribe).
(3) The assessment of each taxpayer's personal property listed for unit-wide taxation (divided into as many categories as the Department of Revenue may prescribe).
(4) The total assessed value of each taxpayer's real and personal property listed for unit-wide purposes.
(5) The amount of ad valorem tax due by each taxpayer for unit-wide purposes.
(6) The amount of dog license tax due by each taxpayer.
(7) The total assessed value of each taxpayer's real and personal property listed for taxation in any special district or subdivision of the unit.
(8) The amount of ad valorem tax due by each taxpayer to any special district or subdivision of the unit.
(9) The amount of penalties, if any, imposed under the provisions of G.S. 105-312.
(10) The total amount of all taxes and penalties due by each taxpayer to the unit and to special districts and subdivisions of the unit.

(d) Listings and assessments and any changes therein made during the period between the close of the regular listing period and the first meeting of the board of equalization and review, as well as those made during the regular listing period, shall be entered on the county tax records, and the county tax records shall be submitted to the board of equalization and review at its first meeting. Additions and changes made by the board of equalization and review shall be entered on the county tax records in accordance with the provisions of G.S. 105-326. Municipal corporations shall be governed by the provisions of G.S. 105-326 through 105-328 with regard to matters dealt with in this subsection (d). (1939, c. 310, s. 1101; 1963, c. 784, s. 1; 1969, c. 1279; 1971, c. 806, s. 1; 1973, c. 476, s. 193.)

CASE NOTES

Constitutionality. — See Bryant v. State Bd. of Assmt., 293 F. Supp. 1379 (E.D.N.C. 1968), construing former similar provisions.

§ 105-320. Tax receipts; preparation.

(a) No taxing unit shall adopt a tax receipt form until it has been approved by the Department of Revenue, and no tax receipt form shall be approved unless it shows at least the following information:

(1) The name and mailing address of the taxpayer charged with taxes.
(2) The assessment of the taxpayer's real property listed for unit-wide taxation.
(3) The assessment of the taxpayer's personal property listed for unit-wide taxation.
(4) The total assessed value of the taxpayer's real and personal property listed for unit-wide taxation.
(5) The total assessed value of the taxpayer's real and personal property listed for taxation in any special district or subdivision of the unit.
(6) The rate of tax levied for each unit-wide purpose, the total rate levied for all unit-wide purposes, and the rate levied by or for any special district or subdivision of the unit in which the taxpayer's property is subject to taxation. (In lieu of showing this information on the tax receipt, it may be furnished on a separate sheet of paper, properly identified, at the time the official receipt is delivered upon payment).
(7) The amount of ad valorem tax due by the taxpayer for unit-wide purposes.
(8) The amount of ad valorem tax due by the taxpayer to any special district or subdivision of the unit.
(9) The amount of dog license tax due by the taxpayer.
(10) The amount of penalties, if any, imposed under the provisions of G.S. 105-312.
(11) The total amount of all taxes and penalties due by the taxpayer to the unit and to special districts and subdivisions of the unit.
(12) The amount of discount allowed for prepayment of taxes under the provisions of G.S. 105-360.
(13) The amount of interest charged for late payment of taxes under the provisions of G.S. 105-360.
(14) Repealed by Session Laws 1987, c. 813, s. 16.
(15) Repealed by 1987 (Regular Session, 1988), c. 1041, s. 1.2.
(16) The total assessed value of farm machinery, attachments, and repair parts of individual owners and Subchapter S corporations engaged in farming subject to the income tax credit in G.S. 105-151.21 and the amount of ad valorem taxes due by an individual farmer or a Subchapter S corporation engaged in farming on farm machinery, attachments, and repair parts subject to that credit.

(b) Instead of being shown on the tax receipt, the information required in subdivision (16) of subsection (a) may be shown on a separate sheet furnished to the affected taxpayers.

(c) The governing body of the county or municipality shall designate the person or persons who shall compute and prepare the tax receipt for all taxes charged upon the tax records. (1939, c. 310, s. 1102; 1961, c. 380; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1985, c. 656, s. 23; 1985 (Reg. Sess., 1986), c. 947, s. 6; 1987, c. 813, ss. 16, 17; 1987 (Reg. Sess., 1988), c. 1041, ss. 1.2, 1.3; 1991, c. 45, s. 14(c).)

§ 105-321. Disposition of tax records and receipts; order of collection.

(a) County tax records shall be filed in the office of the assessor unless the board of county commissioners shall require them to be filed in some other public office of the county. City and town tax records shall be filed in some public office of the municipality designated by the governing body of the city or town. In the discretion of the governing body, a duplicate copy of the tax records may be delivered to the tax collector at the time he is charged with the collection of taxes.

(b) Before delivering the tax receipts to the tax collector in any year, the board of county commissioners or municipal governing body shall adopt and enter in its minutes an order directing the tax collector to collect the taxes charged in the tax records and receipts. A copy of this order shall be delivered to the tax collector at the time the tax receipts are delivered to him, but the failure to do so shall not affect the tax collector's rights and duties to employ the means of collecting taxes provided by this Subchapter. The order of collection shall have the force and effect of a judgment and execution against the taxpayers' real and personal property and shall be drawn in substantially the following form:

State of North Carolina
County (or City or Town) of ______________________________
To the Tax Collector of the County (or City or Town) of ______________
______________:

You are hereby authorized, empowered, and commanded to collect the taxes set forth in the tax records filed in the office of ________ and in the tax receipts herewith delivered to you, in the amounts and from the taxpayers likewise therein set forth. Such taxes are hereby declared to be a first lien upon all real property of the respective taxpayers in the County (or City or Town) of ________, and this order shall be a full and sufficient authority to direct, require, and enable you to levy on and sell any real or personal property of such taxpayers, for and on account thereof, in accordance with law.

Witness my hand and official seal, this ______ day of ________, ______

______________________________ (Seal)
Chairman, Board of Commissioners of
______________ County
(Mayor, City (or Town) of ______________)

Attest:

____
Clerk of Board of Commissioners of ______________ County
(Clerk of the City (or Town) of ______________)

(c) The original tax receipts, together with any duplicate copies that may have been prepared, shall be delivered to the tax collector by the governing body on or before the first day of September each year if the tax collector has made settlement as required by G.S. 105-352. The tax collector shall give his receipt for the tax receipts and duplicates delivered to him for collection.

(d) Repealed by Session Laws 2006-30, s. 5, effective June 29, 2006.

(e) The governing body of a taxing unit may contract with a bank or other financial institution for receipt of payment of taxes payable at par and of delinquent taxes and interest for the current tax year. A financial institution may not issue a receipt for any tax payments received by it, however. Discount for early payment of taxes shall be allowed by a financial institution that contracts with a taxing unit pursuant to this subsection to the same extent as allowed by the tax collector. A financial institution that contracts with a taxing unit for receipt of payment of taxes shall furnish a bond to the taxing unit conditioned upon faithful performance of the contract in a form and amount satisfactory to the governing body of the taxing unit. A governing body of a taxing unit that contracts with a financial institution pursuant to this subsection shall publish a timely notice of the institution at which taxpayers may pay their taxes in a newspaper having circulation within the taxing unit. No notice is required, however, if the financial institution receives payments only through the mail.

(f) Minimal Taxes. — Notwithstanding the provisions of G.S. 105-380, the governing body of a taxing unit that collects its own taxes may, by resolution, direct its assessor and tax collector not to collect minimal taxes charged on the tax records and receipts. Minimal taxes are the combined taxes and fees of the taxing unit and any other units for which it collects taxes, due on a tax receipt prepared pursuant to G.S. 105-320 or on a tax notice prepared pursuant to G.S. 105-330.5, in a total original principal amount that does not exceed an amount, up to five dollars ($5.00), set by the governing body. The amount set by the governing body should be the estimated cost to the taxing unit of billing the taxpayer for the amounts due on a tax receipt or tax notice. Upon adoption of a resolution pursuant to this subsection, the tax collector shall not bill the taxpayer for, or otherwise collect, minimal taxes but shall keep a record of all minimal taxes by receipt number and amount and shall make a report of the amount of these taxes to the governing body at the time of the settlement. These minimal taxes shall not be a lien on the taxpayer's real property and shall not be collectible under Article 26 of this Subchapter. A resolution adopted pursuant to this subsection must be adopted on or before June 15 preceding the first taxable year to which it applies and remains in effect until amended or repealed by resolution of the taxing unit. (1939, c. 310, s. 1103; 1971, c. 806, s. 1; 1973, c. 476, s. 193; c. 615; 1987, c. 45, s. 1; 1989, c. 578, s. 1; 1991, c. 584, s. 1; 1995, c. 24, s. 1; c. 329, ss. 1, 2; 1999-456, s. 59; 2006-30, s. 5.)

Editor's Note. — Session Laws 1995, c. 329, s. 1, enacted subsection (f) of this section. Section 2 of the session law provides: "A resolution adopted under G.S. 105-330.5(b1), as enacted by Chapter 24 of the 1995 Session Laws, prior to the effective date of this act will be considered a resolution adopted under G.S. 105-321(f) as enacted by this act." Section 2 also repealed Chapter 24 of the 1995 Session Laws. For the text of G.S. 105-330.5(b1), see editor's note under that section.

Effect of Amendments. — Session Laws 2006-30, s. 5, effective June 29, 2006, repealed subsection (d), which read: "No tax receipt shall be delivered to the tax collector for any assessment appealed to the Property Tax Commission until such appeal has been finally adjudicated."

ARTICLE 21.

Review and Appeals of Listings and Valuations.

§ 105-322. County board of equalization and review.

(a) Personnel. — Except as otherwise provided herein, the board of equalization and review of each county shall be composed of the members of the board of county commissioners.

Upon the adoption of a resolution so providing, the board of commissioners is authorized to appoint a special board of equalization and review to carry out the duties imposed under this section. The resolution shall provide for the membership, qualifications, terms of office and the filling of vacancies on the board. The board of commissioners shall also designate the chairman of the special board. The resolution may also authorize a taxpayer to appeal a decision of the special board with respect to the listing or appraisal of his property or the property of others to the board of county commissioners. The resolution shall be adopted not later than the first Monday in March of the year for which it is to be effective and shall continue in effect until revised or rescinded. It shall be entered in the minutes of the meeting of the board of commissioners and a copy thereof shall be forwarded to the Department of Revenue within 15 days after its adoption.

Nothing in this subsection (a) shall be construed as repealing any law creating a special board of equalization and review or creating any board charged with the duties of a board of equalization and review in any county.

(b) Compensation. — The board of county commissioners shall fix the compensation and allowances to be paid members of the board of equalization and review for their services and expenses.

(c) Oath. — Each member of the board of equalization and review shall take the oath required by Article VI, § 7 of the North Carolina Constitution with the following phrase added to it: "that I will not allow my actions as a member of the board of equalization and review to be influenced by personal or political friendships or obligations,". The oath must be filed with the clerk of the board of county commissioners.

(d) Clerk and Minutes. — The assessor shall serve as clerk to the board of equalization and review, shall be present at all meetings, shall maintain accurate minutes of the actions of the board, and shall give to the board such information as he may have or can obtain with respect to the listing and valuation of taxable property in the county.

(e) Time of Meeting. — Each year the board of equalization and review shall hold its first meeting not earlier than the first Monday in April and not later than the first Monday in May. In years in which a county does not conduct a real property revaluation, the board shall complete its duties on or before the third Monday following its first meeting unless, in its opinion, a longer period of time is necessary or expedient to a proper execution of its responsibilities. Except as provided in subdivision (g)(5) of this section, the board may not sit later than July 1 except to hear and determine requests made under the provisions of subdivision (g)(2), below, when such requests are made within the time prescribed by law. In the year in which a county conducts a real property revaluation, the board shall complete its duties on or before December 1, except that it may sit after that date to hear and determine requests made under the provisions of subdivision (g)(2), below, when such requests are made within the time prescribed by law. From the time of its first meeting until its adjournment, the board shall meet at such times as it deems reasonably necessary to perform its statutory duties and to receive requests and hear the appeals of taxpayers under the provisions of subdivision (g)(2), below.

(f) Notice of Meetings and Adjournment. — A notice of the date, hours, place, and purpose of the first meeting of the board of equalization and review shall be published at least three times in some newspaper having general circulation in the county, the first publication to be at least 10 days prior to the first meeting. The notice shall also state the dates and hours on which the board will meet following its first meeting and the date on which it expects to adjourn; it shall also carry a statement that in the event of earlier or later adjournment, notice to that effect will be published in the same newspaper. Should a notice be required on account of earlier adjournment, it shall be published at least once in the newspaper in which the first notice was published, such publication to be at least five days prior to the date fixed for adjournment. Should a notice be required on account of later adjournment, it shall be published at least once in the newspaper in which the first notice was published, such publication to be prior to the date first announced for adjournment.

(g) Powers and Duties. — The board of equalization and review has the following powers and duties:

(1) Duty to Review Tax Lists. — The board shall examine and review the tax lists of the county for the current year to the end that all taxable property shall be listed on the abstracts and tax records of the county and appraised according to the standard required by G.S. 105-283, and the board shall correct the abstracts and tax records to conform to the provisions of this Subchapter. In carrying out its responsibilities under this subdivision (g)(1), the board, on its own motion or on sufficient cause shown by any person, shall:
   a. List, appraise, and assess any taxable real or personal property that has been omitted from the tax lists.
   b. Correct all errors in the names of persons and in the description of properties subject to taxation.
   c. Increase or reduce the appraised value of any property that, in the board's opinion, has been listed and appraised at a figure that is below or above the appraisal required by G.S. 105-283; however, the board shall not change the appraised value of any real property from that at which it was appraised for the preceding year except in accordance with the terms of G.S. 105-286 and 105-287.
   d. Cause to be done whatever else is necessary to make the lists and tax records comply with the provisions of this Subchapter.
   e. Embody actions taken under the provisions of subdivisions (g)(1)a through (g)(1)d, above, in appropriate orders and have the orders entered in the minutes of the board.
   f. Give written notice to the taxpayer at the taxpayer's last known address in the event the board, by appropriate order, increases the appraisal of any property or lists for taxation any property omitted from the tax lists under the provisions of this subdivision (g)(1).

(2) Duty to Hear Taxpayer Appeals. — On request, the board of equalization and review shall hear any taxpayer who owns or controls property taxable in the county with respect to the listing or appraisal of the taxpayer's property or the property of others.
   a. A request for a hearing under this subdivision (g)(2) shall be made in writing to or by personal appearance before the board prior to its adjournment. However, if the taxpayer requests review of a decision made by the board under the provisions of subdivision (g)(1), above, notice of which was mailed fewer than 15 days prior to the board's adjournment, the request for a hearing thereon may be made within 15 days after the notice of the board's decision was mailed.
   b. Taxpayers may file separate or joint requests for hearings under the provisions of this subdivision (g)(2) at their election.
   c. At a hearing under provisions of this subdivision (g)(2), the board, in addition to the powers it may exercise under the provisions of subdivision (g)(3), below, shall hear any evidence offered by the appellant, the assessor, and other county officials that is pertinent to the decision of the appeal. Upon the request of an appellant, the board shall subpoena witnesses or documents if there is a reasonable basis for believing that the witnesses have or the documents contain information pertinent to the decision of the appeal.
   d. On the basis of its decision after any hearing conducted under this subdivision (g)(2), the board shall adopt and have entered in its minutes an order reducing, increasing, or confirming the appraisal appealed or listing or removing from the tax lists the

property whose omission or listing has been appealed. The board shall notify the appellant by mail as to the action taken on the taxpayer's appeal not later than 30 days after the board's adjournment.

(3) Powers in Carrying Out Duties. — In the performance of its duties under subdivisions (g)(1) and (g)(2), above, the board of equalization and review may exercise the following powers:

a. It may appoint committees composed of its own members or other persons to assist it in making investigations necessary to its work. It may also employ expert appraisers in its discretion. The expense of the employment of committees or appraisers shall be borne by the county. The board may, in its discretion, require the taxpayer to reimburse the county for the cost of any appraisal by experts demanded by the taxpayer if the appraisal does not result in material reduction of the valuation of the property appraised and if the appraisal is not subsequently reduced materially by the board or by the Department of Revenue.

b. The board, in its discretion, may examine any witnesses and documents. It may place any witnesses under oath administered by any member of the board. It may subpoena witnesses or documents on its own motion, and it must do so when a request is made under the provisions of subdivision (g)(2)c, above.

A subpoena issued by the board shall be signed by the chair of the board, directed to the witness or to the person having custody of the document, and served by an officer authorized to serve subpoenas. Any person who willfully fails to appear or to produce documents in response to a subpoena or to testify when appearing in response to a subpoena shall be guilty of a Class 1 misdemeanor.

(4) Power to Submit Reports. — Upon the completion of its other duties, the board may submit to the Department of Revenue a report outlining the quality of the reappraisal, any problems it encountered in the reappraisal process, the number of appeals submitted to the board and to the Property Tax Commission, the success rate of the appeals submitted, and the name of the firm that conducted the reappraisal. A copy of the report should be sent by the board to the firm that conducted the reappraisal.

(5) Duty to Change Abstracts and Records After Adjournment. — Following adjournment upon completion of its duties under subdivisions (g)(1) and (g)(2) of this subsection, the board may continue to meet to carry out the following duties:

a. To hear and decide all appeals relating to discovered property under G.S. 105-312(d) and (k).

b. To hear and decide all appeals relating to the appraisal, situs, and taxability of classified motor vehicles under G.S. 105-330.2(b).

c. To hear and decide all appeals relating to audits conducted under G.S. 105-296(j) and relating to audits conducted under G.S. 105-296(j) and (*l*) of property classified at present-use value and property exempted or excluded from taxation.

d. To hear and decide all appeals relating to personal property under G.S. 105-317.1(c). (1939, c. 310, s. 1105; 1965, c. 191; 1967, c. 1196, s. 6; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1977, c. 863; 1987, c. 45, s. 1; 1989, c. 79, s. 3; c. 176, s. 1; c. 196; 1991, c. 110, s. 5; 1991 (Reg. Sess., 1992), c. 1007, s. 22; 1993, c. 539, s. 720; 1994, Ex. Sess., c. 24, s. 14(c); 2001-139, ss. 6, 7; 2002-156, s. 3.)

Local Modification. — Buncombe: 1981 (Reg. Sess., 1982), c. 1279; Cabarrus: 2000-92, s. 1 (repealed effective July 15, 2004, by 2004-100, s. 2); 2004-100, s. 1; Catawba: 1973, c. 355; Craven: 1987 (Reg. Sess., 1988), c. 1008; Cumberland: 1987, c. 161; 1989, c. 605, ss. 1, 4(b); Durham: 1989, c. 541, s. 1; 1991 (Reg. Sess., 1992), c. 871, s. 3; Henderson: 1997-186; Iredell: 1993 (Reg. Sess., 1994), c. 645, s. 1; Lincoln: 2000-40; Mecklenburg: 1981, c. 509; Rockingham: 1995 (Reg. Sess., 1996), c. 617, s. 1; Stokes: 1999-353, s. 2; Union: 1998-174, s. 1.

Legal Periodicals. — For note on procedural developments in the discovery of property unlisted for purposes of ad valorem taxation, see 51 N.C.L. Rev. 531 (1973).

For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former similar provisions.*

Valuation by Owner Subject to Review by Board. — The valuation upon personal property is made by the taxpayer when he lists his property, and is binding upon the list taker, but it may be corrected by the board of equalization at the dates fixed by the statute, upon due notice to the taxpayer. Pocomoke Guano Co. v. City of New Bern, 172 N.C. 258, 90 S.E. 202 (1916).

Right to Appeal. — The plain intent and thrust of this section and G.S. 105-282.1(b) and former G.S. 105-324 is to permit a property owner, as a matter of right, to appeal to the Property Tax Commission upon a county or municipal board denying its application for an exemption. In re K-Mart Corp., 79 N.C. App. 725, 340 S.E.2d 752, aff'd in part, rev'd in part, 319 N.C. 378, 354 S.E.2d 468 (1987).

Steps in Obtaining Review of Valuation. — If the county commissioners have failed to value land at its true value in money — be the failure deliberate, an error in judgment, or caused by a misconception of the law — plaintiffs' initial step is to complain to the county board of equalization and review and request a hearing. If they are dissatisfied with the action taken by that board they may except to its order and appeal to the State Board. Thereafter plaintiffs may resort to the courts, but only to obtain judicial review for errors of law or abuse of discretion by the State Board. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

North Carolina law provides two avenues by which a taxpayer may seek relief from an unjust property tax assessment: administrative review followed by judicial review in the Court of Appeals, and direct judicial review in superior or district court. Administrative review begins in the county board of equalization and review. The county board has jurisdiction to hear any taxpayer who has a complaint as to the listing or appraisal of his or others' property. Any taxpayer who wishes to except to an order of the county board shall appeal to the State Property Tax Commission. In turn, a taxpayer who is unsatisfied with the decision of the Property Tax Commission shall appeal to the North Carolina Court of Appeals, and then to the North Carolina Supreme Court. Johnston v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381 (1984), cert. denied, 313 N.C. 508, 329 S.E.2d 392 (1985).

Before Whom Complaint Made. — The complaint against excessive valuation must be made before the board of county commissioners, and the aldermen of the city have no jurisdiction to change such valuation. Pocomoke Guano Co. v. City of New Bern, 172 N.C. 258, 90 S.E. 202 (1916).

Requisites of Complaint. — The complaint in an action against a city to recover for taxes paid must allege that the valuation complained of is greater than that fixed by the county board of equalization, or the tax he was forced to pay was greater than it would have been if correctly computed at the legal rate on the valuation properly ascertained, or a demurrer thereto will be sustained. Pocomoke Guano Co. v. City of New Bern, 172 N.C. 258, 90 S.E. 202 (1916).

Property Tax Commission Empowered to Make Final Valuation of Property. — The legislature's intent is that the agency designated to hear appeals in all matters pertaining to tax valuations should also be the one empowered to make the final valuation. The State Board of Assessment (now Property Tax Commission) — unlike the courts — has the staff, the specialized knowledge and expertise necessary to make informed decisions upon questions relating to the valuation and assessment of property. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

Purpose of Notice Before Meeting. — The notice required before the meeting is general, and has reference to a general revision of the lists of the whole county, with a view to an equal and uniform assessment among the several townships, and it is to give opportunity to all who may be dissatisfied with the valuation of their property to make complaint and have it corrected. Commissioners of Cleaveland County v. Atlanta & C. Air Line Ry., 86 N.C. 541 (1882).

Limits on Commission's Powers. — State Property Tax Commission's authority to issue an order reducing, increasing or confirming the valuation or valuations appealed, or listing or removing from the tax lists the property which has been appealed, is subject to the same statutory parameters as assessors, county boards and county commissioners. In re Allred, 351 N.C. 1, 519 S.E.2d 52 (1999).

Revision Without Notice Void. — Where the value of the solvent credits of a taxpayer is increased without due notice to him or his agent, such increase in value is a nullity. Wolfenden v. Board of Comm'rs, 152 N.C. 83, 67 S.E. 319 (1910).

Designated Date of Meeting Exclusive of Others. — See Wolfenden v. Board of Comm'rs, 152 N.C. 83, 67 S.E. 319 (1910).

County Board Must Pass upon Question of Tax Situs. — Where the question of tax situs is raised before the county board, it is an integral part of its duties to pass upon the question. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

And in doing so, it is not passing upon taxpayer's liability for tax. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

Determination of tax situs is a requirement precedent to any legal listing, assessment, and valuation for tax purposes. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

Designation "property of others" in subdivision (2) of subsection (g) is broad enough to include every piece of rural land or the county's entire tax list if the commissioners have failed to value it as required by law. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

When Property Owner May Contest Valuation on "Property of Others". — It is clear that the property owner may contest the valuation on the "property of others" under subdivision (g)(2) only where he is in some way aggrieved by that valuation. Brock v. North Carolina Property Tax Comm'n, 290 N.C. 731, 228 S.E.2d 254 (1976).

Standing to Appeal. — Where taxpayer complained that the property of a real estate corporation was undervalued, with the result that other property owners in the county would bear a disproportionate share of the tax burden, taxpayer was adversely affected by the alleged undervaluation of the corporation's property and had standing to appeal to the county for a revaluation of the corporate property. In re Whiteside Estates, Inc., 136 N.C. App. 360, 525 S.E.2d 196, 2000 N.C. App. LEXIS 64 (2000), cert. denied, 351 N.C. 473, 543 S.E.2d 511 (2000).

Right to Request Hearing, etc., Not Limited. — The right to request a hearing by and relief from the county board of equalization and review is not limited to the owner in fee simple of the property, the valuation of which is in question. In re Valuation of Property Located at 411-417 W. Fourth St., 282 N.C. 71, 191 S.E.2d 692 (1972).

Subsection (e) Mandatory as to Time Prescribed for Completing Work. — The duty imposed on the board of equalization and review to complete its work within the time prescribed by subsection (e), at least to the extent that authority is given the board to act ex mero motu, is mandatory. Spiers v. Davenport, 263 N.C. 56, 138 S.E.2d 762 (1964).

When Board's Duties and Powers Cease. — After the board of county commissioners has completed the revision of the tax lists as authorized by the statute, its duties and powers as a revising board cease and determine until the time appointed by the statute for the next succeeding year. Wolfenden v. Board of Comm'rs, 152 N.C. 83, 67 S.E. 319 (1910).

Taxpayer Must Exhaust Administrative Remedies Before Resorting to Courts. — The legislature has provided adequate means whereby the individual taxpayer may contest not only the valuation which the county commissioners have placed upon his own property but the entire tax list or assessment roll, and he must exhaust this administrative remedy before he can resort to the courts. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

The superior court has no authority to issue mandamus commanding the commissioners to revalue all real property in the county at its true value in money, since taxpayers must first exhaust the statutory administrative remedies in the county board of equalization and review and in the State Board of Assessment (now Property Tax Commission) before they can resort to the superior court. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

Appeal. — The county commissioners have exclusive original jurisdiction to grant relief against excessive valuation of property for taxation, and, unless they proceed upon some erroneous principle, there is no appeal where the statute gives none. Wade v. Commissioners of Craven County, 74 N.C. 81 (1876). As to appeal to Property Tax Commission, see § 105-290 and notes thereto.

Applied in In re Bosley, 29 N.C. App. 468, 224 S.E.2d 686 (1976).

Cited in In re King, 281 N.C. 533, 189 S.E.2d 158 (1972); In re Moravian Home, Inc., 95 N.C. App. 324, 382 S.E.2d 772 (1989); Kinro, Inc. v. Randolph County, 108 N.C. App. 334, 423 S.E.2d 513 (1992); Edward Valves, Inc. v. Wake County, 343 N.C. 426, 471 S.E.2d 342 (1996), cert. denied, 519 U.S. 1112, 117 S. Ct. 952, 136 L. Ed. 2d 839 (1997).

§ 105-323. Giving effect to decisions of the board of equalization and review.

All changes in listings, names, descriptions, appraisals, and assessments made by the board of equalization and review shall be reflected upon the abstracts and tax records by insertion of rebates given, additional charges made, or any other insertion; by correction; or by any other charge. The tax records shall then be totalled, and at least a majority of the members of the board of equalization and review shall sign the following statement to be inserted at the end of the tax records:

State of North Carolina
County of ______________________________

We, the undersigned members of the Board of Equalization and Review of ________ County, hereby certify that these tax records constitute the fixed and permanent tax list and assessment roll and record of taxes due for the year ______, subject to only such changes as may be allowed by law.

____
____
Members of the Board of Equalization
and Review of ________ County

The omission of this endorsement shall not affect the validity of the tax records or of any taxes levied on the basis of the assessments appearing in them. (1939, c. 310, s. 1106; 1971, c. 806, s. 1; 1999-456, s. 59.)

Legal Periodicals. — For note on procedural developments in the discovery of property unlisted for purposes of ad valorem taxation, see 51 N.C.L. Rev. 531 (1973).

§ 105-324: Repealed by Session Laws 1987, c. 295, s. 4.

§ 105-325. Powers of board of county commissioners to change abstracts and tax records after board of equalization and review has adjourned.

(a) After the board of equalization and review has finished its work and the changes it effected or ordered have been entered on the abstracts and tax records as required by G.S. 105-323, the board of county commissioners shall not authorize any changes to be made on the abstracts and tax records except as follows:

(1) To give effect to decisions of the Property Tax Commission on appeals taken under G.S. 105-290.

(2) To add to the tax records any valuation certified by the Department of Revenue for property appraised in the first instance by the Department or to give effect to corrections made in such appraisals by the Department.

(3) Subject to the provisions of subdivisions (a)(3)a and (a)(3)b, below, to correct the name of any taxpayer appearing on the abstract or tax records erroneously; to substitute the name of the person who should have listed property for the name appearing on the abstract or tax records as having listed the property; and to correct an erroneous description of any property appearing on the abstract or tax records.

a. Any correction or substitution made under the provisions of this subdivision (a)(3) shall have the same force and effect as if the name of the taxpayer or description of the property had been correctly listed in the first instance, but the provisions of this subdivision (a)(3)a shall not be construed as a limitation on the taxation and penalization of discovered property required by G.S. 105-312.

b. If a correction or substitution under this subdivision (a)(3) will adversely affect the interests of any taxpayer, he shall be given written notice thereof and an opportunity to be heard before the change is entered on the abstract or tax records.

(4) To correct appraisals, assessments, and amounts of taxes appearing erroneously on the abstracts or tax records, as the result of clerical or mathematical errors. (If the clerical or mathematical error was made by the taxpayer, his agent, or an officer of the taxpayer and if the correction demonstrates that the property was listed at a substantial understatement of value, quantity, or other measurement, the provisions of G.S. 105-312 shall apply.)

(5) To add to the tax records and abstracts or to correct the tax records and abstracts to include property discovered under the provisions of G.S. 105-312 or property exempted or excluded from taxation pursuant to G.S. 105-282.1(a)(4).

(6) Subject to the provisions of subdivisions (a)(6)a, (a)(6)b, (a)(6)c, and (a)(6)d, below, to appraise or reappraise property when the assessor reports to the board that, since adjournment of the board of equalization and review, facts have come to his attention that render it advisable to raise or lower the appraisal of some particular property of a given taxpayer in the then current calendar year.

a. The power granted by this subdivision (a)(6) shall not authorize appraisal or reappraisal because of events or circumstances that have taken place or arisen since the day as of which property is to be listed.

b. No appraisal or reappraisal shall be made under the authority of this subdivision (a)(6) unless it could have been made by the board of equalization and review had the same facts been brought to the attention of that board.

c. If a reappraisal made under the provisions of this subdivision (a)(6) demonstrates that the property was listed at a substantial understatement of value, quantity, or other measurement, the provisions of G.S. 105-312 shall apply.

d. If an appraisal or reappraisal made under the provisions of this subdivision (a)(6) will adversely affect the interests of any taxpayer, he shall be given written notice thereof and an opportunity to be heard before the appraisal or reappraisal shall become final.

(7) To give effect to decisions of the board of county commissioners on appeals taken under G.S. 105-322(a).

(b) The board of county commissioners may give the assessor general authority to make any changes authorized by subsection (a), above, except those permitted under subdivision (a)(6), above.

(c) Orders of the board of county commissioners and actions of the assessor upon delegation of authority to him by the board that are made under the provisions of this section may be appealed to the Property Tax Commission under the provisions of G.S. 105-290. (1939, c. 310, s. 1108; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1987, c. 45, s. 1; c. 295, s. 8; c. 680, s. 6; 1989, c. 176, s. 2.)

Local Modification. — Buncombe: 1981 (Reg. Sess., 1982), c. 1279.

Legal Periodicals. — For note on procedural developments in the discovery of property unlisted for purposes of ad valorem taxation, see 51 N.C.L. Rev. 531 (1973).

OPINIONS OF ATTORNEY GENERAL

Board of county commissioners may not reappraise property when information as to change comes to tax supervisor's attention while board of equalization and review is in session. See opinion of Attorney General to Mr. H.L. Riddle, Jr., 41 N.C.A.G. 514 (1971).

§ 105-325.1. Special committee for motor vehicle appeals.

The board of county commissioners may appoint a special committee of its members or other persons to hear and decide appeals arising under G.S. 105-330.2(b). The county shall bear the expense of employing the committee. (1991 (Reg. Sess., 1992), c. 961, s. 9.)

Article 22.

Listing, Appraising, and Assessing by Cities and Towns.

§ 105-326. Listing property for city and town taxation; duty of owner; authority of governing body to obtain lists from county.

(a) All property subject to ad valorem taxation in any city or town shall be listed annually during the period prescribed by G.S. 105-307 in the city or town in which it is taxable in the name of the person required by G.S. 105-302 and 105-306 on an abstract prepared according to G.S. 105-309 and affirmed as required by G.S. 105-310. In lieu of requiring property owners to list their property with the city or town, the governing body of any city or town may make provision for obtaining from the abstracts and tax records of the county in which the municipality is situated lists of the property subject to taxation by the city or town.

(b) Regardless of whether a city or town adopts the alternative provided in the second sentence of subsection (a), above, the provisions of G.S. 105-311 and 105-312 shall apply to the listing of property for municipal taxation, as shall the penalties imposed by G.S. 105-308 and 105-312 for failure to list. In the preparation of abstracts, tax records, and tax receipts the city or town shall be governed by the provisions of G.S. 105-318, 105-319, 105-320, and 105-321. The powers and duties assigned to the assessor by the statutes cited as being applicable to municipalities shall be imposed upon and exercised by some official designated by the governing body of the city or town, and the powers and duties assigned therein to the board of county commissioners shall be imposed upon and exercised by the governing body of the city or town. (1939, c. 310, s. 1201; 1971, c. 806, s. 1; 1987, c. 45, s. 1.)

§ 105-327. Appraisal and assessment of property subject to city and town taxation.

For the property it is entitled to tax, a city or town situated in a single county shall accept and adopt the appraisals and assessments fixed by the authorities of that county as modified by the Department of Revenue under the provisions of this Subchapter. However, the requirement of this section shall not be construed to modify the appraisal and assessment authority given cities and towns with respect to discovered property by G.S. 105-312. (1939, c. 310, s. 1201; 1971, c. 806, s. 1; 1973, c. 476, s. 193.)

Legal Periodicals. — For note on procedural developments in the discovery of property unlisted for purposes of ad valorem taxation, see 51 N.C.L. Rev. 531 (1973).

CASE NOTES

Cited in In re Whiteside Estates, Inc., 136 N.C. App. 360, 525 S.E.2d 196, 2000 N.C. App. LEXIS 64 (2000), cert. denied, 351 N.C. 473, 543 S.E.2d 511 (2000).

§ 105-328. Listing, appraisal, and assessment of property subject to taxation by cities and towns situated in more than one county.

(a) For purposes of municipal taxation, all property subject to taxation by a city or town situated in two or more counties may, by resolution of the governing body of the municipality, be listed, appraised, and assessed as provided in G.S. 105-326 and 105-327 if, in such a case, in the opinion of the governing body, the same appraisal and assessment standards will thereby apply uniformly throughout the municipality. However, if, in such a case, the governing body shall determine that adoption of the appraisals and assessments fixed by the counties will not result in uniform appraisals and assessments throughout the municipality, the governing body may, by horizontal adjustments, equalize the appraisal and assessment values fixed by the counties in order to obtain the required uniformity. Taxes levied by the city or town shall be levied uniformly on the assessments so determined.

(b) Should the governing body of a city or town situated in two or more counties not adopt the procedure provided in subsection (a), above, all property subject to taxation by the municipality shall be listed, appraised, and assessed as provided in subdivisions (b)(1) through (b)(6), below.

(1) The governing body of the city or town shall appoint a municipal assessor on or before the first Monday in July in each odd-numbered year. The governing body may remove the municipal assessor from office during his term for good cause after giving him notice in writing and an opportunity to appear and be heard at a public session of the appointing body. Whenever a vacancy occurs in the office, the governing body shall appoint a qualified person to serve as municipal assessor for the period of the unexpired term. A person appointed as a municipal assessor shall meet the qualifications and requirements set for a county assessor under G.S. 105-294. Pursuant to Article VI, Sec. 9, of the North Carolina Constitution, the office of municipal assessor is hereby declared to be an office that may be held concurrently with any other appointive office.

(2) With the approval of the governing body, a municipal assessor may employ listers, appraisers, and clerical assistants necessary to carry out the listing, appraisal, assessing, and billing functions required by law.

(3) A municipal assessor and the persons employed by him have the same powers and duties as their county equivalents with respect to property subject to taxation by a city or town.

(4) The governing body shall, with respect to property subject to city or town taxation, be vested with the powers and duties vested by this Subchapter in boards of county commissioners and boards of equalization and review. Appeals may be taken from the municipal board of equalization and review or governing body to the Property Tax Commission in the manner provided in this Subchapter for appeals from county boards of equalization and review and boards of county commissioners.

(5) All expenses incident to the listing, appraisal, and assessment of property for the purpose of city or town taxation shall be borne by the municipality for whose benefit the work is undertaken.

(6) The intent of this subsection (b) is to provide cities and towns that are situated in two or more counties with machinery for listing, appraising, and assessing property for municipal taxation equivalent to that established by this Subchapter for counties. The powers to be exercised by, the duties imposed on, and the possible penalties against municipal governing bodies, boards of equalization and review, assessors, and persons employed by an assessor shall be the same as those provided in this Subchapter by, on, or against county boards of commissioners, boards of equalization and review, assessors, and persons employed by an assessor. (1939, c. 310, s. 1202; 1971, c. 806, s. 1; 1973, c. 476, s. 193; c. 695, s. 13; 1987, c. 43, s. 8; c. 45, s. 1; c. 46, s. 2.)

§ 105-329: Repealed by Session Laws 1991 (Regular Session, 1992), c. 961, s. 2.

Editor's Note. — Session Laws 1991, c. 629, s. 10, had provided that this section would become effective January 1, 1993; however, this section was repealed by Session Laws 1991 (Reg. Sess., 1992), c. 961, s. 2, effective January 1, 1993. Therefore, this section never went into effect.

ARTICLE 22A.

Motor Vehicles.

§ 105-330. Definitions.

The following definitions apply in this Article:

(1) Classified motor vehicle. — A motor vehicle classified under this Article.

(1a) **(For effective date, see note)** Collecting authority. — The Division of Motor Vehicles or an agent contracting with the Division of Motor Vehicles.

(2) Motor vehicle. — Defined in G.S. 20-4.01(23).

(2a) **(For effective date, see note)** Municipal corporation. — Defined in G.S. 105-273(11).

(3) Public service company. — Defined in G.S. 105-333(14). (1991, c. 624, s. 1; 2005-294, s. 1; 2006-259, s. 31.5; 2007-527, s. 22(b).)

Cross References. — As to the use and confidential nature of actual addresses of Address Confidentiality Program participants by boards of elections for election-related purposes, see G.S. 15C-8.

Editor's Note. — Session Laws 2005-294, s. 12, provides: "The Property Tax Division within the Department of Revenue and the Division of Motor Vehicles within the Department of Transportation shall jointly study and develop a plan for determining the method of valuation of motor vehicles to be taxed and for implementing an integrated computer system needed to combine the registration renewal and property tax collection for motor vehicles in the State. The Divisions shall consult with representatives from the North Carolina Association of County Commissioners, the North Carolina League of Municipalities, the North Carolina Association of Assessing Officers, the North Carolina Automobile Dealers Association, the North Carolina Independent Automobile Dealers Association, and the North Carolina Tax Collectors Association. The Divisions shall submit a report of its findings and recommendations to the Revenue Laws Study Committee, the Joint Legislative Transportation Oversight Committee, and the Fiscal Research Division by April 30, 2006."

Session Laws 2005-294, s. 13, as amended by

Session Laws 2006-259, s. 31.5, and as amended by Session Laws 2007-527, s. 22(b), provides: "Sections 4 and 8 of this act become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 10, and 11 of this act become effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007."

Effect of Amendments. — Session Laws 2005-294, s. 1, effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first, added subdivisions (1a) and (2a).

§ 105-330.1. Classification of motor vehicles.

(a) Classification. — All motor vehicles other than the motor vehicles listed in subsection (b) of this section are designated a special class of property under authority of Article V, Sec. 2(2) of the North Carolina Constitution. Classified motor vehicles shall be listed and assessed as provided in this Article and taxes on classified motor vehicles shall be collected as provided in this Article.

(b) Exceptions. — The following motor vehicles are not classified under subsection (a) of this section:

(1) Motor vehicles exempt from registration pursuant to G.S. 20-51.
(2) Manufactured homes, mobile classrooms, and mobile offices.
(3) Semitrailers or trailers registered on a multiyear basis.
(4) Motor vehicles owned or leased by a public service company and appraised under G.S. 105-335.
(5) Repealed by Session Laws 2000, c. 140, s. 75(a), effective July 1, 2000.
(6) **(Effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first)** Motor vehicles registered under the International Registration Plan. (1991, c. 624, s. 1; 1991 (Reg. Sess., 1992), c. 961, s. 3; 1993, c. 485, s. 18; c. 543, s. 4; 1993 (Reg. Sess., 1994), c. 745, s. 1; 2000-140, s. 75(a); 2007-471, s. 6.)

Editor's Note. — Session Laws 2007-471, s. 8, provides: "Unless otherwise stated, this act becomes effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first."

Effect of Amendments. — Session Laws 2007-471, s. 6, added subdivision (b)(6). For effective date, see Editor's note.

§ 105-330.2. Appraisal, ownership, and situs.

(a) Date Determined. — The value of a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) (registered vehicles) shall be determined as of January 1 of the year the taxes are due. If the value of a new motor vehicle cannot be determined as of that date, the value of that vehicle shall be determined for that year as of the date that model vehicle is first offered for sale at retail in this State.

The ownership, situs, and taxability of a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) (registered vehicles) shall be determined annually as of the day on which a new registration is applied for or the day on which the current vehicle registration is renewed, regardless of whether the registration is renewed after it has expired.

The value of a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(2) (unregistered vehicles) shall be determined as of January 1 of the year in which the motor vehicle is required to be listed pursuant to G.S. 105-330.3(a)(2). The ownership, situs, and taxability of a classified motor vehicle listed or discovered pursuant to G.S. 105-330.3(a)(2) (unregistered vehicles) shall be determined as of January 1 of the year in which the motor vehicle is required to be listed.

(b) **(Effective until July 1, 2010, see note)** Value; Appeal. — A classified motor vehicle shall be appraised by the assessor at its true value in money as prescribed by G.S. 105-283. If the assessor considers the sales price of the motor vehicle in determining the true value of the motor vehicle, the assessor must not include any amount for which the taxpayer is liable under Article 5A of this Chapter. The owner of a classified motor vehicle may appeal the appraised value of the vehicle in the manner provided by G.S. 105-312(d) for appeals in the case of discovered property and may appeal the situs or taxability of the vehicle in the manner provided by G.S. 105-381. The owner of a classified motor vehicle must file an appeal of appraised value with the assessor within 30 days after the date of the tax notice prepared pursuant to G.S. 105-330.5. Notwithstanding G.S. 105-312(d), an owner who appeals the appraised value of a classified motor vehicle shall pay the tax on the vehicle when due, subject to a full or partial refund if the appeal is decided in the owner's favor.

(b) **(Effective July 1, 2010, see note)** Value; Appeal. — A classified motor vehicle shall be appraised by the assessor at its true value in money as prescribed by G.S. 105-283. If the assessor considers the sales price of the motor vehicle in determining the true value of the motor vehicle, the assessor must not include any amount for which the taxpayer is liable under Article 5A of this Chapter. The Property Tax Division of the Department of Revenue shall annually adopt a schedule of values, standards, and rules to be used in the valuation of motor vehicles to ensure equitable statewide valuations, taking into account local market conditions and allowing adjustments for mileage and the condition of the vehicles. The owner of a classified motor vehicle may appeal the appraised value of the vehicle in the manner provided by G.S. 105-312(d) for appeals in the case of discovered property and may appeal the situs or taxability of the vehicle in the manner provided by G.S. 105-381. The owner of a classified motor vehicle must file an appeal of appraised value with the assessor before the taxes become delinquent pursuant to G.S. 105-330.4. Notwithstanding G.S. 105-312(d), an owner who appeals the appraised value of a classified motor vehicle shall pay the tax on the vehicle when due, subject to a full or partial refund if the appeal is decided in the owner's favor.

(c) Administration. — The Department of Revenue, acting through the Property Tax Division, and the Department of Transportation, acting through the Division of Motor Vehicles, shall enter into a memorandum of understanding concerning the vehicle identification information, name and address of the owner, and other information that will be required on the motor vehicle registration forms to implement the tax listing and collection provisions of this Article. The memorandum of understanding shall also include a procedure for the administration of the listing, appraisal, and assessment of classified motor vehicles. (1991, c. 624, s. 1; 1991 (Reg. Sess., 1992), c. 961, s. 4; 1995, c. 510, s. 1; 1995 (Reg. Sess., 1996), c. 646, s. 24; 1997-6, s. 10; 1999-353, s. 1; 2005-294, s. 2; 2005-303, s. 1; 2006-259, s. 31.5; 2007-527, s. 22(b).)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until July 1, 2010, or until the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. The second version of subsection (b) set out above is effective July 1, 2010, or when the Division of Motor Vehicles and the

Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first.

Editor's Note. — Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, and as amended by Session Laws 2007-527, s. 22(b), provides: "Sections 4 and 8 of this act become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 10, and 11 of this act become effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007."

Effect of Amendments. — Session Laws 2005-294, s. 2, effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first, rewrote subsection (b); and added the last sentence in subsection (c).

Session Laws 2005-303, s. 1, effective for taxes imposed for taxable years beginning on or after July 1, 2005, inserted the second sentence of subsection (b).

§ 105-330.3. Assessor's duty to list classified motor vehicles; application for exempt status.

(a)(1) Registered Vehicles. The assessor shall list, appraise, and assess all taxable classified motor vehicles for county, municipal, and special district taxes each year in the name of the record owner as of the day on which the current vehicle registration is renewed or the day on which a new registration is applied for. The owner of a classified motor vehicle listed pursuant to this subdivision need not list the vehicle as provided in G.S. 105-306; G.S. 105-312 does not apply to classified motor vehicles listed pursuant to this subdivision.

(2) Unregistered Vehicles. The owner of a classified motor vehicle who does not register the vehicle or does not renew the registration of the vehicle on or before the expiration date of the current registration shall list the vehicle for taxes by filing an abstract with the assessor of the county in which the vehicle is located on or before January 31 following the date the unregistered vehicle is acquired or, in the case of a registration that is not renewed, January 31 following the date the registration expires, and on or before January 31 of each succeeding year that the vehicle is unregistered. If a classified motor vehicle listed pursuant to this section is registered during the calendar year in which it was listed, it shall be taxed for the fiscal year that opens in the calendar year of listing as an unregistered vehicle. A vehicle required to be listed pursuant to this subdivision that is not listed by January 31 shall be subject to discovery pursuant to G.S. 105-312.

(b) The owner of a classified motor vehicle who claims an exemption or exclusion from tax under this Subchapter has the burden of establishing that the vehicle is entitled to the exemption or exclusion. The owner may establish prima facie entitlement to exemption or exclusion of the classified motor vehicle by filing an application for exempt status with the assessor. When an approved application is on file, the assessor shall omit from the tax records classified motor vehicles described in the application.

(c) The owner of a classified motor vehicle that has been omitted from the tax records as provided in subsection (b) shall report to the assessor any classified motor vehicle registered in the owner's name or owned by him that does not qualify for exemption or exclusion for the current year. This report shall be made within 30 days after the renewal of registration or initial registration of the vehicle or, for an unregistered vehicle, on or before January 31 of the year in which the vehicle is required to be listed by subdivision (a)(2). A classified motor vehicle that does not qualify for exemption or exclusion but has been omitted from the tax records as provided in subsection (b) is subject to discovery under the provisions of G.S. 105-312, except that in lieu of the penalties prescribed by G.S. 105-312(h) there shall be assessed a penalty of one hundred dollars ($100.00) for each registration period that elapsed before the disqualification was discovered.

(d) The provisions of G.S. 105-282.1 do not apply to classified motor vehicles. (1991, c. 624, s. 1.)

§ 105-330.4. Due date, interest, and enforcement remedies.

(a) **(Effective until July 1, 2010)** Taxes on a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(2) shall be due on September 1 following the date by which the vehicle was required to be listed. Taxes on a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) shall be due each year on the following dates:

(1) For a vehicle registered under the staggered system, taxes shall be due on the first day of the fourth month following the date the registration expires or on the first day of the fourth month following the last day of the month in which the new registration is applied for.

(2) For a vehicle newly registered under the annual system, taxes shall be due on the first day of the fourth month following the date the new registration is applied for. For a vehicle whose registration is renewed under the annual system, taxes shall be due on May 1 following the date the registration expired.

(a) **(Effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first)** Taxes on a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(2) are due on September 1 following the date by which the vehicle was required to be listed. Taxes on a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) are due each year on the date a new registration is applied for or the fifteenth day of the month following the month in which the registration renewal sticker expired pursuant to G.S. 20-66(g).

(a1) **(Effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first)** Notwithstanding subsection (a) of this section, taxes on a classified motor vehicle for which the registration fees have been paid pursuant to G.S. 20-79.1 or subsection (a) of G.S. 20-79.1A, are due on the last day of the second month following the date on which the limited registration is applied for.

(b) **(Effective until July 1, 2010)** Subject to the provisions of G.S. 105-395.1, interest on unpaid taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) accrues at the rate of five percent (5%) for the first month following the date the taxes were due and three-fourths percent (¾ %) for each month thereafter until the taxes are paid, unless the notice required by G.S. 105-330.5 is prepared after the date the taxes are due. In that circumstance, the interest accrues beginning the second month following the date of the notice until the taxes are paid. Subject to the provisions of G.S. 105-395.1, interest on delinquent taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(2) accrues as provided in G.S. 105-360(a) and discounts shall be allowed as provided in G.S. 105-360(c).

(b) **(Effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer**

system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first) Subject to the provisions of G.S. 105-395.1, interest on unpaid taxes and registration fees on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) accrues at the rate of five percent (5%) for the remainder of the month following the month in which the registration renewal sticker expired pursuant to G.S. 20-66(g). Interest accrues at the rate of three-fourths percent (¾ %) for each month thereafter until the taxes and fees are paid, unless the notice required by G.S. 105-330.5 is prepared after the date the taxes and fees are due. In that circumstance, the interest accrues beginning the second month following the date of the notice until the taxes and fees are paid. Subject to the provisions of G.S. 105-395.1, interest on delinquent taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(2) accrues as provided in G.S. 105-360(a) and discounts shall be allowed as provided in G.S. 105-360(c).

(c) Unpaid taxes on classified motor vehicles may be collected by levying on the motor vehicle taxed or on any other personal property of the taxpayer pursuant to G.S. 105-366 and G.S. 105-367, or by garnishment of the taxpayer's property pursuant to G.S. 105-368. Notwithstanding the provisions of G.S. 105-366(b), the enforcement measures of levy, attachment, and garnishment may be used to collect unpaid taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) at any time after interest accrues. Notwithstanding the provisions of G.S. 105-355, taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) do not become a lien on real property owned by the taxpayer. (1991, c. 624, s. 1; 1991 (Reg. Sess., 1992), c. 961, s. 5; 1995, c. 510, s. 2; 2001-139, s. 8; 2005-294, ss. 3, 4, 5; 2006-259, s. 31.5; 2007-471, s. 3; 2007-527, s. 22(b).)

Subsections (a) and (b) Set Out Twice. — The first versions of subsections (a) and (b) set out above are effective until July 1, 2010. The second versions of subsections (a) and (b) set out above are effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first.

Support Troops Participating in Operations Enduring Freedom and Noble Eagle. — As to waiver of deadlines, fees, and penalties for military personnel participating in Operations Enduring Freedom and Noble Eagle, see note for Session Laws 2001-508, ss. 3 to 5(b), at G.S. 105-307.

Extension of Deadline for Payment of Property Taxes for Deployed Military Personnel. — Session Laws 2003-300, ss. 1, 2, and 4, provide: "Deployed Military Personnel Defined. — As used in this act, the term 'deployed military personnel' includes both of the following:

"(1) A member of the armed forces or the armed forces reserves of the United States on active duty in support of Operation Iraqi Freedom on or after January 1, 2003.

"(2) A member of the North Carolina Army National Guard or the North Carolina Air National Guard called to active duty in support of Operation Iraqi Freedom on or after January 1, 2003.

"Proof. — Verification by the military member's command specifying deployment is conclusive evidence of the military member's deployment.

"Property Taxes. — Notwithstanding G.S. 105-360 or G.S. 105-330.4, deployed military personnel are allowed 90 days after the end of their deployment to pay property taxes at par, for any property taxes that became due or delinquent during the term of the deployment. For these individuals, the taxes for the relevant tax year do not become delinquent until after the end of the 90-day period provided in this section, and an individual who pays the property taxes before the end of the 90-day period is not liable for interest on the taxes for the relevant tax year. If the individual does not pay the taxes before the end of the 90-day period, interest accrues on the taxes according to the schedule provided in G.S.105-360 or G.S. 105-330.4, as applicable, as though the taxes were unpaid as of the date the taxes would have become delinquent if not for this section.

"Notwithstanding G.S. 105-307, deployed military personnel required to list property for taxation while deployed are allowed 90 days after the end of the deployment to list the property. For these individuals, the listing period for the relevant tax year is extended until the end of the 90-day period provided in this act, and an individual who lists the property before the end of the 90-day period is not subject to civil or criminal penalties for failure to list the property required to be listed during deployment."

Editor's Note. — Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, and as amended by Session Laws 2007-527, s. 22(b), provides: "Sections 4 and 8 of this act become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 10, and 11 of this act become effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007."

Session Laws 2007-471, s. 3 provides: "Unless otherwise stated, this act becomes effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first."

Effect of Amendments. — Session Laws 2005-294, ss. 3 and 5, effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first, rewrote subsection (a); and rewrote the first two sentences in subsection (b).

Session Laws 2005-294, s. 4, effective January 1, 2006, in subsection (b), substituted "five percent (5%)" for "two percent (2%)" and deleted "tax" preceding "notice required by" in the introductory language.

Session Laws 2007-471, s. 3, added subsection (a1). For effective date, see Editor's note.

OPINIONS OF ATTORNEY GENERAL

County May Not Impose Late Payment Penalty or Administrative Fee Upon Delinquent Property Tax Accounts. — Because the statutes authorizing property taxes provide for interest and/or penalties, a county may not, by ordinance, impose a late payment penalty or administrative fee upon delinquent property tax accounts. See opinion of Attorney General to Lloyd C. Smith, Jr., Pritchett & Burch, PLLC, 2001 N.C. AG LEXIS 6 (3/6/2001).

§ 105-330.5. (For effective date, see note) Listing and collecting procedures.

(a) For classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1), upon receiving the registration lists from the Division of Motor Vehicles each month, the assessor shall prepare a tax notice for each vehicle; the tax notice shall contain all county, municipal, and special district taxes due on the motor vehicle. In computing the taxes, the assessor shall appraise the motor vehicle in accordance with G.S. 105-330.2 and shall use the tax rates of the various taxing units in effect on the first day of the month in which the current vehicle registration expired or the new registration was applied for. The tax on the motor vehicle is the product of a fraction and the number of months in the motor vehicle tax year. The numerator of the fraction is the product of the appraised value of the motor vehicle and the tax rate of the various taxing units. The denominator of the fraction is 12. This procedure shall constitute the listing and assessment of each classified motor vehicle for taxation. The tax notice shall contain:

(1) The date of the tax notice.
(2) The appraised value of the motor vehicle.
(3) The tax rate of the taxing units.
(4) A statement that the appraised value of the motor vehicle may be appealed to the assessor within 30 days after the date of the notice.

(a1) When a new registration is obtained for a vehicle registered under the annual system in a month other than December, the assessor shall prorate the taxes due for the remainder of the calendar year. The amount of prorated taxes

G.S. 105-330.5 is set out twice. See notes.

due is the product of the proration fraction and the taxes computed according to subsection (a). The numerator of the proration fraction is the number of full months remaining in the calendar year following the date the registration is applied for and the denominator of the fraction is 12.

(b) When the tax notice required by subsection (a) is prepared, the county tax collector shall mail a copy of the notice, with appropriate instructions for payment, to the motor vehicle owner. The county may retain the actual cost of collecting municipal and special district taxes collected pursuant to this Article, not to exceed one and one-half percent (1 ½%) of the amount of taxes collected. The county finance officer shall establish procedures to ensure that tax payments received pursuant to this Article are properly accounted for and taxes due other taxing units are remitted to the units to which they are due at least once each month. Each month, a county shall provide reasonable information to the municipalities and special districts located in it to enable them to account for the tax payments remitted to them.

(b1) Repealed by Session Laws 1995, c. 329, s. 2.

(c) For classified motor vehicles listed pursuant to G.S. 105-330.3(a)(2), the assessor shall appraise each vehicle in accordance with G.S. 105-330.2. The assessor shall prepare a tax notice for each vehicle before September 1 following the January 31 listing date; the tax notice shall include all county and special district taxes due on the motor vehicle. In computing the taxes, the assessor shall use the tax rates of the taxing units in effect for the fiscal year that begins on July 1 following the January 31 listing date. Municipalities shall list, assess, and tax classified motor vehicles listed pursuant to G.S. 105-330.3(a)(2) as provided in G.S. 105-326, 105-327, and 105-328 and shall send tax notices as provided in this section.

(d) The county shall include taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) in the tax levy for the fiscal year in which the taxes become due and shall charge the taxes to the tax collector for that year, unless the tax notice required by subsection (a) is prepared after the date the taxes are due. If that occurs, the county shall include the taxes from that notice in the tax levy for the current fiscal year and shall charge the taxes to the tax collector for that year. (1991, c. 624, s. 1; 1991 (Reg. Sess., 1992), c. 961, s. 6; 1995, c. 24, s. 1; c. 329, s. 2; c. 510, s. 3; 2005-313, s. 8.)

Section Set Out Twice. — The section above is effective until July 1, 2010. For the section as amended effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first, see the following section, also numbered G.S. 105-330.5. See Editor's Note.

Editor's Note. — Session Laws 1995, c. 24, s. 1, effective April 6, 1995, added a subdivision (b1), which was repealed by Session Laws 1995, c. 329, s. 2, effective for taxes imposed for taxable years beginning on or after July 1, 1995. Prior to its repeal, subdivision (b1) read: "(b1) Notwithstanding the provisions of G.S. 105-380, the board of county commissioners may, by resolution, direct the tax collector to treat as fully paid minimal taxes billed on a tax notice required by subsection (a) of this section. The taxes billed on a tax notice are minimal under this subsection when the total county, municipal, and special district taxes billed on the notice do not exceed an amount up to five dollars ($5.00) set by the board of county commissioners in the resolution. The amount set by the board should be the estimated cost to the county of billing a taxpayer for the taxes on a notice. The tax collector shall not bill the taxpayer for these minimal taxes but shall keep a record of the taxes by taxpayer and amount and shall report the taxes to the board of county commissioners as part of the settlement for the year. A resolution adopted pursuant to this subsection shall become effective no earlier than 30 days after its adoption and shall apply to registration lists received under subsection (a) of this section on or after the date the resolution becomes effective. The resolution remains in effect until amended or repealed by resolution of the board of county commissioners. Upon adoption of a resolution pursuant to this subsection, minimal taxes to which the resolution applies are considered fully paid."

Session Laws 1995, c. 329, s. 2, provides: "A resolution adopted under G.S. 105-330.5(b1), as enacted by Chapter 24 of the 1995 Session Laws, prior to the effective date of this act will be considered a resolution adopted under G.S. 105-321(f) as enacted by this act".

Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, and as amended by Session Laws 2007-527, s. 22, provides, in part, that s. 6 of the act becomes effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007.

Effect of Amendments. — Session Laws 2005-313, s. 8, effective January 1, 2006, inserted the present third through fifth sentences of subsection (a).

§ 105-330.5. (For effective date, see note) Listing and collecting procedures.

(a) For classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1), upon receiving the registration lists from the Division of Motor Vehicles each month, the Property Tax Division of the Department of Revenue shall prepare a combined tax and registration notice for each vehicle. The combined tax and registration notice shall contain all county and municipal corporation taxes and fees due on the motor vehicle as computed by the assessor in the county of registration. In computing the taxes, the assessor shall appraise the motor vehicle in accordance with G.S. 105-330.2 and shall use the tax rates of the various taxing units in effect on the first day of the month in which the current vehicle registration expires or the new registration is applied for. The tax on the motor vehicle is the product of a fraction and the number of months in the motor vehicle tax year. The numerator of the fraction is the product of the appraised value of the motor vehicle and the tax rate of the various taxing units. The denominator of the fraction is 12. This procedure shall constitute the listing and assessment of each classified motor vehicle for taxation. The combined tax and registration notice shall contain:

(1) The date of the combined tax and registration notice.
(2) The appraised value of the motor vehicle.
(3) The tax rate of the taxing units.
(4) A statement that the appraised value of the motor vehicle may be appealed to the assessor before the taxes and fees become delinquent.
(5) The registration fee imposed by the Division of Motor Vehicles and any other information required by the Division of Motor Vehicles to comply with the provisions of Chapter 20 of the General Statutes.

(a1) When a new registration is obtained for a vehicle registered under the annual system in a month other than December, the taxes shall be prorated for the remainder of the calendar year. The amount of prorated taxes due is the product of the proration fraction and the taxes computed according to subsection (a). The numerator of the proration fraction is the number of full months remaining in the calendar year following the date the registration is applied for and the denominator of the fraction is 12.

(a2) For classified motor vehicles where the registration fees have been paid pursuant to G.S. 20-79.1 or subsection (a) of G.S. 20-79.1A, the Property Tax Division's notice shall contain a statement that registration fees have been paid pursuant to G.S. 20-79.1 or G.S. 20-79.1A and that the registration becomes valid for the remainder of the year upon payment of county and municipal taxes and fees due in the current year.

G.S. 105-330.5 is set out twice. See notes.

(b) When the combined tax and registration notice required by subsection (a) or (a2) of this section is prepared, the Property Tax Division of the Department of Revenue or a third-party contractor shall mail a copy of the notice, with appropriate instructions for payment, to the motor vehicle owner. The Department shall establish a fee equal to the actual cost of printing and sending the notice. The Department may receive a fee for each notice generated for a vehicle registered in a county or municipal corporation from the taxes and fees remitted to the county or municipal corporation in which the vehicle is registered. The collecting authority is responsible for collecting county and municipal taxes and fees assessed under this Article and may retain a fee for collecting these taxes and fees. The fee retained by the collecting authority shall be an amount equal to at least one-third of the compensation paid for registration renewals conducted by contract agents under G.S. 20-63(h). The Property Tax Division shall establish procedures to ensure that tax payments and fees received pursuant to this Article and Chapter 20 of the General Statutes are properly accounted for and taxes and fees due other taxing units and the Division of Motor Vehicles are remitted at least once each month. Each collecting authority shall provide a weekly financial report containing information required by the Property Tax Division to the taxing units and Division of Motor Vehicles to enable them to account for payments received.

(b1) Repealed by Session Laws 1995, c. 329, s. 2.

(c) For classified motor vehicles listed pursuant to G.S. 105-330.3(a)(2), the assessor shall appraise each vehicle in accordance with G.S. 105-330.2. The assessor shall prepare a tax notice for each vehicle before September 1 following the January 31 listing date; the tax notice shall include all county and special district taxes due on the motor vehicle. In computing the taxes, the assessor shall use the tax rates of the taxing units in effect for the fiscal year that begins on July 1 following the January 31 listing date. Municipalities shall list, assess, and tax classified motor vehicles listed pursuant to G.S. 105-330.3(a)(2) as provided in G.S. 105-326, 105-327, and 105-328 and shall send tax notices as provided in this section.

(d) The county shall include taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) in the tax levy for the fiscal year in which the taxes become due and shall charge the taxes to the tax collector for that year, unless the tax notice required by subsection (a) is prepared after the date the taxes are due. If that occurs, the county shall include the taxes from that notice in the tax levy for the current fiscal year and shall charge the taxes to the tax collector for that year. (1991, c. 624, s. 1; 1991 (Reg. Sess., 1992), c. 961, s. 6; 1995, c. 24, s. 1; c. 329, s. 2; c. 510, s. 3; 2005-294, s. 6; 2005-313, s. 8; 2006-259, s. 31.5; 2007-471, ss. 4, 5; 2007-527, s. 22(b))

Section Set Out Twice. — The section above is effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. For the section as in effect until July 1, 2010, see the preceding section, also numbered G.S. 105-330.5.

Editor's Note. — Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, and as amended by Session Laws 2007-527, s. 22, provides, in part, that s. 6 of the act becomes effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007.

Session Laws 2007-471, s. 8 provides: "Unless otherwise stated, this act becomes effective

July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first."

Effect of Amendments. — Session Laws 2005-294, s. 6, in subsection (a), rewrote the first two sentences, and inserted "combined" and "and registration" in the last sentence and in subdivision (a)(1); substituted "before the taxes and fees become delinquent" for "within 30 days after the date of the notice" in subdivision (a)(4); added subdivision (a)(5); in subsection (a1), substituted "taxes" for "assessor" and "be prorated" for "prorate the taxes due"; rewrote subsection (b) and made minor stylistic changes. See Editor's Note for effective date.

Session Laws 2007-471, ss. 4 and 5, added subsection (a2); and inserted "or (a2) of this section" in the first sentence of subsection (b). For effective date, see Editor's note.

§ 105-330.6. Motor vehicle tax year; transfer of plates; surrender of plates.

(a) Tax Year. — The tax year for a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) and registered under the staggered system begins on the first day of the first month following the date on which the former registration expires or the new registration is applied for and ends on the last day of the month in which the current registration expires. The tax year for a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) and registered under the annual system begins on the first day of the first month following the date on which the registration expires or the new registration is applied for and ends the following December 31. The tax year for a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(2) is the fiscal year that opens in the calendar year in which the vehicle is required to be listed.

(a1) Change in Tax Year. — If the tax year for a classified motor vehicle changes because of a change in its registration for a reason other than the transfer of its registration plates to another classified motor vehicle pursuant to G.S. 20-64, and the new tax year begins before the expiration of the vehicle's original tax year, the taxpayer may receive a credit, in the form of a release, against the taxes on the vehicle for the new tax year. The amount of the credit is equal to a proportion of the taxes paid on the vehicle for the original tax year. The proportion is the number of full calendar months remaining in the original tax year as of the first day of the new tax year, divided by the number of months in the original tax year. To obtain the credit allowed in this subsection, the taxpayer must apply within 30 days after the taxes for the new tax year are due and must provide the county tax collector information establishing the original tax year of the vehicle, the amount of taxes paid on the vehicle for that year, and the reason for the change in registration.

(b) Transfer of Plates. — If the owner of a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) transfers the registration plates from the listed vehicle to another classified motor vehicle pursuant to G.S. 20-64 during the listed vehicle's tax year, the vehicle to which the plates are transferred is not required to be listed or taxed until the current registration expires or is renewed.

(c) Surrender of Plates. — If the owner of a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) either transfers the motor vehicle to a new owner or moves out-of-state and registers the vehicle in another jurisdiction, and the owner surrenders the registration plates from the listed vehicle to the Division of Motor Vehicles, then the owner may apply for a release or refund of taxes on the vehicle for any full calendar months remaining in the vehicle's tax year after the date of surrender. To apply for a release or refund, the owner must present to the county tax collector within one year after surrendering the plates the receipt received from the Division of Motor Vehicles accepting surrender of the registration plates. The county tax collector shall then multiply the amount of the taxes for the tax year on the vehicle by a fraction, the denominator of which is the number of months in the tax year and the numerator of which is the number of full calendar months remaining in the vehicle's tax year after the date of surrender of the registration plates. The product of the multiplication is the amount of taxes to be released or refunded. If the taxes have not been paid at the date of application, the county tax collector shall make a release of the prorated taxes and credit the owner's tax notice with the amount of the release. If the taxes have been paid at the date of application, the county tax collector shall direct an order for a refund of the prorated taxes to the county finance officer, and the finance officer shall issue a refund to the vehicle owner. (1991, c. 624, s. 1; 1991 (Reg. Sess., 1992), c. 961, s. 7; 1995, c. 510, s. 4; 1998-139, s. 3; 2001-406, s. 1; 2001-497, s. 1(a); 2005-313, s. 9.)

Effect of Amendments. — Session Laws 2005-313, s. 9, effective January 1, 2006, in the first sentence of subsection (a), inserted "former" and substituted "the month in which the current registration expires" for "the twelfth month following the date on which the registration expires or the new registration is applied for"; in subsection (a1), substituted "divided by the number of months in the original tax year" for "divided by 12" at the end of the third sentence; and in subsection (c), substituted "the number of months in the tax year" for "12" near the middle of the third sentence.

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

§ 105-330.7. (For repeal, see note) List of delinquents sent to Division of Motor Vehicles.

On the tenth day of each month the county tax collector shall prepare a list with the name and address of the owner and the vehicle identification number of every classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) on which taxes remain unpaid on that date and on which taxes became due on the first day of the fourth month preceding that date. The tax collector shall mail that list to the Division of Motor Vehicles. The list shall be in the form and contain the information required by the Division of Motor Vehicles. (1991, c. 624, s. 1; 1991 (Reg. Sess., 1992), c. 961, s. 8; 2005-294, s. 7; 2006-259, s. 31.5; 2007-527, s. 22(b).)

Delayed repeal of this section. — Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, and as amended by Session Laws 2007-527, s. 22, provides, in part, that this section is repealed effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007.

§ 105-330.8. Deadlines not extended.

Except as otherwise provided in this Article, the provisions of G.S. 105-395.1 and G.S. 103-5 do not apply to deadlines established in this Article. (1991, c. 624, s. 1.)

§ 105-330.9. Antique Automobiles.

(a) For the purpose of this section, the term "antique automobile" means a motor vehicle that meets all of the following conditions:

G.S. 105-330.10 is set out twice. See notes.

(1) It is registered with the Division of Motor Vehicles and has an historic vehicle special license plate under G.S. 20-79.4.
(2) It is maintained primarily for use in exhibitions, club activities, parades, and other public interest functions.
(3) It is used only occasionally for other purposes.
(4) It is owned by an individual.
(5) It is used by the owner for a purpose other than the production of income and is not used in connection with a business.

(b) Antique automobiles are designated a special class of property under Article V, Sec. 2(2) of the North Carolina Constitution and shall be assessed for taxation in accordance with this section. An antique automobile shall be assessed at the lower of its true value or five hundred dollars ($500.00). (1995, c 512, s 2.)

§ 105-330.10. (Effective until January 1, 2010) Disposition of interest.

Sixty percent (60%) of the first month's interest collected on unpaid taxes pursuant to G.S. 105-330.4 shall be transferred on a monthly basis to the Combined Motor Vehicle and Registration Account created within the Treasurer's Office. Interest generated by the funds in the Combined Motor Vehicle and Registration Account shall be credited to the Account. The Office of State Budget and Management shall direct the Treasurer to distribute the funds in the Account to the Division of Motor Vehicles for the purpose of developing and implementing an integrated computer system within the Division of Motor Vehicles that would allow for the combined assessment, billing, and collection of property taxes on motor vehicles and the issuance of registration plates. Funds in the Account shall not be transferred by the Office of State Budget and Management and appropriated by the General Assembly until the Department of Transportation and the North Carolina Association of County Commissioners reach agreement on a project plan for the integrated system. The Treasurer shall report to the Revenue Laws Study Committee semiannually with the first report due by April 30, 2006. The report shall contain a detailed description of the amount of moneys transferred to the Account and distributed from the Account. Any funds remaining in the Account after the integrated computer system has been certified to be in operation shall be distributed to the local governments on a pro rata basis determined by the first month's interest collected on the unpaid taxes on classified motor vehicles and paid into the Account by each local government. (2005-294, s. 8; 2006-30, s. 3; 2006-259, s. 31.5; 2007-471, s. 7(a); 2007-527, s. 22(b).)

Section Set Out Twice. — The section above is effective until January 1, 2010. For the section as amended effective January 1, 2010, see the following section, also numbered G.S. 105-330.10.

Editor's Note. — Session Laws 2005-294, s. 8, made this section effective January 1, 2006.

Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, and as amended by Session Laws 2007-527, s. 22(b), provides: "Sections 4 and 8 of this act become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 10, and 11 of this act become effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007." Section 9 of Session Laws 2006-259, which rewrote G.S. 105-330.10, effective July 1, 2010, was repealed by Session Laws 2007-527, s. 22(a), effective August 31, 2007.

Effect of Amendments. — Session Laws 2006-30, s. 3, effective June 29, 2006, inserted "first month's" preceding "interest collected" in the first sentence.

G.S. 105-330.10 is set out twice. See notes.

Session Laws 2007-471, s. 7(a), effective August 29, 2007, added the second sentence, substituted "The Office of State Budget and Management" for "The North Carolina Association of County Commissioners" at the beginning of the third sentence, and added the fourth and seventh sentences.

§ 105-330.10. (Effective January 1, 2010) Disposition of interest.

The interest collected on unpaid registration fees pursuant to G.S. 105-330.4 shall be transferred on a monthly basis to the North Carolina Highway Fund for technology improvements within the Division of Motor Vehicles. (2005-294, ss. 8, 9; 2006-30, s. 3; 2006-259, s. 31.5; 2007-471, s. 7(a); 2007-527, s. 22(a)-(c).)

Section Set Out Twice. — The section above is effective January 1, 2010, For the section as in effect until January 1, 2010, see the preceding section, also numbered G.S. 105-330.10.

Editor's Note. — Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, and as amended by Session Laws 2007-527, s. 22(b), provides: "Sections 4 and 8 of this act become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 10, and 11 of this act become effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007." Section 9 of Session Laws 2006-259, which rewrote G.S. 105-330.10, effective July 1, 2010, was repealed by Session Laws 2007-527, s. 22(a), effective August 31, 2007.

Effect of Amendments. — Session Laws 2007-527, s. 22(c), effective January 1, 2010, rewrote the section.

§§ 105-330.11 through 105-332: Reserved for future codification purposes.

ARTICLE 23.

Public Service Companies.

§ 105-333. Definitions.

The following definitions apply in this Article unless the context requires a different meaning:

(1) Airline company. — A company engaged in the business of transporting passengers and property by aircraft for hire within, into, or from this State.

(2) Bus line company. — A company engaged in the business of transporting passengers and property by motor vehicle for hire over the public highways of this State (but not including a bus line company operating primarily upon the public streets within a single local taxing unit), whether the transportation is within, into, or from this State.

(3) Distributable system property. — All real property and personal property owned or used by a railroad company other than nondistributable system property.

(4) Electric membership corporation. — A company organized, reorganized, or domesticated under Chapter 117 of the General Statutes and engaged in the business of supplying electricity for light, heat, or power to consumers in this State.

(5) Electric power company. — A company engaged in the business of supplying electricity for light, heat, or power to consumers in this State.

(6) Repealed by Session Laws 1973, c. 783, s. 5.

(7) Flight equipment. — Aircraft fully equipped for flying and used in any operation within this State.

(8) Gas company. — A company engaged in the business of supplying artificial or natural gas to, from, within, or through this State through pipe or tubing for light, heat, or power to consumers in this State.

(9) Locally assigned rolling stock. — Rolling stock that is owned or leased by a motor freight carrier company, specifically assigned to a terminal or other premises, and regularly used at the premises to which assigned.

(10) Motor freight carrier company. — A company engaged in the business of transporting property by motor vehicle for hire over the public highways of this State as provided in this subdivision:

a. As to interstate carrier companies domiciled in North Carolina, this term includes carriers who regularly transport property by tractor trailer to or from one or more terminals owned or leased by the carrier outside this State or two or more terminals inside this State. For purposes of appraisal and allocation only, the term also includes a North Carolina interstate carrier that does not have a terminal outside this State but whose operations outside the State are sufficient to require the payment of ad valorem taxes on a portion of the value of the rolling stock of the carrier to taxing units in one or more other states.

b. As to interstate carrier companies domiciled outside this State, this term includes carriers who regularly transport property by tractor trailer to or from one or more terminals owned or leased by the carrier inside this State.

c. As to intrastate carrier companies, this term includes only those carriers that are engaged in the transportation of property by tractor trailer to or from two or more terminals owned or leased by the carrier in this State.

(11) Nondistributable system property. — The following properties owned by a railroad company: land other than right-of-way, depots, machine shops, warehouses, office buildings, other structures, and the contents of the structures listed in this subdivision.

(12) Nonsystem property. — The real and tangible personal property owned by a public service company but not used in its public service activities.

(13) Pipeline company. — A company engaged in the business of transporting natural gas, petroleum products, or other products through pipelines to, from, within, or through this State, or having control of pipelines for such a purpose.

(14) Public service company. — A railroad company, a pipeline company, a gas company, an electric power company, an electric membership corporation, a telephone company, a telegraph company, a bus line company, an airline company, or a motor freight carrier company. The term also includes any company performing a public service that is regulated by the United States Department of Energy, the United States Department of Transportation, the Federal Communications Commission, the Federal Aviation Agency, or the North Carolina Utilities Commission, except that the term does not include a water company, a radio common carrier company as defined in G.S. 62-

119(3), a cable television company, or a radio or television broadcasting company.

(15) Railroad company. — A company engaged in the business of operating a railroad to, from, within or through this State on rights-of-way owned or leased by the company. It also means a company operating a passenger service on the lines of any railroad located wholly or partly in this State.

(16) Rolling stock. — Motor vehicles, railroad locomotives, and railroad cars that are propelled by mechanical or electrical power and used upon the highways or, in the case of railroad vehicles, upon tracks.

(17) System property. — The real property and personal property used by a public service company in its public service activities. The term also includes public service company property under construction on the day as of which property is assessed which when completed will be used by the owner in its public service activities.

(18) Telegraph company. — A company engaged in the business of transmitting telegraph messages to, from, within, or through the State.

(19) Telephone company. — A company engaged in the business of transmitting telephone messages and conversations to, from, within, or through this State.

(20) Repealed by Session Laws 1973, c. 783, s. 5. (1939, c. 310, ss. 1600-1605; 1943, c. 634, s. 3; 1965, c. 287, s. 17; 1971, c. 806, s. 1; c. 1121, s. 4; 1973, c. 198; c. 783, ss. 1-5; c. 1180; 1991 (Reg. Sess., 1992), c. 961, s. 1; 1995, c. 350, ss. 1, 2; 1995 (Reg. Sess., 1996), c. 646, s. 18; 1997-23, ss. 6, 7; 1998-98, s. 25.)

Editor's Note. — Section 62-119, referred to in subdivision (14) of this section, was repealed by Session Laws 1995, c. 523, s. 31.

CASE NOTES

Applied in In re S. Ry., 59 N.C. App. 119, 296 S.E.2d 463 (1982); In re Duke Power Co., 82 N.C. App. 492, 347 S.E.2d 54 (1986).

Cited in In re Colonial Pipeline Co., 67 N.C. App. 388, 313 S.E.2d 819 (1984); In re Colonial Pipeline Co., 318 N.C. 224, 347 S.E.2d 382 (1986); North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990).

OPINIONS OF ATTORNEY GENERAL

Radio and Television Stations Not Within Definition of "Public Service Companies". — See opinion of Attorney General to Mr. Douglas R. Holbrook, State Board of Assessment, 41 N.C.A.G. 702 (1971).

§ 105-334. Duty to file report; penalty for failure to file.

(a) Every public service company, whether incorporated under the laws of this State or any other state or any foreign nation, whose property is subject to taxation in this State, shall prepare and deliver to the Department of Revenue each year a report showing (as of January 1) such information with regard to the property it owns and the system property it leases as the Department of Revenue may by regulation prescribe. This report shall be filed on or before the last day of March, and the following affirmation, which shall be annexed to the report, shall be signed by a principal officer of the public service company making the report:

Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief this report, including any accompanying statements, inventories, schedules, and other information is true and complete.

(b) Any individual who willfully subscribes a report required by this section which he does not believe to be true and correct as to every material matter shall be guilty of a Class 2 misdemeanor.

(c) For good cause the Department may grant reasonable extensions of time for filing the required reports.

(d) The Department may require any additional reports or information it deems necessary to properly carry out its duties under this Article.

(e) The provisions of G.S. 105-291 and 105-312 are made specifically applicable to all proceedings taken under this Article. (1939, c. 310, ss. 1600-1606; 1943, c. 634, s. 3; 1965, c. 287, s. 17; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1993, c. 539, s. 721; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in Albemarle Elec. Membership Corp. v. Alexander, 282 N.C. 402, 192 S.E.2d 811 (1972); In re Colonial Pipeline Co., 67 N.C. App. 388, 313 S.E.2d 819 (1984).

§ 105-335. Appraisal of property of public service companies.

(a) Duty to Appraise. — In accordance with the provisions of subsection (b), below, the Department of Revenue shall appraise for taxation the true value of each public service company (other than bus line, motor freight carrier, and airline companies) as a system (both inside and outside this State). Certain specified properties of bus line, motor freight carrier, and airline companies shall be appraised by the Department in accordance with the provisions of subsection (c), below, and all other properties of such companies shall be listed, appraised, and assessed in the manner prescribed by this Subchapter for the properties of taxpayers other than public service companies.

(b) Property of Public Service Companies Other Than Those Noted in Subsection (c). —

(1) System Property. — Each year, as of January 1, the Department of Revenue shall appraise at its true value (as defined in G.S. 105-283) the system property used by each public service company both inside and outside this State. Property leased by a public service company shall be included in appraising the value of its system property if necessary to ascertain the true value of the company's system property.

(2) Nonsystem Personal Property. — Each year as of January 1, the Department shall appraise at its true value (as defined in G.S. 105-283) each public service company's nonsystem tangible personal property subject to taxation in this State.

(3) Nonsystem Real Property. — In accordance with the county in which the public service company's nonsystem real property is located and the schedules set out in G.S. 105-286 and 105-287, the Department of Revenue shall appraise at its true value (as defined in G.S. 105-283) each public service company's nonsystem real property subject to taxation in this State.

(c) Property of Bus Line, Motor Freight Carrier, and Airline Companies. —

(1) Bus Company Rolling Stock. — Each year as of January 1, the Department shall appraise at its true value (as defined in G.S. 105-283) the rolling stock owned or leased by or operated under the control of each bus line company, which bus line company is domiciled in this State or which is regularly engaged in business in this State.

(2) Motor Freight Carrier Company Rolling Stock. — Each year as of January 1, the Department shall appraise at its true value (as defined in G.S. 105-283) the rolling stock owned by a motor freight carrier company or leased by a motor freight carrier company and operated by its employees which motor freight carrier company is domiciled in this State or is regularly engaged in business in this State at a terminal owned or leased by the carrier.

(3) Flight Equipment. — Each year, as of January 1, the Department shall appraise at its true value (as defined in G.S. 105-283) the flight equipment owned or leased by or operated under the control of each airline company that is domiciled in the State or that is regularly engaged in business at some airport in this State. (1939, c. 310, s. 1608; 1971, c. 806, s. 1; 1973, c. 476, s. 193; c. 783, s. 6; c. 1180.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former similar provisions.*

Personal property (rolling stock) of motor carriers may be taxed at a higher ratio of true market value than commercial and industrial real property. Arkansas-Best Freight Sys. v. Lynch, 723 F.2d 365 (4th Cir. 1983).

Assessment of Railroad Property by Local Officers. — In assessing railroad property, local officers only list and assess such property as is off the right-of-way. Caldwell Land & Lumber Co. v. Smith, 151 N.C. 70, 65 S.E. 641 (1909).

Rolling stock of a railroad company used upon the branch roads, or roads otherwise acquired, ascertained by a pro rata standard based on the relative length thereof to the whole line, is liable to taxation. Wilmington & W.R.R. v. Alsbrook, 110 N.C. 137, 14 S.E. 652, aff'd, 146 U.S. 279, 13 S. Ct. 72, 36 L. Ed. 972 (1892).

Abandoned Portion of Railroad. — Where a railroad, under an order of the Interstate Commerce Commission, abandoned its operations as a common carrier on a portion of its road, and thereafter did not operate over such portion of its line except to haul away the scrap as the roadbed was dismantled and salvaged, it was held that such abandoned portion of the road ceased to be vested with a character which would bring it within the jurisdiction of the Department of Revenue for appraisal and taxation. Warren v. Maxwell, 223 N.C. 604, 27 S.E.2d 721 (1943).

A road definitely abandoned and retired from the operative system, after a proper order respecting the convenience and necessity of its further operation as a carrying road has been granted for such abandonment, was no longer within the purview of the predecessor to this statute. Warren v. Maxwell, 223 N.C. 604, 27 S.E.2d 721 (1943).

Former Law. — As to construction of prior law providing for the assessment of railroad property by the former Corporation Commission, see Atlantic & N.C.R.R. v. City of New Bern, 147 N.C. 165, 60 S.E. 925 (1908).

Applied in In re S. Ry., 59 N.C. App. 119, 296 S.E.2d 463 (1982); In re Duke Power Co., 82 N.C. App. 492, 347 S.E.2d 54 (1986); North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990).

Cited in In re Colonial Pipeline Co., 67 N.C. App. 388, 313 S.E.2d 819 (1984); In re Colonial Pipeline Co., 318 N.C. 224, 347 S.E.2d 382 (1986).

§ 105-336. Methods of appraising certain properties of public service companies.

(a) Appraising System Property of Public Service Companies Other Than Those Noted in Subsection (b). — In determining the true value of each public service company (other than one covered by subsection (b), below) as a system the Department of Revenue shall give consideration to the following:

(1) The market value of the company's capital stock and debt, taking into account the influence of any nonsystem property.

(2) The book value of the company's system property as reflected in the books of account kept under the regulations of the appropriate federal or State regulatory agency and what it would cost to replace or reproduce the system property, less a reasonable allowance for depreciation.

(3) The gross receipts and operating income of the company.

(4) Any other factor or information that in the judgment of the Department has a bearing on the true value of the company's system property.

(b) Appraising Rolling Stock and Flight Equipment. — In determining the true value of the rolling stock of bus line and motor freight carrier companies and the flight equipment of airline companies, the Department of Revenue shall consider the book value of the property as reflected in the books of account kept under the regulations of the appropriate federal or State regulatory agency and what it would cost to replace or reproduce the property in its existing condition. (1939, c. 310, s. 1608; 1971, c. 806, s. 1; 1973, c. 476, s. 193.)

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

CASE NOTES

Department of Revenue is by statute given the power to value property. Albemarle Elec. Membership Corp. v. Alexander, 282 N.C. 402, 192 S.E.2d 811 (1972).

Implicit in this power is the power to reject a value declared by the taxpayer. Albemarle Elec. Membership Corp. v. Alexander, 282 N.C. 402, 192 S.E.2d 811 (1972).

Department Presumed to Act in Good Faith. — The members of the Department of Revenue are public officers, and the Department's official acts are presumed to be made in good faith and in accordance with law. Albemarle Elec. Membership Corp. v. Alexander, 282 N.C. 402, 192 S.E.2d 811 (1972).

And burden is upon party asserting otherwise to overcome such presumptions by competent evidence to the contrary. Albemarle Elec. Membership Corp. v. Alexander, 282 N.C. 402, 192 S.E.2d 811 (1972).

"Appraisal" and "Assessment" Are Synonymous. — For public service companies, the true value of property is its tax value, and "appraisal" and "assessment" are synonymous. In re S. Ry., 59 N.C. App. 119, 296 S.E.2d 463, rev'd on other grounds, 313 N.C. 177, 328 S.E.2d 235 (1985).

Appraisal Methods Discussed and Compared. — See In re S. Ry., 59 N.C. App. 119, 296 S.E.2d 463 (1982), rev'd on other grounds, 313 N.C. 177, 328 S.E.2d 235 (1985).

Choice of Valuation Method Generally. — A careful reading of the statute reveals that all four approaches to valuation are to be used in establishing the appraised value, but no guidelines are set out establishing the weight to be given any single system of valuation. Rather, based on the judgment of the Ad Valorem Tax Division, the Department may exercise its discretion on valuation. The appraisal must not be arbitrary, must be based on substantial evidence, and must be based on lawful methods of valuation. In re S. Ry., 59 N.C. App. 119, 296 S.E.2d 463 (1982), rev'd on other grounds, 313 N.C. 177, 328 S.E.2d 235 (1985).

Any method of appraisal which does not tend to establish market value is an illegal method of valuation for property tax purposes. In re S. Ry., 59 N.C. App. 119, 296 S.E.2d 463 (1982), rev'd on other grounds, 313 N.C. 177, 328 S.E.2d 235 (1985).

Appraisal Presumed Correct Although Tentative. — Although the appraisal is called "tentative," it nevertheless remains in effect unless the Property Tax Commission overturns or otherwise disposes of it. The appraisals are presumed to be correct. This presumption applies, as well, to the good faith of the tax assessors and the validity of their actions. In re S. Ry., 59 N.C. App. 119, 296 S.E.2d 463 (1982), rev'd on other grounds, 313 N.C. 177, 328 S.E.2d 235 (1985).

Rebuttal of Presumption of Correctness. — To rebut the presumption of correctness of an appraisal, the taxpayer must produce competent, material, and substantial evidence that tends to show that: (1) Either the county tax supervisor used an arbitrary method of valuation; or (2) the county tax supervisor used an illegal method of valuation; and (3) the assessment substantially exceeded the true value in money of the property. In re S. Ry., 59 N.C. App. 119, 296 S.E.2d 463 (1982), rev'd on other grounds, 313 N.C. 177, 328 S.E.2d 235 (1985).

Value Set by Department Will Stand Where Appellants Fail to Rebut. — Where appellants have failed to offer sufficient evidence of probative value showing the true value of their property, the value set by the Department of Revenue must stand. Albemarle Elec. Membership Corp. v. Alexander, 282 N.C. 402, 192 S.E.2d 811 (1972).

Actions to Set Aside or Modify Appraisals Generally. — Since the appraisal, although tentative, remains in existence and is presumed to be correct, any action to set aside or modify it is an appeal which the Commission was created to hear. Such appeal presents the first opportunity for a public service company to challenge an appraisal made by the Ad Valorem Tax Division. It broadens the scope of the hearing of the appeal in G.S. 105-342(d). In re S. Ry., 59 N.C. App. 119, 296 S.E.2d 463 (1982), rev'd on other grounds, 313 N.C. 177, 328 S.E.2d 235 (1985).

Courts Will Only Interfere with Department's Assessment Where Arbitrary and Capricious. — It is only when the actions of the Department of Revenue are found to be arbitrary and capricious that courts will interfere with tax assessments because of asserted violations of the due process clause. Albemarle Elec. Membership Corp. v. Alexander, 282 N.C. 402, 192 S.E.2d 811 (1972).

Commission erred in approving Department's use of pipeline company's imbedded, historical cost of debt rather than current market cost in arriving at a proper capitalization rate under the income approach to value. In re Colonial Pipeline Co., 318 N.C. 224, 347 S.E.2d 382 (1986).

Inclusion of Future Investment Tax Credits in Projected Future Income Stream Not Supported by Record. — Where there was a stipulation in the record that pipeline company's last major construction program ended in 1980 and that since termination of this project in 1980, it had had no major construction plans or programs in effect, there was no factual basis in the record for including in the company's projected future income stream amounts attributable to future investment tax credits, for there was no evidence to support the fact that there would be such credits in the future. In re Colonial Pipeline Co., 318 N.C. 224, 347 S.E.2d 382 (1986).

Department's refusal to deduct from valuations of the Federal Energy Regulatory Commission (FERC) an amount attributable to "economic obsolescence" because the FERC had limited pipeline company's rate of return to a rate below the market rate was not error. In re Colonial Pipeline Co., 318 N.C. 224, 347 S.E.2d 382 (1986).

Applied in In re Colonial Pipeline Co., 67 N.C. App. 388, 313 S.E.2d 819 (1984).

§ 105-337. Apportionment of taxable values to this State.

With respect to any public service company operating both inside and outside this State, it shall be the duty of the Department of Revenue to apportion for taxation in this State a fair and reasonable share of the value of the company as a system or its rolling stock or flight equipment as appraised under the provisions of G.S. 105-336. Thus, when the Department has determined true value in accordance with the provisions of G.S. 105-336(a) or G.S. 105-336(b), it shall ascertain the portion of the total value subject to taxation in this State by applying property, business, and mileage factors thereto in accordance with the ratio that the company's property, business, or mileage in this State bears to its total property, business, or mileage. In its discretion, the Department may use one or more of the factors listed in the preceding sentence in order to achieve a fair and accurate result in the apportionment of the value of the property of any public service company. As used in this section,

(1) The term "business factor" means data that reflect the use of the company's property, such as gross revenue, net income, tons of freight carried, revenue ton miles, passenger miles, car miles, ground hours, and comparable data.

(2) The term "mileage factor" means factual information as to the linear miles of the company's track, wire, lines, pipes, routes, and similar operational routes and factual information as to the miles traveled by the company's rolling stock.

(3) The term "property factor" means investment in property; it may be either gross or net investment or any other reasonable figure reflecting the company's investment in property. (1939, c. 310, s. 1609; 1971, c. 806, s. 1; 1973, c. 476, s. 193.)

CASE NOTES

Cited in In re Colonial Pipeline Co., 67 N.C. App. 388, 313 S.E.2d 819 (1984); In re Colonial Pipeline Co., 318 N.C. 224, 347 S.E.2d 382 (1986).

§ 105-338. Allocation of appraised valuation of system property among local taxing units.

(a) State Board's Duty. — For purposes of taxation by local taxing units in this State, the Department of Revenue shall allocate the valuations of public service company property among the local taxing units in accordance with the provisions of this section.

(b) System Valuation of Companies Other Than Those Noted in Subsection (c). —

(1) System Property of Railroad Companies. — The appraised valuation of the distributable system property of a railroad shall be allocated for taxation to the local taxing units in accordance with the ratio of the miles of all the company's tracks in the local taxing unit to the total miles of all the company's tracks in this State, adjusted to reflect density of traffic in the local taxing unit.

(2) System Property of Telephone Companies. —

a. The Department of Revenue shall divide each telephone company's system property in this State into the following two classes and shall determine the original cost of that property and the percentage thereof represented by the property in each of the two classes.

— Class 1: Property located in this State that is identified under the applicable uniform system of accounts as central office equipment, large P.B.X. equipment, motor vehicles, tools and work equipment, office furniture and equipment, materials and supplies, and land and buildings (including towers and other structures).

— Class 2: Property located in this State that does not come within Class 1.

The Department of Revenue shall then apply the percentages obtained in accordance with this subdivision to the appraised valuation of the company's system property in this State and thereby derive the proportions of appraised valuation to be allocated as Class 1 and Class 2 valuations to local taxing units in accordance with subdivision (b)(2)b, below.

b. Having made the division required by subdivision (b)(2)a, above, the Department of Revenue shall allocate the appraised valuation of the properties in each class among the local taxing units of the State as follows:

— Class 1: The appraised valuations of property in this class shall be allocated among the local taxing units in which such property of the company is situated on January 1 in the proportion that the original cost of such property in the taxing unit bears to the original cost of all such property in this State.

— Class 2: The appraised valuations of property in this class shall be allocated among the local taxing units in which the company operates in the proportion that the miles of the company's single aerial wire and single wire in cable (including single tube in coaxial cable) in the taxing unit bears to the total of such wire miles of the company in this State.

(3) System Property of Other Companies Appraised by the Department of Revenue. —

a. The provisions of this subdivision (b)(3) shall govern the allocation of the property of all companies appraised by the Department of Revenue except railroad, telephone, bus line, motor freight carrier, and airline companies.

b. The appraised valuation of the system property of such a company shall be allocated for taxation to the local taxing units in which the company operates in the proportion that the original cost of the taxable system property in the local taxing unit on January 1 bears to the original cost of all the taxable system property in this State. If in any local taxing unit the company owns system property acquired prior to January 1, 1972, for which the original cost cannot be definitely ascertained, a reasonable estimate of the original cost of that property shall be made by the company, and this estimate shall be used by the Department of Revenue for allocation purposes as if it were the actual original cost of the property.

(c) Property of Bus Line, Motor Freight Carrier, and Airline Companies. —

(1) The appraised valuation of a bus line company's rolling stock shall be allocated for taxation to each local taxing unit according to the ratio of the company's scheduled miles during the calendar year preceding January 1 in each such unit to the company's total scheduled miles in this State for the same period. In no event, however, shall the State Board make an allocation to a taxing unit if, when computed, the valuation for that taxing unit amounts to less than five hundred dollars ($500.00).

(2) The appraised valuation of the rolling stock (other than locally assigned rolling stock) owned or leased by a motor freight carrier company shall be allocated for taxation to each local taxing unit in which the company has a terminal according to the ratio of the tons of freight handled in the calendar year preceding January 1 at the company's terminals within the taxing unit to the total tons of freight handled by the company in this State in the same period. If a North Carolina interstate motor freight carrier company has no terminal outside this State, but has been required to pay ad valorem tax to one or more taxing units outside this State, there shall be allowed a reduction in the North Carolina valuation measured by the ratio of the rolling stock subject to ad valorem taxation outside the State to all of the carrier's rolling stock.

(3) The appraised valuation of an airline company's flight equipment shall be allocated for taxation to each local taxing unit in which an airport used by the company is situated according to the ratio obtained by averaging the following two ratios: the ratio of the company's ground hours in the taxing unit in the year preceding January 1 to the company's ground hours in the State in the same period, and the ratio of the company's gross revenue in the taxing unit in the year preceding January 1 to the company's gross revenue in the State in the same period. (1939, c. 310, s. 1610; 1971, c. 806, s. 1; 1973, c. 476, s. 193; c. 1180; 1997-456, s. 27.)

Editor's Note. — Subdivision (b)(2)(a) was redesignated as subdivision (b)(2)a. pursuant to Session Laws 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Applied in In re Duke Power Co., 82 N.C. App. 492, 347 S.E.2d 54 (1986); North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990).

Cited in Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981); Clinchfield R.R. v. Lynch, 700 F.2d 126 (4th Cir. 1983); In re Colonial Pipeline Co., 318 N.C. 224, 347 S.E.2d 382 (1986).

§ 105-339. Certification of appraised valuations of nonsystem property and locally assigned rolling stock.

Having determined the appraised valuations of the nonsystem properties of public service companies in accordance with subdivisions (b)(2) and (b)(3) of G.S. 105-335 and the appraised valuations of locally assigned rolling stock in accordance with subdivision (c)(1) of G.S. 105-335, the Department of Revenue shall assign those appraised valuations to the taxing units in which such properties are situated by certifying the valuations to the appropriate counties and municipalities. Each local taxing unit receiving such certified valuations shall assess them at the figures certified and shall tax the assessed valuations at the rate of tax levied against other property subject to taxation therein. (1939, c. 310, s. 1610; 1971, c. 806, s. 1; 1973, c. 476, s. 193; c. 695, s. 18.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Applied in North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990).

§ 105-340. Certification of appraised valuations of railroad companies.

(a) Having determined the appraised valuation of the "nondistributable" system property of a railroad company, the Department of Revenue shall assign the valuations for taxation to the local taxing units in which such property is situated in the same manner as is provided for nonsystem property in G.S. 105-339.

(b) Having determined the appraised valuation of the "distributable" system property of a railroad company and having allocated the valuations in accordance with G.S. 105-338(b)(1), the Department of Revenue shall then certify the amounts of those allocations to the local taxing units to which such amounts are due in accordance with the provisions of G.S. 105-341.

(c) Each local taxing unit receiving certified valuations in accordance with this section shall assess them at the figures certified and shall tax the assessed valuations at the rate of tax levied against other property subject to taxation therein. (1939, c. 310, s. 1620; 1971, c. 806, s. 1; 1973, c. 476, s. 193; c. 695, s. 19.)

§ 105-341. Certification of public service company system appraised valuations.

Having determined the appraised valuations of public service company system property in accordance with subdivision (b)(1) of G.S. 105-335 and having allocated the valuations in accordance with G.S. 105-338(b)(2) and (3), the Department of Revenue shall assign each local taxing unit's appraised valuations by certifying them to the appropriate counties and municipalities. Each local taxing unit receiving such certified valuations shall assess them at the figures certified and shall tax the assessed valuations at the rate of tax levied against other property subject to taxation therein. (1939, c. 310, s. 1610; 1971, c. 806, s. 1; 1973, c. 476, s. 193; c. 695, s. 20.)

CASE NOTES

Applied in In re Duke Power Co., 318 N.C. App. 224, 347 S.E.2d 54 (1986); North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990).

§ 105-342. Notice, hearing, and appeal.

(a) Right to Information. — Upon written request to the Department of Revenue, any public service company whose property values are subject to appraisal, apportionment, and allocation for purposes of taxation under this Article shall be entitled to be informed of the elements that the Department considered in the appraisal of the company's property, the result in dollars produced by each element (including the methods and mathematical calculations used in determining those results), the specific factors and ratios the Department used in apportioning the appraised valuation of the company's property to this State, and the factors and the specific mathematical calculations the Department used in allocating the company's valuation among the local taxing units of this State. Upon written request to the Department of Revenue, any local taxing unit in this State shall be entitled to the same information with regard to any public service company whose property values are subject to appraisal, apportionment, and allocation for purposes of taxation under this Article.

(b) Appraisal and Apportionment Review. — The appraised valuation of public service company's property and the share thereof apportioned for taxation in this State under G.S. 105-335, 105-336, and 105-337 shall be deemed tentative figures until the provisions of this subsection (b) have been complied with. As soon as practicable after the tentative figures referred to in the preceding sentence have been determined, the Department of Revenue shall give the taxpayer written notice of the proposed figures and shall state in the notice that the taxpayer shall have 20 days after the date on which the notice was mailed in which to submit a written request to the Property Tax Commission for a hearing on the tentative appraisal or apportionment or both. If a timely request for a hearing is not made, the tentative figures shall become final and conclusive at the close of the twentieth day after the notice was mailed. If a timely request is made, the Property Tax Commission shall fix a date and place for the requested hearing and give the taxpayer at least 20 days' written notice thereof. The hearing shall be conducted under the provisions of subsection (d), below.

(c) Repealed by Session Laws 1985, c. 601.

(d) Hearing and Appeal. — At any hearing under this section, the Property Tax Commission shall hear all evidence and affidavits offered by the taxpayer and may exercise the authority granted by G.S. 105-290(d) to obtain information pertinent to decision of the issue. The Commission shall make findings of fact and conclusions of law and issue an order embodying its decision. As soon as practicable thereafter, the Commission shall serve a written copy of its decision upon the taxpayer by personal service or by registered or certified mail, return receipt requested. (1971, c. 806, s. 1; 1973, c. 476, s. 193; 1979, c. 584, s. 2; c. 665, s. 1; 1985, c. 601, s. 4; 1987 (Reg. Sess., 1988), c. 1052, s. 1.)

Cross References. — As to judicial review and enforcement of orders of the Property Tax Commission, see G.S. 105-345 through 105-346.

Editor's Note. — Session Laws 1987 (Reg. Sess., 1988), c. 1052, s. 1, effective January 1, 1988, rewrote section 5 of Session Laws 1985, c. 601, section 4 of which act repeals subsection (c) of this section, to read:

"Sec. 5. Sections 1 and 3 of this act shall become effective January 1, 1987; provided that as to any public service company whose property values in a county are adjusted in the third year after the year of reappraisal of real property in the county pursuant to G.S. 105-342(c) and whose property values in the same county are adjusted in the following year pursuant to Section 1 of this act, a county shall be entitled in such following year to increase the property values of the public service company certified to the county by the Department of Revenue by the same amount as the public service company property values were reduced the preceding year pursuant to G.S. 105-342(c). Sections 2 and 5 are effective upon ratification. Section 4 shall become effective in each county as of January 1 of the year in which sales assessment ratio studies are first required to be conducted in the county by the Department of Revenue under Section 1."

Session Laws 1985, c. 601, by its effectiveness provision removed subsection (c). The Revisor of Statutes has been informed that the condition applies to all counties and directed to show subsection (c) as repealed.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

CASE NOTES

Purposes in Amending and Rewriting Section Between 1985 and 1988. — For a case discussing the Legislature's purposes in amending and rewriting this section between 1985 and 1988, particularly as those amendments affected Division Five counties, see North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

North Carolina Const., Art. II, § 23 Not Applicable to Session Laws 1987 (Reg. Sess., 1988), Chapter 1052. — North Carolina Const., Art. II, § 23 applies, inter alia, to laws enacted for the purpose of imposing a tax. Chapter 1052 of Session Laws 1987 (Reg. Sess., 1988) neither imposes a tax nor authorizes its imposition, and therefore, N.C. Const., Art. II, § 23 does not apply. North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

There is no doubt that the effect of Chapter 1052 of Session Laws 1987 (Reg. Sess., 1988) imposed a greater tax burden on plaintiff for 1988. However, N.C. Const., Art. II, § 23 focuses on the purpose of the statute (to impose a tax) and not the result of the statute (an increased tax burden). North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

Discriminatory Taxation of Railroads. — In suits alleging discriminatory taxation of real and personal property in violation of G.S. 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), codified at 49 U.S.C. § 11503 (1982), the counties had the burden of establishing facts sufficient for the court to find levels of assessment for business personal property different from the levels stipulated for real property. Clinchfield R.R. v. Lynch, 784 F.2d 545 (4th Cir. 1986).

In suits alleging discriminatory taxation of real and personal property in violation of G.S. 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), codified at 49 U.S.C. § 11503 (1982), the trial court was correct in considering as a factor in its finding of tax discrimination the fact that under G.S. 105-277 stored tobacco inventories were taxed at only 60% of fair market value. Clinchfield R.R. v. Lynch, 784 F.2d 545 (4th Cir. 1986).

Once North Carolina is shown to have discriminated with respect to real property assessment, the burden shifts to the State and counties to establish facts sufficient to warrant a different conclusion with respect to personal property. In re Duke Power Co., 82 N.C. App. 492, 347 S.E.2d 54 (1986), cert. denied, 319 N.C. 694, 351 S.E.2d 744 (1987).

Time Period for Appealing Valuation. — Appellant taxpayer's written request for a hearing on the valuation made on its property for tax purposes was properly made within the 20-day period set forth in G.S. 105-342(b) where that request was submitted by facsimile, the statute did not require the written submission be made in any particular form, and the statute had to be strictly construed against appellee state property tax commission and in favor of appellant. In re Appeal of Intermedia Communications, Inc., 144 N.C. App. 424, 548 S.E.2d 562, 2001 N.C. App. LEXIS 440 (2001).

Cited in In re S. Ry., 59 N.C. App. 119, 296 S.E.2d 463 (1982); Clinchfield R.R. v. Lynch, 700 F.2d 126 (4th Cir. 1983).

§ 105-343. Penalty for failure to make required reports.

Any public service company which fails or refuses to prepare and deliver to the Department of Revenue any report required by this Article shall forfeit and pay to the State of North Carolina one hundred dollars ($100.00) for each day the report is delayed beyond the date on which it is required to be submitted. This penalty may be recovered in an action in the appropriate division of the General Court of Justice of Wake County in the name of the State on the relation of the Secretary of Revenue. When collected, the penalty shall be paid into the general fund of the State. The Secretary shall have the power to reduce or waive the penalty provided in this section for good cause. (1939, c. 310, s. 1606; 1971, c. 806, s. 1; 1973, c. 476, s. 193.)

§ 105-344. Failure to pay tax; remedies; penalty.

If any public service company fails or refuses to pay any taxes imposed on its property by any taxing unit of this State, the taxing unit may bring an action in the appropriate division of the General Court of Justice of the county in which the taxing unit is located for the recovery of the tax. Not less than 15 days before such an action is instituted, the taxing unit shall notify the taxpayer by registered or certified mail of its intention to bring the action. The judgment rendered in such an action shall include the tax imposed and unpaid and, as an additional tax, a penalty of fifty percent (50%) of the amount of the tax with interest on the sum of these taxes at the rate of nine percent (9%) per annum from the date the tax was due to be paid, plus reasonable attorneys' fees for the prosecution of the action to be fixed by the court. (The awarding of attorneys' fees by the court shall not prevent the taxing unit from paying its attorney an additional fee pursuant to contract, nor shall it prevent the taxing unit from requiring that the attorneys' fees awarded by the court be paid into the general fund of the taxing unit in accordance with any arrangement between the taxing unit and its attorneys.) The judgment rendered by the court may include a mandamus ordering the payment of the judgment, penalty, interest, and costs including the attorneys' fees as part of the costs.

If, during the pendency of an action brought under this section, additional or subsequent taxes shall accrue, those taxes, together with penalties and interest, may be included in the judgment if, prior to rendition of the judgment, the tax collector of the taxing unit files with the court a certificate of the additional taxes, penalties, and interest.

In any action brought under this section, the appraised valuation of the taxpayer's property as determined, allocated, and certified to the taxing unit by the Department of Revenue shall be conclusive and shall not be subject to collateral attack. (1939, c. 310, s. 1611; 1971, c. 806, s. 1; c. 931, s. 1; 1973, c. 476, s. 193.)

ARTICLE 24.

Review and Enforcement of Orders.

§ 105-345. Right of appeal; filing of exceptions.

(a) No party to a proceeding before the Property Tax Commission may appeal from any final order or decision of the Commission unless within 30 days after the entry of such final order or decision the party aggrieved by such decision or order shall file with the Commission notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decision or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commission.

(b) Any party may appeal from all or any portion of any final order or decision of the Commission in the manner herein provided. Copy of the notice of appeal shall be mailed by the appealing party at the time of filing with the Commission, to each party to the proceeding to the addresses as they appear in the files of the Commission in the proceeding. The failure of any party, other than the Commission, to be served with or to receive a copy of the notice of appeal shall not affect the validity or regularity of the appeal.

(c) The Commission may on motion of any party to the proceeding or on its own motion set the exceptions to the final order upon which such appeal is based for further hearing before the Commission.

(d) The appeal shall lie to the Court of Appeals as provided in G.S. 7A-29. The procedure for the appeal shall be as provided by the rules of appellate procedure.

(e) The Court of Appeals shall hear and determine all matters arising on such appeal, as in this Article provided, and may in the exercise of its discretion assign the hearing of said appeal to any panel of the Court of Appeals. (1979, c. 584, s. 3; 1983, c. 565.)

Legal Periodicals. — For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

CASE NOTES

Legislative Intent. — Subsection (d) of this section, which provides that appeal shall lie to the Court of Appeals, and G.S. 105-345.2(b), which describes the breadth of review by the Court of Appeals, indicate that the General Assembly intended such appeal to be the exclusive mode of judicial review of property tax assessments contested in the county board and Property Tax Commission. Johnston v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381 (1984), cert. denied, 313 N.C. 508, 329 S.E.2d 392 (1985).

North Carolina law provides two avenues by which a taxpayer may seek relief from an unjust property tax assessment: administrative review followed by judicial review in the Court of Appeals, and direct judicial review in superior or district court. Administrative review begins in the county board of equalization and review. The county board has jurisdiction to hear any taxpayer who has a complaint as to the listing or appraisal of his or others' property. Any taxpayer who wishes to except to an order of the county board shall appeal to the State Property Tax Commission. In turn, a taxpayer who is unsatisfied with the decision of the Property Tax Commission shall appeal to the North Carolina Court of Appeals, and then to the North Carolina Supreme Court. Johnston v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381 (1984), cert. denied, 313 N.C. 508, 329 S.E.2d 392 (1985).

This section effectively bypassed the provision in the North Carolina Administrative Act, § 150B-1 et seq., for judicial review in superior court for persons aggrieved by a final agency decision. Johnston v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381 (1984), cert. denied, 313 N.C. 508, 329 S.E.2d 392 (1985).

A party may not circumvent the manner in which appeals are taken under subsection (a) of this section by relying on N.C.R.A.P., Rule 18(b)(2) or other state or federal rules of civil procedure; therefore, the appropriate analysis for the time for taking such appeal lies in this section where the appealing party has 30 days after the entry of the final order or decision to file its notice of appeal and exceptions not from a party's receipt of a copy of the final order. In re Gen. Tire, Inc., 102 N.C. App. 38, 401 S.E.2d 391 (1991).

N.C.R.A.P., Rule 27(b) Inapplicable. — Under this section, the entry of the final order or decision triggers the time limitations for giving notice of appeal. Service is not required by this section, and therefore, N.C.R.A.P., Rule 27(b) is inapplicable. In re Gen. Tire, Inc., 102 N.C. App. 38, 401 S.E.2d 391 (1991).

Cited in In re Moravian Home, Inc., 95 N.C. App. 324, 382 S.E.2d 772 (1989); Edward Valves, Inc. v. Wake County, 343 N.C. 426, 471 S.E.2d 342 (1996), cert. denied, 519 U.S. 1112, 117 S. Ct. 952, 136 L. Ed. 2d 839 (1997).

§ 105-345.1. No evidence admitted on appeal; remission for further evidence.

No evidence shall be received at the hearing on appeal to the Court of Appeals but if any party shall satisfy the court that evidence has been discovered since the hearing before the Property Tax Commission that could not have been obtained for use at that hearing by the exercise of reasonable diligence, and will materially affect the merits of the case, the court may, in its discretion, remand the record and proceedings to the Commission with directions to take such subsequently discovered evidence, and after consideration thereof, to make such order as the Commission may deem proper, from which order an appeal shall lie as in the case of any other final order from which an appeal may be taken as provided in G.S. 105-345. (1979, c. 584, s. 3.)

CASE NOTES

Evidence Known at Time of Hearing. — G.S. 105-345.1 addresses only evidence that becomes known after the hearing before the North Carolina Property Tax Commission; because the evidence at issue was known before the hearing, but was not considered at the hearing, the North Carolina Property Tax Commission considered the incorrect square footage of the property. In re Greens of Pine Glen Ltd., 356 N.C. 642, 576 S.E.2d 316, 2003 N.C. LEXIS 27 (2003).

§ 105-345.2. Record on appeal; extent of review.

(a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of appellate procedure, and any alleged irregularities in procedures before the Property Tax Commission, not shown in the record, shall be considered under the rules of appellate procedure.

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions; or
(2) In excess of statutory authority or jurisdiction of the Commission; or
(3) Made upon unlawful proceedings; or
(4) Affected by other errors of law; or
(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
(6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commission. (1979, c. 584, s. 3.)

CASE NOTES

This section is the controlling judicial review statute for appeals from the Property Tax Commission. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Duty of Appellate Court. — Under this section, the appellate court is to decide all relevant questions of law and interpret constitutional and statutory provisions to determine whether the decision of the commission is affected by errors of law. MAO/Pines Assocs. v. New Hanover County Bd. of Equalization, 116 N.C. App. 551, 449 S.E.2d 196 (1994).

Duty of Commission. — The Property Tax Commission has the authority and responsibility to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. In re Philip Morris U.S.A., 130 N.C. App. 529, 503 S.E.2d 679 (1998), cert. denied, 349 N.C. 359 (1998).

Review Procedure Equal to That Under Administrative Procedure Act. — Procedure for judicial review provided by this section is equal to that under the Administrative Procedure Act, Chapter 150A (see now Chapter 150B), G.S. 150B-1 et seq.). In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

"Substantial Prejudice" Defined. — Substantial prejudice under this section is a substantially higher valuation than one which would have been reached under a legal valuation process. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

The "whole record" test is not a tool of judicial intrusion, but instead, merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence. In re Owens, 132 N.C. App. 281, 511 S.E.2d 319 (1999).

Appraisal Notice in Violation of Constitutional Provisions and Unlawful. — Where timing of notice, size, generalities of wording and single publication newspaper of schedule of values used by county in appraising property for ad valorem tax purposes were not reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections, such notice was insufficient to fulfill due process requirement and to bar an attack against the revaluation schedules themselves; hence, Property Tax Commission's action in affirming the procedure employed by county was in violation of constitutional provisions and made upon unlawful proceedings within the meaning of subdivisions (b)(1) and (3) of this section. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Error of Law in Using Comparable Sales in Present Use Valuation. — Property Tax Commission committed an error of law as contemplated by this section by upholding the use of sales of similarly used land as a factor upon which a present use valuation was based. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Burden of Overcoming Presumption of Correctness of Ad Valorem Assessments. — The presumption in this State that ad valorem tax assessments are presumed correct places the burden upon the taxpayer to prove that the assessments are incorrect. In order to overcome this presumption, the taxpayer must produce competent material and substantial evidence that tends to show that: (1) Either the county tax supervisor used an arbitrary method of valuation; or (2) the county tax supervisor used an illegal method of valuation; and (3) the assessment substantially exceeded the true value in money of the property. In re Odom, 56 N.C. App. 412, 289 S.E.2d 83, cert. denied, 305 N.C. 760, 292 S.E.2d 575 (1982).

Burden of Proving Reasonableness of Valuation. — When taxpayer has rebutted the presumption of regularity in favor of the county, burden shifts to the county to demonstrate to the Property Tax Commission that the values determined in the revaluation process were not substantially higher than those called for by the statutory formula, and the county must demonstrate the reasonableness of its valuation under subdivision (b)(5) of this section. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

Taxpayer's contention that cost approach method of appraisal was not legal because it did not consider the 26 U.S.C.S. § 42 rent restrictions on the property was insufficient to rebut the presumption that the appraisal was properly administered; the intermediate appellate court's ruling reversing a decision of the North Carolina Property Tax Commission was itself reversed. In re Greens of Pine Glen Ltd., 356 N.C. 642, 576 S.E.2d 316, 2003 N.C. LEXIS 27 (2003).

Expert Evidence. — Although Commission agreed with expert that property was affected by functional and economic obsolescence, it was not bound to accept the expert's percentage for such obsolescence and could arrive at its own percentage so long as supported by competent, material and substantial evidence. In re Stroh Brewery Co., 116 N.C. App. 178, 447 S.E.2d 803 (1994).

The Commission's findings of fact were supported by competent, material, and substantial evidence that the property of the family corporation was not actively engaged in the commercial growing of trees under a sound management program, and therefore, not eligible for taxation at present-use value. In re Whiteside Estates, Inc., 136 N.C. App. 360, 525 S.E.2d 196, 2000 N.C. App. LEXIS 64 (2000), cert. denied, 351 N.C. 473, 543 S.E.2d 511 (2000).

Commission's Valuation Not Upheld. — The Property Tax Commission's valuation of commercial property was not supported by substantial evidence, where it did not specify in its final decision the "appropriate" capitalization rate used, and the record did not support the ultimate capitalization rate apparently employed. In re Owens, 132 N.C. App. 281, 511 S.E.2d 319 (1999).

North Carolina Property Tax Commission's valuation of a rent-restricted, low-income, apartment complex was illegal because it did not take into account the restriction on the complex's income imposed by federal statute. In re Greens of Pine Glen Ltd., 147 N.C. App. 221, 555 S.E.2d 612, 2001 N.C. App. LEXIS 1139 (2001), appeal dismissed, cert. granted, 355 N.C. 286, 560 S.E.2d 801 (2002).

Commission's finding that county used an arbitrary method of valuing taxpayer's property was supported by the evidence, where the county had averaged eight of 14 comparable sales, entirely omitting six others, where county witnesses set a figure of $640 per front foot without considering the suitability for building on parcel with two cemeteries, wetlands and limited depth, and where the county did not consider limited access to the property or the cemeteries. In re Boos, 95 N.C. App. 386, 382 S.E.2d 769 (1989).

When a county assessed the value of a mobile home located on leased land without taking into consideration the personal property elements in G.S. 105-317.1, its appraisal arbitrarily or illegally under G.S. 105-345.2(b) appraised the home as if it were real property and assigned it a value that substantially exceeded its true value, because G.S. 105-273(13) expressly defined differences between real property and tangible personal property as it pertained to manufactured homes. In re Murray, — N.C. App. —, 635 S.E.2d 477, 2006 N.C. App. LEXIS 2157 (2006).

Absent evidence that the Property Tax Commission's decision was based on statutorily-mandated criteria, the appellate court found that the Commission exceeded its statutory authority and that its decision was unsupported by competent evidence, resulting in prejudice to the county's substantial rights. In re Camel City Laundry Co., 115 N.C. App. 469, 444 S.E.2d 689 (1994).

Educational Purpose Not Shown. — Taxpayer that sent missionaries to different parts of the world did not prove entitlement to additional tax exemption where buildings were used to house owner, for guest lodging, and for storage, as the buildings were not used wholly and exclusively for educational purposes; the taxpayer bore the burden of proving that its property was entitled to an exemption under the law, which it failed to do. In re Master's Mission, 152 N.C. App. 640, 568 S.E.2d 208, 2002 N.C. App. LEXIS 964 (2002).

North Carolina Property Tax Commission's decision to deny a taxpayer, a university, a tax exemption for a property that was renovated and operated as a restaurant by the taxpayer and its students was affirmed as substantial evidence showed that the property was not used wholly and exclusively for an educational purpose by the taxpayer. In re Univ. for the Study of Human Goodness & Creative Group Work, 159 N.C. App. 85, 582 S.E.2d 645, 2003 N.C. App. LEXIS 1423 (2003).

Authority Exceeded. — It is not the Commission's place to equalize property values between anchor store property and the surrounding property in a shopping mall; thus in doing so, the Commission exceeded its authority and committed an error of law. In re Belk-Broome Co., 119 N.C. App. 470, 458 S.E.2d 921 (1995), aff'd, 342 N.C. 890, 467 S.E.2d 242 (1996).

Commission's Valuation Upheld. — Under the "whole record" test, an appellate court found that substantial evidence in the record supported the findings of fact of the North Carolina Property Tax Commission as to the typical fee paid for use of race tracks such as was located on the taxpayer's property, the highest and best use of the property, and the true value in money of the property; in light of this conclusion, the appellate court also held that the commission's decision was neither arbitrary nor capricious, as the commission reasonably concluded from the evidence the property's market value. In re North Wilkesboro Speedway, Inc., 158 N.C. App. 669, 582 S.E.2d 39, 2003 N.C. App. LEXIS 1233 (2003).

Where a taxpayer submitted insufficient evidence to meet a burden of proof under G.S. 105-345.2(b) to show that a county board of equalization and review's decision to use the cost valuation assessment method for appraising the taxpayer's property was improper, the taxpayer's appeal was rejected. In re Schwartz & Schwartz, Inc., 166 N.C. App. 744, 603 S.E.2d 852, 2004 N.C. App. LEXIS 2022 (2004).

Taxpayer did not show that county used an arbitrary and illegal valuation method or that the assessment of its personal property for a prior, six-year period substantially exceeded that property's true value in money; thus, the assessment was upheld because the taxpayer failed to meet its initial burden of presenting material, competent, and substantial evidence that the assessment was arbitrary and illegal. In re Appeal of Westmoreland-LG&E, 174 N.C. App. 692, 622 S.E.2d 124, 2005 N.C. App. LEXIS 2611 (2005).

Land Without Buildings was not Exempt. — Property tax exemption for religious purposes applied only to buildings used for religious purposes and the land necessary for their convenient use; where a church's land had no buildings on it, the land was not exempt. In re Appeal of the Church of Yahshua the Christ, 160 N.C. App. 236, 584 S.E.2d 827, 2003 N.C. App. LEXIS 1766 (2003), cert. denied, appeal dismissed sub nom. In re Appeal of the Church of Yahshua the Christ, 357 N.C. 505, 587 S.E.2d 421 (2003).

Corporation's Tax-Exempt Status Supported by Evidence. — Finding that a corporation was entitled to a tax exemption under G.S. 105-278.7 was supported by substantial evidence, including the fact that 90 percent of the corporation's income was provided by government funding, and that the corporation was recognized as a nonprofit organization by both the state and federal governments. In re Totsland Preschool, Inc., — N.C. App. —, 636 S.E.2d 292, 2006 N.C. App. LEXIS 2249 (2006).

Applied in In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981); In re Southview Presbyterian Church, 62 N.C. App. 45, 302 S.E.2d 298 (1983); In re Barham, 70 N.C. App. 236, 319 S.E.2d 657 (1984); Johnston v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381 (1984); In re Greensboro Office Partnership, 72 N.C. App. 635, 325 S.E.2d 24 (1985); In re R.J. Reynolds Tobacco Co., 73 N.C. App. 475, 326 S.E.2d 911 (1985); In re Parker, 76 N.C. App. 477, 333 S.E.2d 749 (1985); Rainbow Springs Partnership v. County of Macon, 79 N.C. App. 335, 339 S.E.2d 681 (1986); In re Duke Power Co., 82 N.C. App. 492, 347 S.E.2d 54 (1986); In re Worley, 93 N.C. App. 191, 377 S.E.2d 270 (1989); In re Westinghouse Elec. Corp., 93 N.C. App. 710, 379 S.E.2d 37 (1989); In re Church of Creator, 102 N.C. App. 507, 402 S.E.2d 874 (1991); In re Johnson, 106 N.C. App. 61, 415 S.E.2d 108 (1992); In re Lee Memory Gardens, Inc., 110 N.C. App. 541, 430 S.E.2d 451 (1993); In re Hotel L'Europe, 116 N.C. App. 651, 448 S.E.2d 865 (1994), cert. denied, 339 N.C. 612, 454 S.E.2d 252 (1995); In re Mount Shepherd Methodist Camp, 120 N.C. App. 388, 462 S.E.2d 229 (1995); In re Parsons, 123 N.C. App. 32, 472 S.E.2d 182 (1996); In re Allred, 351 N.C. 1, 519 S.E.2d 52 (1999); In re Southeastern Baptist Theological Seminary, Inc., 135 N.C. App. 247, 520 S.E.2d 302 (1999); In re Corbett, 138 N.C. App. 534, 530 S.E.2d 90, 2000 N.C. App. LEXIS 617 (2000).

Cited in In re Colonial Pipeline Co., 67 N.C. App. 388, 313 S.E.2d 819 (1984); In re Butler, 84 N.C. App. 213, 352 S.E.2d 232 (1987); In re Senseney, 95 N.C. App. 407, 382 S.E.2d 765 (1989); In re Found. Health Sys. Corp., 96 N.C. App. 571, 386 S.E.2d 588 (1989); In re Moravian Home, Inc., 95 N.C. App. 324, 382 S.E.2d 772 (1989); In re ELE, Inc., 97 N.C. App. 253, 388 S.E.2d 241 (1990); In re Consol. Appeals of Certain Timber Cos., 98 N.C. App. 412, 391 S.E.2d 503 (1990); In re Lee Memory Gardens, Inc., 110 N.C. App. 541, 430 S.E.2d 451 (1993); In re Cone Mills Corp., 112 N.C. App. 539, 435 S.E.2d 835 (1993); In re Atl. Coast Conference, 112 N.C. App. 1, 434 S.E.2d 865 (1993); In re R.W. Moore Equip. Co., 115 N.C. App. 129, 443 S.E.2d 734, cert. denied, 337 N.C. 693, 448 S.E.2d 533 (1994); In re Interstate Income Fund I, 126 N.C. App. 162, 484 S.E.2d 450 (1997); In re Interstate Income Fund I, 126 N.C. App. 162, 484 S.E.2d 450 (1997); In re Allred, 128 N.C. App. 604, 496 S.E.2d 405 (1998); In re Phoenix Ltd. Partnership, 134 N.C. App. 474, 517 S.E.2d 903 (1999); In re Winston-Salem Joint Venture, 144 N.C. App. 706, 551 S.E.2d 450, 2001 N.C. App. LEXIS 557 (2001); In re Frizzelle, 151 N.C. App. 552, 566 S.E.2d 506, 2002 N.C. App. LEXIS 770 (2002); In re Maharishi Spiritual Ctr. of Am., 152 N.C. App. 269, 569 S.E.2d 3, 2002 N.C. App. LEXIS 918 (2002), cert. denied, 356 N.C. 436, 572 S.E.2d 785 (2002).

§ 105-345.3. Relief pending review on appeal.

Pending judicial review, the Property Tax Commission is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, a judge of the Court of Appeals is authorized to issue all necessary and appropriate process to postpone the effective date of any action by the Commission or take such action as may be necessary to preserve status or rights of any of the parties pending conclusion of the proceedings on appeal. The court may require the applicant for such stay to post adequate bond as required by the court. (1979, c. 584, s. 3.)

§ 105-345.4. Appeal to Supreme Court.

In all appeals heard in the Court of Appeals, any party may file a motion for review in the Supreme Court of the decision of the Court of Appeals under G.S. 7A-31, and in cases entitled to be appealed as a matter of right under G.S. 7A-30(3) any party may appeal to the Supreme Court from the decision of the Court of Appeals under the same rules and regulations as are prescribed by law for appeals, and such court may advance the cause on its docket. (1979, c. 584, s. 3.)

Editor's Note. — Subdivision (3) of G.S. 7A-30, referred to in this section, was deleted by Session Laws 1983, c. 526, s. 2.

CASE NOTES

Applied in Johnston v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381 (1984).

§ 105-345.5. Judgment on appeal enforced by mandamus.

In all cases in which, upon appeal, an order or decision of the Property Tax Commission is affirmed, in whole or in part, the appellate court may include in its decree a mandamus to the appropriate party to put said order in force, or so much thereof as shall be affirmed, or the appellate court may make such other order as it deems appropriate. (1979, c. 584, s. 3.)

CASE NOTES

Cited in Edward Valves, Inc. v. Wake County, 343 N.C. 426, 471 S.E.2d 342 (1996), cert. denied, 519 U.S. 1112, 117 S. Ct. 952, 136 L. Ed. 2d 839 (1997).

§ 105-346. Peremptory mandamus to enforce order when no appeal.

(a) If no appeal is taken from an order or decision of the Property Tax Commission within the time prescribed by law and the person to which the order or decision is directed fails to put the same in operation, as therein required, the Commission may apply to the judge regularly assigned to the superior court district which includes Wake County, or to the resident judge of said district at chambers upon 10 days' notice, for a peremptory mandamus upon said person for the putting in force of said order or decision; and if said judge shall find that the order or said Commission was valid and within the scope of its powers, he shall issue such peremptory mandamus.

(b) An appeal shall lie to the Court of Appeals in behalf of the Commission, or the defendant, from the refusal or the granting of such peremptory mandamus. The remedy prescribed in this section for enforcement of orders of the Commission is in addition to other remedies prescribed by law. (1979, c. 584, s. 3.)

ARTICLE 25.

Levy of Taxes and Presumption of Notice.

§ 105-347. Levy of property taxes.

Each year — not later than the date prescribed by applicable law or, in the absence of specific statutory provisions, not later than the first day of August — the tax levying authorities of counties and municipalities shall levy on property rates of taxes, not exceeding any constitutional or statutory limits, necessary to meet the general and other legally authorized expenses of the taxing units. (1939, c. 310, s. 1400; 1971, c. 806, s. 1.)

CASE NOTES

Reason Why Board Must Act Within Fixed Time. — The reason why the board of equalization is required to act within a fixed time is apparent. The taxing authority must know the value of the taxable property before it can fix a rate sufficient to meet governmental needs. Spiers v. Davenport, 263 N.C. 56, 138 S.E.2d 762 (1964), decided under former similar provisions.

§ 105-348. All interested persons charged with notice of taxes.

All persons who have or who may acquire any interest in any real or personal property that may be or may become subject to a lien for taxes are hereby charged with notice that such property is or should be listed for taxation, that taxes are or may become a lien thereon, and that if taxes are not paid the proceedings allowed by law may be taken against such property. This notice shall be conclusively presumed, whether or not such persons have actual notice. (1939, c. 310, s. 1705; 1971, c. 806, s. 1.)

CASE NOTES

Cited in Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976); Henderson County v. Osteen, 292 N.C. 692, 235 S.E.2d 166 (1977).

Article 26.

Collection and Foreclosure of Taxes.

§ 105-349. Appointment, term, qualifications, and bond of tax collectors and deputies.

(a) Appointment and Term. — The governing body of each county and municipality shall appoint a tax collector on or before July 1, 1971, to serve for a term to be determined by the appointing body and until his successor has been appointed and qualified. Until the first such appointments are made, county and municipal taxes shall be collected by the tax collectors presently serving under prior provisions of law. The governing body may remove the tax collector from office during his term for good cause after giving him notice in writing and an opportunity to appear and be heard at a public session of the governing body. No hearing shall be required, however, if the tax collector is removed for failing to meet the prerequisites prescribed by G.S. 105-352(b) for delivery of the tax receipts. Unless otherwise provided by G.S. 105-373, whenever any vacancy occurs in this office, the governing body shall appoint a qualified person to serve as tax collector for the period of the unexpired term.

(b) Qualifications. — The governing body shall appoint as tax collector a person of character and integrity whose experience in business and collection work is satisfactory to the governing body.

(c) Bond. — No tax collector shall be allowed to begin his duties until he shall have furnished bond conditioned upon his honesty and faithful performance in such amount as the governing body may prescribe. A tax collector shall not be permitted to collect any taxes not covered by his bond, nor shall a tax collector be permitted to continue collecting taxes after his bond has expired without renewal.

(d) Compensation. — The compensation and expense allowances of the tax collector shall be fixed by the governing body.

(e) Alternative to Separate Office of Tax Collector. — Pursuant to Article VI, Sec. 9, of the North Carolina Constitution, the office of tax collector is hereby declared to be an office that may be held concurrently with any appointive or elective office other than those hereinafter designated, and the governing body may appoint as tax collector any appointive or elective officer who meets the personal and bonding requirements established by this section. A member of the governing body of a taxing unit may not be appointed tax collector, nor may the duties of the office be conferred upon him. A person appointed or elected as the treasurer or chief accounting officer of a taxing unit may not be appointed tax collector, nor may the duties of the office of tax collector be conferred upon him except with the written permission of the secretary of the Local Government Commission who, before giving his permission, shall satisfy himself that the unit's internal control procedures are sufficient to prevent improper handling of public funds.

(f) Deputy Tax Collectors. — The governing body of a county or municipality is authorized to appoint one or more deputy tax collectors and to establish their terms of office, compensation, and bonding requirements. A deputy tax collector shall have authority to perform, under the direction of the tax collector, any act that the tax collector may perform unless the governing body appointing the deputy specifically limits the scope of the deputy's authority.

(g) Oath. — Every tax collector and deputy tax collector, as the holder of an office, shall take the oath required by Article VI, § 7 of the North Carolina Constitution with the following phrase added to it: "that I will not allow my actions as tax collector to be influenced by personal or political friendships or obligations,". The oath must be filed with the clerk of the governing body of the taxing unit. (1939, c. 310, ss. 1701, 1702; 1957, c. 537; 1971, c. 806, s. 1; 1991, c. 110, s. 6; 1991 (Reg. Sess., 1992), c. 1007, s. 23.)

Local Modification. — Bald Head Island: 1997, c. 324, s. 1; Havelock: 1995 (Reg. Sess., 1996), c. 619, s. 1; New Hanover (As to subsection (a)): 1971, c. 928; Roanoke Rapids: 1995, c. 34, s. 5.3; city of Elizabeth City: 2001, c. 227, s.1; city of Mount Airy: 1989, c. 416, s. 1; 2003-281, s. 1; town of Carthage: 1999-239, s. 1; town of China Grove: 2002-42, s. 1; town of Laurel Park: 2000-8, s. 1; town of Plymouth: 1995, c. 325; town of Tarboro: 1995, c. 73, s. 5.3.

CASE NOTES

Cited in Town of Scotland Neck v. Western Sur. Co., 46 N.C. App. 124, 264 S.E.2d 917 (1980).

OPINIONS OF ATTORNEY GENERAL

For a discussion of the proper authority and procedures for appointing an interim county tax collector, see opinion of Attorney General to The Honorable Charles Beall, North Carolina House of Representatives, 1998 N.C.A.G. 35 (8/5/98).

§ 105-350. General duties of tax collectors.

It shall be the duty of each tax collector:

(1) To employ all lawful means to collect all property, dog, license, privilege, and franchise taxes with which he is charged by the governing body.

(2) To give such bond as may be required of him by the governing body under the provisions of G.S. 105-349.

(3) To perform such duties in connection with the preparation of the tax records and tax receipts as the governing body may direct under the provisions of G.S. 105-319 and 105-320.

(4) To keep adequate records of all collections he makes.
(5) To account for all moneys coming into his hands in such form and detail as may be required by the chief accounting officer of the taxing unit.
(6) To make settlement at the times required by G.S. 105-373 and at any other time the governing body may require him to do so.
(7) To submit to the governing body at each of its regular meetings a report of the amount he has collected on each year's taxes with which he is charged, the amount remaining uncollected, and the steps he is taking to encourage or enforce payment of uncollected taxes.
(8) To send bills or notices of taxes due to taxpayers if instructed to do so by the governing body.
(9) To visit delinquent taxpayers to encourage payment of taxes if instructed to do so by the governing body. (1939, c. 310, s. 1703; 1971, c. 806, s. 1.)

Local Modification. — Roanoke Rapids: 1995, c. 34, s. 5.3.

CASE NOTES

Cited in Town of Scotland Neck v. Western Sur. Co., 46 N.C. App. 124, 264 S.E.2d 917 (1980); Great S. Media, Inc. v. McDowell County, 50 N.C. App. 705, 275 S.E.2d 226 (1981).

§ 105-351. Authority of successor collector.

The successor in office of any tax collector may continue and complete any legally authorized process or proceeding begun by his predecessor for the collection of taxes. (1939, c. 310, s. 1703; 1971, c. 806, s. 1.)

§ 105-352. Delivery of tax receipts to tax collector; prerequisites; procedure upon default.

(a) Time of Delivery. — As provided in G.S. 105-321, upon order of the governing body, the tax receipts shall be delivered to the tax collector on or before the first day of September.

(b) Settlement, Bond, and Prepayments. — Before the tax receipts for the current year are delivered to the tax collector, he shall have:
(1) Delivered to the chief accounting officer of the taxing unit the duplicate receipts issued for prepayments received by the tax collector.
(2) Demonstrated to the satisfaction of the chief accounting officer that all moneys received by the tax collector as prepayments have been deposited to the credit of the taxing unit.
(3) Made his annual settlement (as defined in G.S. 105-373) for all taxes in his hands for collection.
(4) Provided bond or bonds as required by G.S. 105-349(c) for taxes for the current year and all prior years in his hands for collection. (In no event shall the governing body accept a bond of lesser amount than that prescribed by any local act applying to the taxing unit.)

In the event prepayments have been received by a person other than the regular tax collector, that person shall, before the tax receipts are delivered to the tax collector, deliver the prepayment receipt duplicates to the chief accounting officer and demonstrate to the satisfaction of that officer that all moneys received by him as prepayments have been deposited to the credit of the taxing unit. If the chief accounting officer has accepted prepayments, he shall not later than the day on which the tax receipts are delivered to the tax collector, make settlement with the governing body in such manner and form as the governing body may prescribe.

(c) Procedure upon Default. — If, when the tax receipts for the current year have been computed and prepared, the regular tax collector shall not have met the requirements of subsection (b), above, the governing body shall immediately appoint a special tax collector and, after he has given satisfactory bond for the full amount of the taxes as required by G.S. 105-349(c), deliver to him the tax receipts for the current year and order him to make collections as provided in G.S. 105-321. In the discretion of the governing body, the cost of the special tax collector's bond and compensation may be deducted from the compensation of the regular tax collector. If the regular tax collector shall thereafter meet the requirements of subsection (b), above, the special collector shall make full settlement (in the manner provided in G.S. 105-373 for tax collectors retiring from office), and the governing body, as provided in G.S. 105-321, shall deliver the tax receipts for the current year to the regular tax collector and order their collection.

(d) Civil and Criminal Penalties. —

(1) Any member of the governing body who shall vote to deliver the tax receipts to a tax collector before the tax collector has met the requirements prescribed by this section shall be individually liable for the amount of taxes charged against the tax collector for which he has not made satisfactory settlement; and any member of the governing body who so votes, or who willfully fails to perform any duty imposed by this section, shall be guilty of a Class 1 misdemeanor.

(2) Any tax collector or other official who fails to account for prepayments as prescribed by this section shall be guilty of a Class 1 misdemeanor. (1939, c. 310, s. 1707; 1971, c. 806, s. 1; 1993, c. 539, s. 722; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 105-353. Place for collection of taxes.

Taxes shall be payable at the office of the tax collector or at a financial institution with which the taxing unit has contracted for receipt of payment of taxes. For the convenience of taxpayers, the governing body may require the tax collector to be present to collect taxes in person or by deputy at other designated places within the taxing unit at times prescribed by the governing body. If the governing body exercises this authority, the tax collector shall give timely notice of the places and times at which he will be present for collection; this notice shall be published in a newspaper having general circulation in the taxing unit and posted at three or more public places within the taxing unit. (1939, c. 310, s. 1712; 1971, c. 806, s. 1; 1989, c. 578, s. 2.)

Local Modification. — Cleveland: 1989, c. 155, s. 1; Gaston and municipalities and special districts located in that county: 1987 (Reg. Sess., 1988), c. 908; Iredell: 1983, c. 284, s. 4; 1985, c. 570, s. 5; Wake and municipalities and special districts located in that county: 1987 (Reg. Sess., 1988), c. 908.

§ 105-354. Collections for districts and other units of local government.

Whenever a taxing unit collects taxes for some district or other unit of local government, those taxes, for collection and foreclosure purposes, shall be treated as taxes of the taxing unit making the collection. (1971, c. 806, s. 1.)

§ 105-355. Creation of tax lien; date as of which lien attaches.

(a) Lien on Real Property. — Regardless of the time at which liability for a tax for a given fiscal year may arise or the exact amount thereof be determined, the lien for taxes levied on a parcel of real property shall attach to the parcel taxed on the date as of which property is to be listed under G.S. 105-285, and the lien for taxes levied on personal property shall attach to all real property of the taxpayer in the taxing unit on the same date. All penalties, interest, and costs allowed by law shall be added to the amount of the lien and shall be regarded as attaching at the same time as the lien for the principal amount of the taxes. For purposes of this subsection (a):

(1) Taxes levied on real property listed in the name of a life tenant under G.S. 105-302(c)(8) shall be a lien on the fee as well as the life estate.

(2) Taxes levied on improvements on or separate rights in real property owned by one other than the owner of the land, whether or not listed separately from the land under G.S. 105-302(c)(11), shall be a lien on both the improvements or rights and on the land.

(b) Lien on Personal Property. — Taxes levied on real and personal property (including penalties, interest, and costs allowed by law) shall be a lien on personal property from and after levy or attachment and garnishment of the personal property levied upon or attached. (1939, c. 310, s. 1704; 1971, c. 806, s. 1; 1973, c. 564, s. 4.)

Cross References. — For present provisions as to listing land owned by husband and wife as tenants by the entirety, see G.S. 105-302.

Legal Periodicals. — For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

For note discussing sufficiency of notice of tax sales in light of Mennonite Board of Missions v. Adams, 103 S. Ct. 2706 (1983), see 62 N.C.L. Rev. 1091 (1984).

For article, "North Carolina's Real Estate Recording Laws: The Ghost of 1885," see 28 N.C. Cent. L.J. 199 (2006).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former similar provisions.*

This section authorizes a tax lien on the land to which improvements are connected for the value of the tax on those improvements. Mid-State Serv. Co. v. Dunford, 18 N.C. App. 641, 197 S.E.2d 626 (1973).

This lien attaches the date the land is listed. Mid-State Serv. Co. v. Dunford, 18 N.C. App. 641, 197 S.E.2d 626 (1973).

When Tax on Personal Property Becomes Lien on That Property. — A tax on personal property becomes a lien on that personal property only after levy or attachment of the personal property taxed. Mid-State Serv. Co. v. Dunford, 18 N.C. App. 641, 197 S.E.2d 626 (1973).

And When It Becomes Lien on Real Property. — A tax assessed against personal property becomes a lien on real property only when both the realty and personalty are owned by the same owner. Mid-State Serv. Co. v. Dunford, 18 N.C. App. 641, 197 S.E.2d 626 (1973).

Taxes Owed on Due Parcel Not a Lien on Another Parcel. — Taxes owed on Parcel A are not a lien on taxpayer's Parcel B in the same county. Goldsboro Milling Co. v. Reaves, 804 F. Supp. 762 (E.D.N.C. 1991).

Lessee's Obligation to Pay Taxes Extinguished. — Any obligation a lessee may have had to pay taxes was extinguished with the release and cancellation of the lease contract. Mid-State Serv. Co. v. Dunford, 18 N.C. App. 641, 197 S.E.2d 626 (1973).

Lien Attaches Only to Land of Taxpayer Liable. — Though liability for the payment of taxes does not arise out of contract, a tax is a debt of the taxpayer, and a lien for taxes cannot be fastened upon the land of a person other than the taxpayer liable for the tax. Duplin County v. Jones, 267 N.C. 68, 147 S.E.2d 603 (1966).

Land Owned by Entireties Is Not Subject to Lien for Taxes on Personal Property Owned Separately. — When land, owned by a husband and wife as tenants by the entireties, is listed for taxation by the husband in his name as owner it is not subject to a lien for taxes assessed on account of personal property, listed by him at the same time in his own name, some of which is owned by him and some by his wife but none by both together. Duplin County v. Jones, 267 N.C. 68, 147 S.E. 603 (1966).

The pivotal event in determining when a tax is incurred is the date that the property is listed by the owner thereof; the obligation to pay ad valorem property taxes in the State of North Carolina attaches at the time the property is listed, even though the amount of the tax has not yet been determined. Burns v. City of Winston-Salem, 991 F.2d 116 (4th Cir. 1993).

Cited in Powell v. County of Haywood, 15 N.C. App. 109, 189 S.E.2d 785 (1972); W.R. Co. v. North Carolina Property Tax Comm'n, 48 N.C. App. 245, 269 S.E.2d 636 (1980); County of Lenoir v. Moore, 114 N.C. App. 110, 441 S.E.2d 589 (1994), aff'd, 340 N.C. 104, 455 S.E.2d 158 (1995); City of Durham v. Hicks, 135 N.C. App. 699, 522 S.E.2d 583, 1999 N.C. App. LEXIS 1227 (1999); Stafford v. County of Bladen, 163 N.C. App. 149, 592 S.E.2d 711, 2004 N.C. App. LEXIS 305 (2004), appeal dismissed sub nom. Stafford v. Bladen Co., cert. denied, 358 N.C. 545, 599 S.E.2d 409 (2004).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— Some of the opinions of the Attorney General cited below were issued under former similar provisions.*

Lien Arising from Levy of Supplemental Taxes Went Back to Date Prior to Creation of School District and Authorization of Tax. — See opinion of Attorney General to Mr. Rom B. Parker, Halifax County Attorney 40 N.C.A.G. 265 (1969.)

Lien for Ad Valorem Taxes, Both upon Real and Personal Property, Attaches to All Real Property of Taxpayer Within Taxing Unit. — See opinion of Attorney General to Mr. Jule McMichael, Rockingham County Attorney, 40 N.C.A.G. 814 (1970).

Imposition of Interest by Town Governing Board on Delinquent Property Taxes Is Mandatory. — See opinion of Attorney General to Dr. A.P. Dickson, 41 N.C.A.G. 538 (1971).

County May Not Impose Late Payment Penalty or Administrative Fee Upon Delinquent Property Tax Accounts. — Because the statutes authorizing property taxes provide for interest and/or penalties, a county may not, by ordinance, impose a late payment penalty or administrative fee upon delinquent property tax accounts. See opinion of Attorney General to Lloyd C. Smith, Jr., Pritchett & Burch, PLLC, 2001 N.C. AG LEXIS 6 (3/6/2001).

§ 105-356. Priority of tax liens.

(a) On Real Property. — The lien of taxes imposed on real and personal property shall attach to real property at the time prescribed in G.S. 105-355(a). The priority of that lien shall be determined in accordance with the following rules:

(1) Subject to the provisions of the Revenue Act prescribing the priority of the lien for State taxes, the lien of taxes imposed under the provisions of this Subchapter shall be superior to all other liens, assessments, charges, rights, and claims of any and every kind in and to the real property to which the lien for taxes attaches regardless of the claimant and regardless of whether acquired prior or subsequent to the attachment of the lien for taxes.

(2) The liens of taxes of all taxing units shall be of equal dignity.

(3) The priority of the lien for taxes shall not be affected by transfer of title to the real property after the lien has attached, nor shall it be affected by the death, receivership, or bankruptcy of the owner of the real property to which the lien attaches.

(b) On Personal Property. — The lien of taxes on real and personal property shall attach to personal property at the time prescribed in G.S. 105-355(b). The priority of that lien shall be determined in accordance with the following rules:

(1) The tax lien, when it attaches to personal property, shall, insofar as it represents taxes imposed upon the property to which the lien attaches, be superior to all other liens and rights whether such other liens and rights are prior or subsequent to the tax lien in point of time.

(2) The tax lien, when it attaches to personal property, shall, insofar as it represents taxes imposed upon property other than that to which the

lien attaches, be inferior to prior valid liens and perfected security interests and superior to all subsequent liens and security interests.

(3) As between the tax liens of different taxing units, the tax lien first attaching shall be superior. (1939, c. 310, s. 1704; 1971, c. 806, s. 1.)

Legal Periodicals. — For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

CASE NOTES

Purchase of Warehouse Receipt without Knowledge of Lien Senior in Time. — Under G.S. 105-241, a lien for State taxes on personal property is not enforceable against a bona fide purchaser for value, except upon a levy upon such property under an execution or a tax warrant; but when a tax lien is perfected, it is, by subsection (b) of this section, superior to all other liens or rights prior or subsequent in time. By G.S. 25-7-502(1)(c) a bona fide purchaser of a warehouse receipt acquires good title against a lien senior in time of which the purchaser had no notice. Thus, an enforceable lien on oil stored in North Carolina would not arise until it was executed on; but it could not be attached when a warehouse receipt therefor was in the hands of one who purchased it not knowing of the lien. Davenport v. Ralph N. Peters & Co., 386 F.2d 199 (4th Cir. 1967) (decided under former provisions similar to this section).

Tax Liens Take Priority Over Estate Administration Costs. — The conflict between G.S. 28A-19-6 and this section was resolved in favor of city and county who sought to recover back taxes and interest through a foreclosure proceeding on property, although a guardian ad litem and public administrator, who had advanced funds to administrate the properties, asserted that such foreclosure would cause the tax lien to take precedence over the costs of estate administration in violation of G.S. 28A-19-6 and would result in inequity should the sale fail to render sufficient funds to cover both taxes and costs. City of Durham v. Hicks, 135 N.C. App. 699, 522 S.E.2d 583, 1999 N.C. App. LEXIS 1227 (1999).

A local ad valorem tax lien is superior to all other liens, including State tax liens. County of Lenoir v. Moore, 114 N.C. App. 110, 441 S.E.2d 589 (1994), aff'd, 340 N.C. 104, 455 S.E.2d 158 (1995).

Applied in In re Taxes of Bob Dance Chevrolet, 67 N.C. App. 509, 313 S.E.2d 207 (1984).

Cited in Powell v. County of Haywood, 15 N.C. App. 109, 189 S.E.2d 785 (1972); Andrews v. Crump, 984 F. Supp. 393 (W.D.N.C. 1996); Stafford v. County of Bladen, 163 N.C. App. 149, 592 S.E.2d 711, 2004 N.C. App. LEXIS 305 (2004), appeal dismissed sub nom. Stafford v. Bladen Co., cert. denied, 358 N.C. 545, 599 S.E.2d 409 (2004).

§ 105-357. Payment of taxes.

(a) Medium of Payment. — Taxes shall be payable in existing national currency. Deeds to real property, notes of the taxpayer or others, bonds or notes of the taxing unit, and payments in kind shall not be accepted in payment of taxes. A taxing unit may not permit the payment of taxes by offset of any bill, claim, judgment, or other obligation owed to the taxpayer by the taxing unit. The prohibition against payment of taxes by offset does not apply to offset of an obligation arising from a lease or another contract entered into between the taxpayer and the taxing unit before July 1 of the fiscal year for which the unpaid taxes were levied.

(b) Acceptance of Checks and Electronic Payment. — The tax collector may accept checks and electronic payments, as defined in G.S. 147-86.20, in payment of taxes, as authorized by G.S. 159-32.1. Acceptance of a check or electronic payment is at the tax collector's own risk. A tax collector who accepts electronic payment of taxes may add a fee to each electronic payment transaction to offset the service charge the taxing unit pays for electronic payment service. A tax collector who accepts electronic payment or check in payment of taxes may issue the tax receipt immediately or withhold the receipt until the check has been collected or the electronic payment invoice has been honored by the issuer.

If a tax collector accepts a check or an electronic payment and issues a tax receipt and the check is returned unpaid (without negligence on the part of the tax collector in presenting the check for payment) or the electronic payment invoice is not honored by the issuer, the taxes for which the check or electronic payment was given shall be deemed unpaid; the tax collector shall immediately correct the copy of the tax receipt and other appropriate records to show the fact of nonpayment, and shall give written notice by certified or registered mail to the person to whom the tax receipt was issued to return it to the tax collector. After correcting the records to show the fact of nonpayment, the tax collector shall proceed to collect the taxes by the use of any remedies allowed for the collection of taxes or by bringing a civil action on the check or electronic payment.

A financial institution with which a taxing unit has contracted for receipt of payment of taxes may accept a check in payment of taxes. If the check is honored, the financial institution shall so notify the tax collector, who shall, upon request of the taxpayer, issue a receipt for payment of the taxes. If the check is returned unpaid, the financial institution shall so notify the tax collector, who shall proceed to collect the taxes by use of any remedy allowed for collection of taxes or by bringing a civil action on the check.

(1) Effect on Tax Lien. — If the tax collector accepts a check or electronic payment in payment of taxes on real property and issues the receipt, and the check is later returned unpaid or the electronic payment invoice is not honored by the issuer, the taxing unit's lien for taxes on the real property shall be inferior to the rights of purchasers for value and of persons acquiring liens of record for value if the purchasers or lienholders acquire their rights in good faith and without actual knowledge that the check has not been collected or the electronic payment invoice has not been honored, after examination of the copy of the tax receipt in the tax collector's office during the time that record showed the taxes as paid or after examination of the official receipt issued to the taxpayer prior to the date on which the tax collector notified the taxpayer to return the receipt.

(2) Penalty. — In addition to interest for nonpayment of taxes provided by G.S. 105-360 and in addition to any criminal penalties provided by law, the penalty for presenting in payment of taxes a check or electronic funds transfer that is returned or not completed because of insufficient funds or nonexistence of an account of the drawer or transferor is twenty-five dollars ($25.00) or ten percent (10%) of the amount of the check or electronic invoice, whichever is greater, subject to a maximum of one thousand dollars ($1,000). This penalty does not apply if the tax collector finds that, when the check or electronic funds transfer was presented for payment, the drawer of the check or transferor of funds had sufficient funds in an account at a financial institution in this State to make the payment and, by inadvertence, the drawer of the check or transferor of the funds failed to draw the check or initiate a transfer on the account that had sufficient funds. This penalty shall be added to and collected in the same manner as the taxes for which the check or electronic payment was given.

(c) Small Underpayments and Overpayments. — The governing body of a taxing unit may, by resolution, permit its tax collector to treat small underpayments of taxes as fully paid and to not refund small overpayments of taxes unless the taxpayer requests a refund before the end of the fiscal year in which the small overpayment is made. A "small underpayment" is a payment made, other than in person, that is no more than one dollar ($1.00) less than the taxes due on a tax receipt. A "small overpayment" is a payment made, other than in person, that is no more than one dollar ($1.00) greater than the taxes due on a tax receipt.

The tax collector shall keep records of all underpayments and overpayments of taxes by receipt number and amount and shall report these payments to the governing body as part of his settlement.

A resolution authorizing adjustments of underpayments and overpayments as provided in this subsection shall:

(1) Be adopted on or before June 15 of the year to which it is to apply;
(2) Apply to taxes levied for all previous fiscal years; and
(3) Continue in effect until repealed or amended by resolution of the taxing unit. (1939, c. 310, s. 1710; 1971, c. 806, s. 1; 1987, c. 661; 1989, c. 578, s. 3; 1989 (Reg. Sess., 1990), c. 1005, s. 8; 1991, c. 584, s. 2; 1999-434, s. 6; 2001-487, s. 25; 2002-156, s. 1; 2005-134, s. 1; 2005-313, s. 10.)

Local Modification. — Cleveland: 1989, c. 155, s. 1; Durham: 1985 (Reg. Sess., 1986), c. 910; Gaston and municipalities and special districts located in that county: 1987 (Reg. Sess. 1988), c. 908; Iredell: 1983, c. 284, s. 4; 1985, c. 570, s. 5; Wake and municipalities and special districts located in that county: 1987 (Reg. Sess. 1988), c. 908; city of Reidsville: 1989 (Reg. Sess., 1990), c. 957, s. 1; city of Salisbury: 1985 (Reg. Sess., 1986), c. 910; city of Wilmington: 1985 (Reg. Sess., 1986), c. 910; town of Ahoskie: 1987, c. 262, s. 2; town of Elkin: 1987, c. 740, s. 1; town of Farmville: 1985 (Reg. Sess., 1986), c. 910.

Effect of Amendments. — Session Laws 2005-134, s. 1, effective June 29, 2005, in subsection (a), divided the former one sentence into two by substituting "payment of taxes. A taxing unit may not permit" for "payment of taxes, nor shall any taxing unit permit," and added the present third sentence.

Session Laws 2005-313, s. 10, effective August 25, 2005, rewrote subdivision (b)(2).

CASE NOTES

Failure to Follow Statutory Procedure upon Return of Check. — The fact that a county tax collector accepted a check in payment of taxes, and the check was returned, and he paid the taxes in his settlement with the board of county commissioners, did not give him a lien which might be foreclosed under former G.S. 105-414. The collector having failed to correct the tax record so as to show that the check had been returned and that the taxes were not paid, the tax lien was not reinstated. He could have protected himself and preserved the tax lien if he had followed the procedure outlined in this section; this he failed to do, and the returned check was but a simple promise to pay. Since the provisions of this section enacted for the protection of the collector were not complied with and he elected to hold the returned check as evidence of the nonpayment of the taxes, he was in no better position than if he had accepted a note in lieu of the check. Miller v. Neal, 222 N.C. 540, 23 S.E.2d 852 (1943).

OPINIONS OF ATTORNEY GENERAL

Taxpayer May Not Pay His Ad Valorem Taxes by Use of Credit Card. — See opinion of Attorney General to Mr. Fred P. Parker, Jr., Wayne County Attorney, 40 N.C.A.G. 817 (1969), issued under former similar provisions.

§ 105-358. Waiver of penalties; partial payments.

(a) Waiver. — A tax collector may, upon making a record of the reasons therefor, reduce or waive the penalty imposed on giving a worthless check under G.S. 105-357(b)(2).

(b) Partial Payments. — Unless otherwise directed by the governing body, the tax collector shall accept partial payments on taxes and issue partial payment receipts therefor.

When a payment is made on the tax for any year or on any installment, it shall first be applied to accrued penalties, interest, and costs and then to the principal amount of the tax or installment. In its discretion, the governing body may prescribe by uniform regulation the minimum amount or percentage of tax liability that may be accepted as a partial payment. (1939, c. 310, ss. 1708, 1709; 1971, c. 806, s. 1; 2002-156, s. 1.2; 2003-416, s. 10.)

§ 105-359. Prepayments.

(a) To Whom Made. — Payments of taxes made before the tax receipts have been delivered to the tax collector, herein referred to as prepayments, shall be made to the regular tax collector unless the governing body shall have designated some other person to receive them. The regular tax collector or person named to receive prepayments shall give bond satisfactory to the governing body.

(b) When Accepted. — No taxing unit shall be required to accept any tender of prepayment until the annual budget estimate has been filed as required by law.

(c) Estimation of Liability; Overpayment and Underpayment. — If the tax rate has not been finally fixed or if the assessed valuation of the taxpayer's property has not been finally determined at the time a prepayment is tendered, the tax collector shall compute the amount of the tax liability on the basis of the best information available to him. If it is later ascertained that there has been an overpayment, the excess (without interest) shall be refunded by the taxing unit. If it is later ascertained that there was an underpayment, the unpaid balance of the tax shall be due, and the balance due shall be allowed the discount or charged the interest in effect with respect to taxes for the same year at the time the balance is paid.

(d) Receipts. — A receipt issued for a prepayment made on the basis of an estimate of the tax rate or assessed valuation shall so state, and such a receipt shall not release property from the tax lien created by G.S. 105-355(a). An official and final receipt shall be made available to the taxpayer as soon as possible after determination that the tax has been fully paid.

(e) Duties of Chief Accounting Officer. — It shall be the duty of the chief accounting officer of the taxing unit to:

(1) Secure and retain in his office, available to taxpayers upon request, the official receipts for taxes paid in full by prepayment.

(2) Credit on the tax receipts to be delivered to the tax collector all taxes that have been paid in full or in part by prepayment.

(3) Prepare and deliver refunds for overpayments made by way of prepayment.

(4) Reduce the charge to be made against the tax collector by deducting from the total amount of taxes levied so much of the amount received as prepayments as is not required to be refunded under the provisions of subsection (c), above.

Any chief accounting officer who fails to perform the duties imposed upon him by this subsection (e) shall be guilty of a Class 1 misdemeanor. (1939, c. 310, ss. 1706, 1707; 1969, c. 921, s. 2; 1971, c. 806, s. 1; 1993, c. 539, s. 723; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Designation of County Official to Collect Prepayments. — By its failure to designate specifically any county official to collect prepayments under this section, and by its instructions to the sheriff as to the manner of collecting taxes and the payment of commissions, and by its acquiescence in the manner in which commissions were paid to the sheriffs in the past years, a county board of commissioners in effect designated the sheriff as collector of prepayments of taxes under this section. Barbour v. Goodman, 247 N.C. 655, 101 S.E.2d 696 (1958), decided under former similar provisions.

§ 105-360. Due date; interest for nonpayment of taxes; discounts for prepayment.

(a) Taxes levied under this Subchapter by a taxing unit are due and payable on September 1 of the fiscal year for which the taxes are levied. Taxes are payable at par or face amount if paid before January 6 following the due date. Taxes paid on or after January 6 following the due date are delinquent and are subject to interest charges. Interest accrues on taxes paid on or after January 6 as follows:

(1) For the period January 6 to February 1, interest accrues at the rate of two percent (2%); and

(2) For the period February 1 until the principal amount of the taxes, the accrued interest, and any penalties are paid, interest accrues at the rate of three-fourths of one percent (3⁄4%) a month or fraction thereof.

(b) Repealed by Session Laws 1987, c. 93, s. 2.

(c) Under the conditions established by this subsection (c), the governing body of any county or municipality levying taxes under the provisions of this Subchapter shall have authority to establish a schedule of discounts to be applied to taxes paid prior to the due date prescribed in subsection (a) above. To exercise this authority, the governing body shall:

(1) Not later than the first day of May preceding the due date of the taxes to which it first applies, adopt a resolution or ordinance specifying the amounts of the discounts and the periods of time during which they are to be applicable.

(2) Submit the resolution or ordinance to the Department of Revenue for approval.

(3) Upon approval by the Department of Revenue, publish the discount schedule at least once in some newspaper having general circulation in the taxing unit.

When such a resolution or ordinance is submitted to the Department of Revenue, the Department may approve it or disapprove it in whole or in part if, in the opinion of the Department, the discounts or the periods of time for which discounts are allowed are excessive or unreasonable. Such a resolution or ordinance, once adopted and approved by the Department of Revenue, shall continue in effect until repealed. Nothing in this subsection (c) shall prevent the governing body of any taxing unit from providing by resolution that the schedule of discounts for prepayment of taxes in effect in the taxing unit on June 30, 1971, shall continue in effect through November 1, 1971, but no longer.

(d) For the purposes of computing discounts and interest, tax payments submitted by mail shall be deemed to be received as of the date shown on the postmark affixed by the United States Postal Service. If no date is shown on the postmark or if the postmark is not affixed by the United States Postal Service, the tax payment shall be deemed to be received when the payment is received in the office of the tax collector. In any dispute arising under this subsection, the burden of proof shall be on the taxpayer to show that the payment was timely made. (1939, c. 310, s. 1403; 1943, c. 667; 1945, c. 247, s. 3; c. 1041; 1947, c. 888, s. 1; 1969, c. 921, s. 1; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1977, c. 327, s. 2; c. 630; 1979, c. 233, ss. 1, 2; 1987, c. 93, ss. 1, 2.)

Local Modification. — Brunswick: 1979, c. 439; Cabarrus: 1983, c. 823; Lincoln: 1981 (Reg. Sess., 1982), c. 1171, 1983 (Reg. Sess., 1984), c. 958; Stokes and municipalities located therein (for taxes paid prior to November 1, 2002): 2002-51, s. 2; Surry: 1991, c. 148; 1983, c. 241; town of Duck: 2001, c. 394, s.1 (for fiscal year 2002-2003); town of Midland (for fiscal year 2000-01, contingent on passage of local referendum): 2000-91, s. 2; town of Red Cross: 2002-56, s. 2 (for fiscal year 2002-2003); village of Chimney Rock: 1991, c. 444, s. 3 (for fiscal year 1991-92); village of Wesley Chapel: 1998-43, s. 2 (for fiscal years 1997-98 and 1998-99).

Support Troops Participating in Operations Enduring Freedom and Noble Eagle. — As to waiver of deadlines, fees, and penalties for military personnel participating in Operations Enduring Freedom and Noble Eagle, see note for Session Laws 2001-508, ss. 3 to 5(b), at G.S. 105-307.

Extension of Deadline for Payment of Property Taxes for Deployed Military Personnel. — Session Laws 2003-300, ss. 1, 2, and 4, provide: "Deployed Military Personnel Defined. — As used in this act, the term 'deployed military personnel' includes both of the following:

"(1) A member of the armed forces or the armed forces reserves of the United States on active duty in support of Operation Iraqi Freedom on or after January 1, 2003.

"(2) A member of the North Carolina Army National Guard or the North Carolina Air National Guard called to active duty in support of Operation Iraqi Freedom on or after January 1, 2003.

"Proof. — Verification by the military member's command specifying deployment is conclusive evidence of the military member's deployment.

"Property Taxes. — Notwithstanding G.S. 105-360 or G.S. 105-330.4, deployed military personnel are allowed 90 days after the end of their deployment to pay property taxes at par, for any property taxes that became due or delinquent during the term of the deployment. For these individuals, the taxes for the relevant tax year do not become delinquent until after the end of the 90-day period provided in this section, and an individual who pays the property taxes before the end of the 90-day period is not liable for interest on the taxes for the relevant tax year. If the individual does not pay the taxes before the end of the 90-day period, interest accrues on the taxes according to the schedule provided in G.S. 105-360 or G.S. 105-330.4, as applicable, as though the taxes were unpaid as of the date the taxes would have become delinquent if not for this section.

"Notwithstanding G.S. 105-307, deployed military personnel required to list property for taxation while deployed are allowed 90 days after the end of the deployment to list the property. For these individuals, the listing period for the relevant tax year is extended until the end of the 90-day period provided in this act, and an individual who lists the property before the end of the 90-day period is not subject to civil or criminal penalties for failure to list the property required to be listed during deployment."

Session Laws 2006-72, s. 1, provides: "A taxing unit's governing body may by resolution provide that, notwithstanding the provisions of G.S. 105-360 regarding the due date and accrual of interest, G.S. 105-380 and G.S. 105-381 regarding the release, refund, and compromise of taxes, and G.S. 160A-58.10 regarding the taxation of newly annexed property, property taxes for the partial fiscal year October 1, 2005, through June 30, 2006, shall be collected over a three-year period with one-third due and payable on September 1, 2006, one-third due and payable on September 1, 2007, and the remaining one-third due and payable on September 1, 2008. The resolution may provide that interest accrues on unpaid property taxes only to the extent that the property taxes have become due and payable under the payment schedule set out in the resolution. To the extent property taxes are due and payable pursuant to a resolution adopted under this act, interest accruing on taxes that remain unpaid shall be computed according to the schedule stated in G.S. 105-360. A resolution adopted pursuant to this act applies only to taxes for the partial fiscal year October 1, 2005, through June 30, 2006, on property located in an area that was annexed between January 1, 2003, and January 1, 2006, and for which effective date of the annexation was set by judicial order."

Session Laws 2006-72, s. 2, provides: "If a resolution adopted by a taxing unit's governing body pursuant to this act delays the due date, accrual of interest, or both for any property taxes, the tax collector's obligations under G.S. 160A-58.10 and G.S. 105-360 with respect to those taxes are delayed to the same extent."

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

CASE NOTES

Discrimination Between Different Counties. — A statute which discriminates between the different counties of the State, as to the times when the payment of taxes can be compelled, is not unconstitutional, since its provisions affect every one alike in the localities to which they are applicable and contain no violation of the principle of equation of taxation. State v. Jones, 121 N.C. 616, 28 S.E. 347 (1897), decided under former similar provisions.

Applied in In re Foreclosure of Deed of Trust, 41 N.C. App. 563, 255 S.E.2d 260 (1979).

Cited in W.R. Co. v. North Carolina Property Tax Comm'n, 48 N.C. App. 245, 269 S.E.2d 636 (1980); Justus v. Deutsch, 62 N.C. App. 711, 303 S.E.2d 571 (1983); Bradbury v. Cummings, 68 N.C. App. 302, 314 S.E.2d 568 (1984); Stafford

v. County of Bladen, 163 N.C. App. 149, 592 S.E.2d 711, 2004 N.C. App. LEXIS 305 (2004), appeal dismissed sub nom. Stafford v. Bladen Co., cert. denied, 358 N.C. 545, 599 S.E.2d 409 (2004).

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County May Not Impose Late Payment Penalty or Administrative Fee Upon Delinquent Property Tax Accounts. — Because the statutes authorizing property taxes provide for interest and/or penalties, a county may not, by ordinance, impose a late payment penalty or administrative fee upon delinquent property tax accounts. See opinion of Attorney General to Lloyd C. Smith, Jr., Pritchett & Burch, PLLC, 2001 N.C. AG LEXIS 6 (3/6/2001).

§ 105-361. Statement of amount of taxes due.

(a) Duty to Furnish a Certificate. — On the request of any of the persons prescribed in subdivision (a)(1), below, and upon the condition prescribed by subdivision (a)(2), below, the tax collector shall furnish a written certificate stating the amount of any taxes and special assessments for the current year and for prior years in his hands for collection (together with any penalties, interest, and costs accrued thereon) including the amount due under G.S. 105-277.4(c) if the property should lose its eligibility for the benefit of classification under G.S. 105-277.2 et seq. that are a lien on a parcel of real property in the taxing unit.

(1) Who May Make Request. — Any of the following persons shall be entitled to request the certificate:
  a. An owner of the real property;
  b. An occupant of the real property;
  c. A person having a lien on the real property;
  d. A person having a legal interest or estate in the real property;
  e. A person or firm having a contract to purchase or lease the property or a person or firm having contracted to make a loan secured by the property;
  f. The authorized agent or attorney of any person described in subdivisions (a)(1)a through e above.

(2) Duty of Person Making Request. — With respect to taxes, the tax collector shall not be required to furnish a certificate unless the person making the request specifies in whose name the real property was listed for taxation for each year for which the information is sought. With respect to assessments, the tax collector shall not be required to furnish a certificate unless the person making the request furnishes such identification of the real estate as may be reasonably required by the tax collector.

(b) Reliance on the Certificate. — When a certificate has been issued as provided in subsection (a), above, all taxes and special assessments that have accrued against the property for the period covered by the certificate shall cease to be a lien against the property, except to the extent of taxes and special assessments stated to be due in the certificate, as to all persons, firms, and corporations obtaining such a certificate and their successors in interest who rely on the certificate:

(1) By paying the amount of taxes and assessments stated therein to be a lien on the real property;
(2) By purchasing or leasing the real property; or
(3) By lending money secured by the real property.

The tax collector shall be liable on his bond for any loss to the taxing unit arising from an understatement of the tax and special assessment obligations in the preparation of a certificate furnished under this section.

(c) Penalty. — Any tax collector who fails or refuses to furnish a certificate when requested under the conditions prescribed in this section shall be liable for a penalty of fifty dollars ($50.00) recoverable in a civil action by the person who made the request.

(d) Oral Statements. — An oral statement made by the tax collector as to the amount of taxes, special assessments, penalties, interest, and costs due on any real or personal property shall bind neither the tax collector nor the taxing unit.

(e) Internet. — If the taxing unit maintains an Internet web site on which current information on the amount of taxes, special assessments, penalties, interest, and costs due on any real or personal property is available, the governing body of the taxing unit may adopt an ordinance to allow a person to rely on information obtained from the web site as if it were a certificate issued pursuant to subsection (a) of this section. The ordinance may provide for disclaimers to be posted on the web site containing language notifying the person relying on the information contained in the web site about matters relevant to the information, such as the date on which the information was posted, the date as of which the information is current, and any special instructions and procedures for accessing the complete and accurate information. The ordinance may also provide for appropriate procedural provisions by which the tax collector may ensure full and accurate payment of all taxes, assessments, and obligations certified under this subsection.

A person who relies on the web site information must keep and present a copy of the information as necessary or appropriate, as if the copy were a certificate issued under subsection (a) of this section. The tax collector shall be liable on the tax collector's bond for any loss to the taxing unit arising from an understatement of the tax and special assessment obligations contained in the information available on the web site unless the taxing unit's ordinance provides the disclaimers authorized by this subsection. (1939, c. 310, s. 1711; 1971, c. 806, s. 1; 1973, c. 604; c. 1340; 2003-399, s. 1.)

§ 105-362. Discharge of lien on real property.

(a) General Rule. — The tax lien on real property shall continue until the principal amount of the taxes plus penalties, interest, and costs allowed by law have been fully paid.

(b) Release of Separate Parcels from Tax Lien. —

(1) When the lien of taxes of any taxing unit for any year attaches to two or more parcels of real property owned by the same taxpayer, the lien may be discharged as to any parcel at any time prior to advertisement of tax foreclosure sale in accordance with either subdivision (b)(1)a or subdivision (b)(1)b:

a. Upon payment, by or on behalf of the listing taxpayer, of the taxes for the year on the parcel or parcels to be released, plus all personal property taxes owed by the listing taxpayer for the same year.

b. Upon payment, by or on behalf of any person (other than the listing taxpayer) who has a legal interest in the parcel or parcels to be released, of the taxes for the year on the parcel or parcels to be released, plus a proportionate part of personal property taxes owed by the listing taxpayer for the same year. The proportionate part shall be a percentage of the personal property taxes equal to the percentage of the total assessed valuation of the taxpayer's real property in the taxing unit represented by the assessed valuation of the parcel or parcels to be released.

(2) When real property listed as one parcel is divided, a part thereof may be released as provided in subdivision (b)(1), above, after the assessed

valuation of the part to be released has been determined and certified to the tax collector by the tax supervisor.

(3) It shall be the duty of the tax collector accepting a payment made under this subsection (b) for the purpose of releasing the tax lien from less than all of the taxpayer's real property:

a. To give the person making the payment a receipt setting forth a description of the real property released from the tax lien and bearing a statement that such property is being released from the tax lien.

b. To indicate on the tax receipts, tax records, and other official records of his office what real property has been released from the tax lien.

If the tax collector fails to issue the receipt or make the record entries required by this subdivision (3), the omission may be supplied at any time.

(4) When any parcel of real property has been released under the provisions of this subsection (b) from the lien of taxes of any taxing unit for any year, the property shall not thereafter be subject to the lien of any other regularly levied taxes of the same taxing unit for the same year, whether such other taxes be levied against the listing owner of the property or against some other person acquiring title thereto. No tax foreclosure judgment for such other taxes shall become a lien on the released property; and, upon appropriate request and satisfactory proof of the release by any interested person, the clerk of the superior court shall indicate on the judgment docket that the judgment is not a lien on the released property. However, the failure to make such an entry shall not have the effect of making the judgment a lien on the released property. (1939, c. 310, s. 1704; 1971, c. 806, s. 1.)

CASE NOTES

Duration of Lien. — The General Assembly, pursuant to the Constitution, has established the procedure for levying and collecting taxes and when levied the tax lien shall continue until the taxes, plus interest, penalties, and costs, as allowed by law, have been fully paid. City of Charlotte v. Kavanaugh, 221 N.C. 259, 20 S.E.2d 97 (1942), decided under former similar provisions.

Cancellation of Liens on Specific Parcels. — When taxes are owed on several parcels of real estate in a county, an interested party may pay the taxes owed on one parcel and cancel the tax lien on that parcel. Goldsboro Milling Co. v. Reaves, 804 F. Supp. 762 (E.D.N.C. 1991).

Any time before the taxes have been reduced to a judgment, one may pay the real property taxes accrued on a specific parcel, with a pro-rata portion of any personal property taxes and advertising expenses, and have that parcel released from all tax liens. Goldsboro Milling Co. v. Reaves, 804 F. Supp. 762 (E.D.N.C. 1991).

Attorney's Fees. — Subsection (a) and G.S. 105-374(e) do not specifically include attorney's fees as "costs" and G.S. 105-374(i) contemplates attorney's fees as they are awarded by the court in its discretion; thus, plaintiff acted improperly by refusing to release tax lien against defendants' property until attorney's fees were paid. Onslow County v. Phillips, 123 N.C. App. 317, 473 S.E.2d 643 (1996), modified on other grounds, 346 N.C. 265, 485 S.E.2d 618 (1997).

§ 105-363. Remedies of cotenants and joint owners of real property.

(a) Payment of Taxes on Share of One Cotenant. — Any one of several tenants in common or joint tenants (other than copartners) of real property may pay that portion of the taxes, interest, and costs that are a lien upon his undivided share of the property and thereby release the tax lien from his share. Thereafter, in any partition sale of the property the share of the joint owner who has paid his portion of the taxes shall be set apart free from the tax lien, and his share of the proceeds of any sale shall not be diminished by disbursements to pay any taxes, interest, or costs. In the event the tax lien is foreclosed and the property is sold for failure to pay taxes, the share of any joint owner who has paid his portion of the taxes shall be excepted from the advertisement and sale.

(b) Payment of Entire Amount of Taxes by One Cotenant. — Any one of several tenants in common or joint tenants (other than copartners) of real property may pay the entire amount of the taxes, interest, and costs constituting a lien on the property, and any amount so paid that is in excess of his share of the taxes, interest, and costs and that was not paid through agreement with or on behalf of the other joint owners shall constitute a lien in his favor upon the shares of the other joint owners. Such a lien may be enforced in a proceeding for actual partition, a proceeding for partition and sale, or by any other appropriate judicial proceeding. (1901, c. 558, ss. 13, 14, 47; Rev., s. 2860; C.S., s. 7983; 1971, c. 806, s. 1.)

CASE NOTES

Editor's Note. *— Some of the cases cited below were decided under former similar provisions.*

Payment by One Tenant in Common. — Petitioners in a proceeding for sale of land for partition may not object to the allowance of a sum advanced by one of the parties to pay taxes on the property, as provided by this section, when there is no exception or appeal entered of record by the testator's administrator. Everton v. Rodgers, 206 N.C. 115, 173 S.E. 48 (1934).

Where One Tenant in Possession. — This section refers to cases where all the tenants are on the same footing, all or none being in possession. It does not authorize one tenant in common to take title for the whole tract, nor does it apply to a case where one tenant was in possession for all. Smith v. Smith, 150 N.C. 81, 63 S.E. 177 (1908).

Contention of Exclusive Possession Rejected. — Trial judge properly ordered reimbursement under this section, despite contention of one cotenant that the other, her ex-husband, was in sole possession of the property. A cotenant's mere presence on the property does not amount to a prima facie showing of exclusive possession. Consequently, the trial judge did not, and was not required to, make findings on that issue. Knotts v. Hall, 85 N.C. App. 463, 355 S.E.2d 237, aff'd, 321 N.C. 119, 361 S.E.2d 591 (1987).

§ 105-364. Collection of taxes outside the taxing unit.

(a) Duty of Governing Body. — It shall be the duty of the governing body of each taxing unit to require reports from the tax collector at such times as it may prescribe (but not less frequently than in connection with the tax collector's annual settlement) concerning the efforts he has made to locate taxpayers who have removed from the taxing unit, the efforts he has made to locate personal property in other taxing units belonging to delinquent taxpayers, and the efforts he has made under the provisions of this section to collect taxes.

(b) Duty to Certify Unpaid Taxes. — If a taxpayer has no personal property or real property subject to the tax lien in the taxing unit but does have personal property in some other taxing unit in this State, or if a taxpayer has removed from the taxing unit, leaving no personal property or real property subject to the tax lien there, and is known to be in some other taxing unit in this State, the tax collector shall forward the tax receipt (with a certificate stating that the taxes are unpaid) for collection to the tax collector of the taxing unit in which the taxpayer is known to have personal property or in which he is known to be. The tax collector may not, however, certify an unpaid tax receipt to another taxing unit if 10 years have elapsed since the date the unpaid taxes became due.

(c) Effect of Certificate; Duty of Receiving Tax Collector. — In the hands of the tax collector receiving them, the copy of the tax receipt and the certificate of nonpayment shall have the force and effect of an unpaid tax receipt of his own taxing unit, and it shall be the receiving tax collector's duty to proceed immediately to collect the taxes by any means by which he could lawfully collect taxes of his own taxing unit. Within 30 days after receiving such a tax receipt and certificate, the collector receiving them shall report to the tax collector that sent them that he has collected the tax, that he has begun proceedings to collect the tax, or that he is unable to collect it. If the tax collector reports that he has begun proceedings to collect the tax, he shall, not later than 90 days after so reporting, make a final report to the tax collector who certified the tax receipt stating that he has collected the tax or that he is unable to collect it.

(1) In acting on a tax receipt and certificate under the provisions of this section, the tax collector receiving them shall, in addition to collecting the amount of taxes certified as due, also impose a fee equal to ten percent (10%) of the amount of taxes certified as unpaid, to be paid into the general fund of his taxing unit.

(2) Within five days after making a collection under the provisions of this section, the tax collector receiving the tax receipt and certificate shall remit the funds collected, less the fee provided for in subdivision (c)(1), above, to the tax collector of the taxing unit that levied the tax.

(3) If the tax collector receiving the tax receipt and certificate reports that he is unable to collect the tax, he shall make his report under oath and shall state therein that he has used due diligence and is unable to collect the tax by levy, attachment and garnishment, or any other legal means.

(d) Liability on Bond. — A tax collector who receives a tax receipt and certificate from the tax collector of another taxing unit under the provisions of subsection (b), above, shall be liable on his bond to the taxing unit that levied the tax for the amount of the taxes certified if:

(1) The tax collector receiving the certified tax receipt fails to make any report to the certifying tax collector within 30 days after receiving the certified tax receipt.

(2) The tax collector receiving the certified tax receipt fails to swear to any report stating that he is unable to collect the certified tax.

(3) Having reported that he has begun proceedings to collect a certified tax, the tax collector receiving the certified tax receipt fails to make a final report within 90 days after reporting that he has begun proceedings for collection. (1939, c. 310, s. 1714; 1955, c. 909; 1963, c. 132; 1971, c. 806, s. 1; 1973, c. 231.)

Local Modification. — Gaston: 1979, c. 303.

§ 105-365. Preference accorded taxes in liquidation of debtors' estates.

In all cases in which a taxpayer's assets are in the hands of a receiver or assignee for the benefit of creditors or are otherwise being liquidated or managed for the benefit of creditors, the taxes owed by the debtor (together with interest, penalties, and costs) shall be a preferred claim, second only to administration expenses and specific liens. The provisions of this section shall not be construed to modify or reduce the priority given by G.S. 105-356 to tax liens on real and personal property or to alter or preclude the exercise of any remedies against personal property provided for in G.S. 105-366. (1939, c. 310, s. 1704; 1971, c. 806, s. 1.)

§ 105-366. Remedies against personal property.

(a) Authority to Proceed against Personal Property; Relation between Remedies against Personal Property and Remedies against Real Property. — All tax collectors shall have authority to proceed against personal property to enforce the collection of taxes as provided in this section and in G.S. 105-367 and 105-368. Any tax collector may, in his discretion, proceed first against personal property before employing the remedies for enforcing the lien for taxes against real property, and he shall proceed first against personal property:

(1) When directed to do so by the governing body of the taxing unit; or

(2) When requested to do so by the taxpayer or by a mortgagee or other person holding a lien upon the real property subject to the lien for taxes if the person making the request furnishes the tax collector with a written statement describing the personal property to be proceeded against and giving its location.

No foreclosure of a tax lien on real property may be attacked as invalid on the ground that payment of the tax should have been procured from personal property.

(b) Remedies after Taxes Are Delinquent. — At any time after taxes are delinquent and before the filing of a tax foreclosure complaint under G.S. 105-374 or the docketing of a judgment for taxes under G.S. 105-375, and subject to the provisions of G.S. 105-356 governing the priority of liens, the tax collector may levy upon and sell or attach the following property for failure to pay taxes:

(1) Any personal property owned by the taxpayer, regardless of the time at which it was acquired and regardless of the existence or date of creation of mortgages or other liens thereon.

(2) Any personal property transferred by the taxpayer to a relative (which shall mean any parent, grandparent, child, grandchild, brother, sister, aunt, uncle, niece, or nephew, or their spouses, of the taxpayer or his spouse).

(3) Personal property in the hands of a receiver for the taxpayer. (It shall not be necessary for the tax collector to apply for an order of the court directing payment or authorizing the levy or attachment, but he may proceed as though the property were not in the hands of the receiver, and the tax collector's filing of a claim in a receivership proceeding shall not preclude him from proceeding to levy under G.S. 105-367 or to attach under G.S. 105-368.)

(4) Personal property of a deceased taxpayer if the levy or attachment is made before final settlement of the estate.

(5) The stock of goods or fixtures of a wholesale merchant or retailer, as defined in G.S. 105-164.3, in the hands of a purchaser or transferee thereof, or any other personal property of the purchaser or transferee of the property, if the taxes on the goods or fixtures remain unpaid 30 days after the date of the sale or transfer. In the case of other personal property of the purchaser or transferee, the levy or attachment must be made within six months of the sale or transfer.

(6) Personal property of the taxpayer that has been repossessed by one having a security interest therein so long as the property remains in the hands of the person who has repossessed it or the person to whom it has been transferred other than by bona fide sale for value.

(7) Personal property due the taxpayer or to become due to him within the calendar year.

(8) Personal property of a partner in satisfaction of taxes on partnership property, but only after the tax collector:
  a. Has sold the taxing unit's lien for taxes against the partnership real property, if any; and
  b. Exhausted the partnership's personal property through the use of levy and attachment and garnishment; and
  c. Exercised the authority granted him by G.S. 105-364 in an effort to collect the tax due on the partnership's property.

(9) Personal property transferred by the taxpayer by any type of transfer other than those mentioned in this subsection (b) and other than by bona fide sale for value if the levy or attachment is made within six months of the transfer.

(c) Remedies Before Taxes Are Delinquent. — If between the date as of which property is to be listed and January 6 of the fiscal year for which the taxes are imposed the tax collector has reasonable grounds for believing that the taxpayer is about to remove his property from the taxing unit or transfer it to another person or is in imminent danger of becoming insolvent, the tax collector may levy on or attach that property or any other personal property of the taxpayer, in the manner provided in G.S. 105-367 and 105-368. If the amount of taxes collected under this subsection has not yet been determined, these taxes shall be computed in accordance with G.S. 105-359 and any applicable discount shall be allowed.

(d) Remedies against Sellers and Purchasers of Stocks of Goods or Fixtures of Wholesale Merchants or Retailers. —

(1) Any wholesale merchant or retailer, as defined in G.S. 105-164.3, who sells or transfers the major part of its stock of goods, materials, supplies, or fixtures, other than in the ordinary course of business, or who goes out of business, must take the following actions:
  a. At least 48 hours prior to the date of the pending sale, transfer, or termination of business, give notice to the assessors and tax collectors of the taxing units in which the business is located.
  b. Within 30 days of the sale, transfer, or termination of business, pay all taxes due or to become due on the transferred property on the first day of September of the current calendar year.

(2) Any person to whom the major part of the stock of goods, materials, supplies, or fixtures of a wholesale merchant or retailer is sold or transferred, other than in the ordinary course of business, or who becomes the successor in business of a wholesale merchant or retailer shall withhold from the purchase money paid to the merchant an amount sufficient to pay the taxes due or to become due on the transferred property on the first day of September of the current calendar year until the former owner or seller produces either a receipt from the tax collector showing that the taxes have been paid or a certificate that no taxes are due. If the purchaser or successor in business fails to withhold a sufficient amount of the purchase money to pay the taxes as required by this subsection and the taxes remain unpaid after the 30-day period allowed, the purchaser or successor is personally liable for the amount of the taxes unpaid. This liability may be enforced by means of a civil action brought in the name of the taxing unit against the purchaser or successor in an appropriate trial division of the General Court of Justice in the county in which the taxing unit is located.

(3) Whenever any wholesale merchant or retailer sells or transfers the major part of its stock of goods, materials, supplies, or fixtures, other than in the ordinary course of business, or goes out of business and the taxes due or to become due on the transferred property on the first day

of September of the current calendar year are unpaid, the tax collector, to enforce collection of the unpaid taxes, may do any of the following:

a. Levy on or attach any personal property of the seller.

b. If the taxes remain unpaid 30 days after the date of the transfer or termination of business, levy on or attach any of the property transferred in the hands of the transferee or successor in business, or any other personal property of the transferee or successor in business, but in either case the levy or attachment must be made within six months of the transfer or termination of business.

(4) In using the remedies provided in this subsection, the amount of taxes not yet determined shall be computed in accordance with G.S. 105-359, and any applicable discount shall be allowed. (1939, c. 310, s. 1713; 1951, c. 1141, s. 1; 1955, cc. 1263, 1264; 1957, c. 1414, ss. 2-4; 1969, c. 305; c. 1029, s. 1; 1971, c. 806, s. 1; 1973, c. 564, s. 1; 1987, c. 45, s. 1; c. 93, s. 3; 1998-98, ss. 112, 113.)

CASE NOTES

Constitutionality. — This section and G.S. 105-368, enabling a city to garnish defendant taxpayer's bank account for taxes due on a bulk sale without prior notice or hearing, do not violate the due process or equal protection rights of the taxpayer as guaranteed by the Constitutions of the United States and this State. Town of Hudson v. Martin-Kahill Ford Lincoln Mercury, Inc., 54 N.C. App. 272, 283 S.E.2d 417 (1981), cert. denied, 304 N.C. 733, 288 S.E.2d 804 (1982).

Sale by Assignee for Benefit of Creditors Prior to Levy. — Where an assignee for the benefit of the creditors of a taxpayer sells personal property of his assignor, on which a tax had been assessed, but not levied, prior to the assignment, the proceeds in the hands of the assignee are not subject to garnishment for the payment of the tax, but belong to the creditors. Town of Shelby v. Tiddy, 118 N.C. 792, 24 S.E. 521 (1896).

Tax list in the hands of a tax collector is equivalent to an execution, and the tax collector, in lieu of selling real estate for the collection of taxes due thereon, may seize personal property belonging to the taxpayer and sell same or so much thereof as may be necessary for the satisfaction of all taxes due by the taxpayer. Town of Apex v. Templeton, 223 N.C. 645, 27 S.E.2d 617 (1943).

Notice of Place Where Property Will be Sold. — Notice that a county would conduct a tax sale at a "storage location" to collect taxes due on a mobile home did not provide specificity required by G.S. 1-339.51, and the trial court properly invalidated the sale of a home that was valued at $50,000, but was sold for $5,000. Oakwood Acceptance Corp., LLC v. Massengill, 162 N.C. App. 199, 590 S.E.2d 412, 2004 N.C. App. LEXIS 118 (2004).

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When merchant transfers goods without paying personal property tax, and when taxing unit fails to levy on the property within six months, the purchaser becomes personally liable. See opinion of Attorney General to Mr. Fred P. Parker, Jr., 41 N.C.A.G. 482 (1971).

§ 105-367. Procedure for levy.

(a) The levy upon the sale of tangible personal property for tax collection purposes (including levy and sale fees) shall be governed by the laws regulating levy and sale under execution except as otherwise provided in this section.

(b) The tax collector or any duly appointed deputy tax collector shall make the levy and conduct the sale; it shall not be necessary for the sheriff to make the levy or conduct the sale. However, upon the authorization of the governing body of the taxing unit, the tax collector may direct an execution against personal property for taxes to the sheriff in the case of county or municipal taxes or to a municipal policeman in the case of municipal taxes. In either case the officer to whom the execution is directed shall proceed to levy on and sell the personal property subject to levy in the manner and with the powers and authority normally exercised by sheriffs in levying upon and selling personal property under execution.

(c) In addition to the notice of sale required by the laws governing sale of property levied upon under execution, the tax collector may advertise the sale in any reasonable manner and for any reasonable period of time he deems necessary to produce an adequate bid for the property. The taxing unit shall advance the cost of all advertising.

(d) Levy and sale fees, plus actual advertising costs, shall be added to and collected in the same manner as taxes. The advertising costs, when collected, shall be used to reimburse the taxing unit for advertising costs it has advanced. Levy and sale fees, when collected, shall be treated in the same manner as other fees received by the collecting official. (1939, c. 310, s. 1713; 1951, c. 1141, s. 1; 1955, cc. 1263, 1264; 1957, c. 1414, ss. 2-4; 1969, c. 305; c. 1029, s. 1; 1971, c. 806, s. 1.)

CASE NOTES

Notice of Place Where Property Will be Sold. — Notice that a county would conduct a tax sale at a "storage location" to collect taxes due on a mobile home did not provide specificity required by G.S. 1-339.51, and the trial court properly invalidated the sale of a home that was valued at $50,000, but was sold for $5,000. Oakwood Acceptance Corp., LLC v. Massengill, 162 N.C. App. 199, 590 S.E.2d 412, 2004 N.C. App. LEXIS 118 (2004).

§ 105-368. Procedure for attachment and garnishment.

(a) Subject to the provisions of G.S. 105-356 governing the priority of the lien acquired, the tax collector may attach wages and other compensation, rents, bank deposits, the proceeds of property subject to levy, or any other intangible personal property, including property held in the Escheat Fund, in the circumstances and to the extent prescribed in G.S. 105-366(b), (c), and (d).

In the case of property due the taxpayer or to become due to him within the current calendar year, the person owing the property to the taxpayer or having the property in his possession shall be liable for the taxes to the extent of the amount he owes or has in his possession. However, when wages or other compensation for personal services is attached, the garnishee shall not pay to the tax collector more than ten percent (10%) of such compensation for any one pay period.

(b) To proceed under this section, the tax collector shall serve or cause to be served upon the taxpayer and the person owing or having in his possession the wages, rents, debts or other property sought to be attached a notice as provided by this subsection. The notice may be personally served by any deputy or employee of the tax collector or by any officer having authority to serve summonses, or may be served in any manner provided in Rule 4 of the North Carolina Rules of Civil Procedure. The notice shall contain:

(1) The name of the taxpayer, and if known his Social Security number or federal tax identification number and his address.
(2) The amount of the taxes, penalties, interest, and costs (including the fees allowed by this section) and the year or years for which the taxes were imposed.
(3) The name of the taxing unit or units by which the taxes were levied.
(4) A brief description of the property sought to be attached.
(5) A copy of the applicable law, that is, G.S. 105-366 and 105-368. Notices concerning two or more taxpayers may be combined if they are to be served upon the same garnishee, but the taxes, penalties, interest, and costs charged against each taxpayer must be set forth separately.

(c) If the garnishee has no defense to offer or no setoff against the taxpayer, he shall within 10 days after service of the notice answer it by sending to the tax collector by registered or certified mail a statement to that effect, and if the amount demanded by the tax collector is then due to the taxpayer or subject to his demand, the garnishee shall remit it to the tax collector with his statement; but if the amount due to the taxpayer or subject to his demand is to mature in the future, the garnishee's statement shall set forth that fact, and the demand shall be paid to the tax collector upon maturity. Any payment by the garnishee under the provisions of this subsection (c) shall completely satisfy any liability therefor on his part to the taxpayer.

(d) If the garnishee has a defense or setoff against the taxpayer, he shall state it in writing under oath, and, within 10 days after service of the garnishment notice, he shall send two copies of his statement to the tax collector by registered or certified mail. If the tax collector admits the defense or setoff, he shall so advise the garnishee in writing within 10 days after receipt of the garnishee's statement, and the attachment or garnishment shall thereupon be discharged to the amount required by the defense or setoff, and any amount attached or garnished which is not affected by the defense or setoff shall be remitted to the tax collector as provided in subsection (c), above.

If the tax collector does not admit the defense or setoff, he shall set forth in writing his objections thereto and send a copy thereof to the garnishee within 10 days after receipt of the garnishee's statement, or within such further time as may be agreed on by the garnishee, and at the same time the tax collector shall file a copy of the notice of garnishment, a copy of the garnishee's statement, and a copy of the tax collector's objections thereto in the appropriate division of the General Court of Justice of the county in which the garnishee resides or does business, where the issues made shall be tried as in civil actions.

(e) If the garnishee has not responded to the notice of garnishment as required by subsections (c) and (d), above, within 15 days after service of the notice, the tax collector may file in the appropriate division of the General Court of Justice of the county in which the garnishee resides a copy of the notice of garnishment, accompanied by a written statement that the garnishee has not responded thereto and a request for judgment, and the issues shall be tried as in civil actions.

(f) The taxpayer may raise any defenses to the attachment or garnishment that he may have in the manner provided in subsection (d), above, for the garnishee.

(g) The fee for serving a notice of garnishment shall be the same as that charged in a civil action. If judgment is entered in favor of the taxing unit by default or after hearing, the garnishee shall become liable for the taxes, penalties, and interest due by the taxpayer, plus the fees and costs of the action, but payment shall not be required from amounts which are not to become due to the taxpayer until they actually come due. The garnishee may satisfy the judgment upon paying the amount thereof, and if he fails to do so, execution may issue as provided by law. From any judgment or order entered, either the taxing unit or the garnishee may appeal as provided by law. If, before or after judgment, adequate security is filed for the payment of the taxes, penalties, interest, and costs, the tax collector may release the attachment or garnishment, or execution may be stayed at the request of the tax collector pending appeal, but the final judgment shall be paid or enforced as above provided. If judgment is rendered against the taxing unit, it shall pay the fees and costs of the action. All fees collected by officers shall be disposed of in the same manner as other fees collected by such officers.

(h) Tax collectors may proceed against the wages, salary, or other compensation of officials and employees of this State and its agencies, instrumentalities, and political subdivisions in the manner provided in this section. If the taxpayer is an employee of the State, the notice of attachment shall be served upon him and upon the head or chief fiscal officer of the department, agency, instrumentality, or institution by which he is employed. If the taxpayer is an employee of a political subdivision of the State (county, municipality, etc.), the notice of attachment shall be served upon him and upon the officer charged with making up the payrolls of the political subdivision by which he is employed. All deductions from the wages or salary of a taxpayer made pursuant to this subsection (h) and remitted to the tax collector shall, pro tanto, constitute a satisfaction of the salary or wages due the taxpayer.

(i) (1) Any person who, after written demand therefor, refuses to give the tax collector or assessor a list of the names and addresses of all of his employees who may be liable for taxes, shall be guilty of a Class 1 misdemeanor.

(2) Any tax collector or assessor who receives, upon his written demand, any list of employees may not release or furnish that list or any copy thereof, or disclose any name or information thereon, to any other person, and may not use that list in any manner or for any purpose not directly related to and in furtherance of the collection and foreclosure of taxes. Any tax collector or assessor who violates or allows the violation of this subdivision (i)(2) shall be guilty of a Class 1 misdemeanor. (1939, c. 310, s. 1713; 1951, c. 1141, s. 1; 1955, cc. 1263, 1264; 1957, c. 1414, ss. 2-4; 1969, c. 305; c. 1029, s. 1; 1971, c. 806, s. 1; 1979, c. 103, ss. 3, 4; 1979, 2nd Sess., c. 1085, s. 2; 1981, c. 76, s. 1; 1987, c. 45, s. 1; 1989, c. 580, s. 2; 1993, c. 539, s. 724; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Constitutionality. — Section 105-366 and this section, enabling a city to garnish defendant taxpayer's bank account for taxes due on a bulk sale without prior notice or hearing, do not violate the due process or equal protection rights of the taxpayer as guaranteed by the Constitutions of the United States and this State. Town of Hudson v. Martin-Kahill Ford Lincoln Mercury, Inc., 54 N.C. App. 272, 283 S.E.2d 417 (1981), cert. denied, 304 N.C. 733, 288 S.E.2d 804 (1982).

Proper notice under this statute is a prerequisite to a valid attachment. City of Durham v. Herndon, 61 N.C. App. 275, 300 S.E.2d 460 (1983).

Where the notice states the amount of taxes, penalties, interest, and assessments, the requirement of the statute even though the amount stated is not divided specifically into the stated categories and although the notice does not contain the year or years for which the taxes were imposed, this omission is not fatal since giving notice to those whose property is attached, which is the purpose of the statute. City of Durham v. Herndon, 61 N.C. App. 275, 300 S.E.2d 460 (1983).

To require the bank to establish priority by exercising the right to setoff before receiving notice of attachment would necessitate the senseless practice of requiring a garnishee bank to anticipate which accounts might potentially be attached in order to avoid losing its right to the property upon receipt of notice of attachment. In re Taxes of Bob Dance Chevrolet, 67 N.C. App. 509, 313 S.E.2d 207 (1984).

OPINIONS OF ATTORNEY GENERAL

Municipal Police Officer May Serve Notice of Attachment and Garnishment within the Corporate Limits. — See opinion of Attorney General to Mr. J. Troy Smith, Jr., 42 N.C.A.G. 296 (1973).

Home addresses of State employees may be obtained by ad valorem tax collectors pursuant to subsection (i) of this section. See opinion of Attorney General to Dr. Sarah T. Morrow, Secretary, Department of Human Resources, 52 N.C.A.G. 85 (1983).

§ 105-369. Advertisement of tax liens on real property for failure to pay taxes.

(a) Report of Unpaid Taxes That Are Liens on Real Property. — In February of each year, the tax collector must report to the governing body the total amount of unpaid taxes for the current fiscal year that are liens on real property. A county tax collector's report is due the first Monday in February, and a municipal tax collector's report is due the second Monday in February. Upon receipt of the report, the governing body must order the tax collector to advertise the tax liens. For purposes of this section, district taxes collected by county tax collectors shall be regarded as county taxes and district taxes collected by municipal tax collectors shall be regarded as municipal taxes.

(b) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1013.

(b1) Notice to Owner. — After the governing body orders the tax collector to advertise the tax liens, the tax collector must send a notice to the record owner of each affected parcel of property, as determined as of the date the taxes became delinquent. The notice must be sent to the owner's last known address by first-class mail at least 30 days before the date the advertisement is to be published. The notice must state the principal amount of unpaid taxes that are a lien on the parcel to be advertised and inform the owner that the name of the record owner as of the date the taxes became delinquent will appear in a newspaper advertisement of delinquent taxes if the taxes are not paid before the publication date. Failure to mail the notice required by this section to the correct record owner does not affect the validity of the tax lien or of any foreclosure action.

(c) Time and Contents of Advertisement. — A tax collector's failure to comply with this subsection does not affect the validity of the taxes or tax liens. The county tax collector shall advertise county tax liens by posting a notice of the liens at the county courthouse and by publishing each lien at least one time in one or more newspapers having general circulation in the taxing unit. The municipal tax collector shall advertise municipal tax liens by posting a notice of the liens at the city or town hall and by publishing each lien at least one time in one or more newspapers having general circulation in the taxing unit. Advertisements of tax liens shall be made during the period March 1 through June 30. The costs of newspaper advertising shall be paid by the taxing unit. If the taxes of two or more taxing units are collected by the same tax collector, the tax liens of each unit shall be advertised separately unless, under the provisions of a special act or contractual agreement between the taxing units, joint advertisement is permitted.

The posted notice and newspaper advertisement shall set forth the following information:

(1) Repealed by Session Laws 2006-106, s. 2, effective for taxes imposed for taxable years beginning on or after July 1, 2006.

(1a) The name of the record owner as of the date the taxes became delinquent for each parcel on which the taxing unit has a lien for unpaid taxes, in alphabetical order.

(1b) After the information required by subdivision (1a) of this subsection for each parcel, a brief description of each parcel of land to which a lien has attached and a statement of the principal amount of the taxes constituting a lien against the parcel.

(2) A statement that the amounts advertised will be increased by interest and costs and that the omission of interest and costs from the amounts advertised will not constitute waiver of the taxing unit's claim for those items.

(3) In the event the list of tax liens has been divided for purposes of advertisement in more than one newspaper, a statement of the names

of all newspapers in which advertisements will appear and the dates on which they will be published.

(4) A statement that the taxing unit may foreclose the tax liens and sell the real property subject to the liens in satisfaction of its claim for taxes.

(d) Costs. — Each parcel of real property advertised pursuant to this section shall be assessed an advertising fee to cover the actual cost of the advertisement. Actual advertising costs per parcel shall be determined by the tax collector on any reasonable basis. Advertising costs assessed pursuant to this subsection are taxes.

(e) Payments during Advertising Period. — At any time during the advertisement period, any parcel may be withdrawn from the list by payment of the taxes plus interest that has accrued to the time of payment and a proportionate part of the advertising fee to be determined by the tax collector. Thereafter, the tax collector shall delete that parcel from any subsequent advertisement, but the tax collector is not liable for failure to make the deletion.

(f) Listing and Advertising in Wrong Name. — No tax lien is void because the real property to which the lien attached was listed or advertised in the name of a person other than the person in whose name the property should have been listed for taxation if the property was in other respects correctly described on the abstract or in the advertisement.

(g) Wrongful Advertisement. — Any tax collector or deputy tax collector who willfully advertises any tax lien knowing that the property is not subject to taxation or that the taxes advertised have been paid is guilty of a Class 3 misdemeanor, and shall be required to pay the injured party all damages sustained in consequence. (1939, c. 310, s. 1715; 1955, c. 993; 1971, c. 806, s. 1; 1983, c. 808, s. 1; 1983 (Reg. Sess., 1984), c. 1013; 1993, c. 539, s. 725; 1994, Ex. Sess., c. 24, s. 14(c); 1999-439, s. 1; 2000-140, s. 73; 2006-106, s. 2.)

Editor's Note. — Subdivision (b1) has been designated as such at the direction of the Revisor of Statutes.

Session Laws 1983, c. 808, which rewrote this section, provided in s. 12 that the act would not affect the validity of any tax lien sale held before July 1, 1983, and in s. 13 provided: "Anything in this act to the contrary notwithstanding, any person, firm, or corporation who purchased or took assignment of a tax lien sale certificate before July 1, 1983, pursuant to statutes amended or repealed by this act may initiate a foreclosure action under G.S. 105-374 no earlier than six months after the date of the original lien sale."

Effect of Amendments. — Session Laws 2006-106, s. 2, effective for taxes imposed for taxable years beginning on or after July 1, 2006, rewrote subsection (b1); repealed subdivision (c)(1); and rewrote subdivision (c)(1a).

CASE NOTES

Judgment Is Lien on All Property Owned by Debtor. — A judgment for taxes is a lien on all of the property owned by the judgment debtor in the county. Goldsboro Milling Co. v. Reaves, 804 F. Supp. 762 (E.D.N.C. 1991).

Power to sell real estate for taxes was repealed by Session Laws 1939, c. 310, and the sheriff or tax collector is limited to the sale of the tax lien. Crandall v. Clemmons, 222 N.C. 225, 22 S.E.2d 448 (1942).

Tax lien can be enforced only by an action in the county in which the land is situated in the nature of an action to foreclose a mortgage. Crandall v. Clemmons, 222 N.C. 225, 22 S.E.2d 488 (1942). See §§ 105-374 and 105-375.

Newspaper Must Meet "General Circulation" Requirements of Both Subsection (d) and § 1-597. — In order to qualify to publish notices of tax lien sales a newspaper must meet the "general circulation" requirements of both subsection (d) of this section, and G.S. 1-597. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

Reading both G.S. 1-597 and subsection (d) of this section together and giving effect to each, in order for a newspaper to qualify to publish notices of tax lien sales it must be a newspaper of general circulation to actual paid subscribers in the taxing unit. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

This Section and § 1-597 Do Not Con-

flict. — The "general circulation" provision in subsection (d) of this section does not conflict with its counterpart in G.S. 1-597. It simply specifies the geographic area, i.e., "the taxing unit" in which there must be a newspaper of general circulation and the times at which publication must be made. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

General Circulation to Actual Paid Subscribers in Taxing Unit. — For a newspaper to be one of general circulation to actual paid subscribers in the taxing unit it must meet a four-pronged test: first, it must have a content that appeals to the public generally; second, it must have more than a de minimis number of actual paid subscribers in the taxing unit; third, its paid subscriber distribution must not be entirely limited geographically to one community, or section, of the taxing unit; and fourth, it must be available to anyone in the taxing unit who wishes to subscribe to it. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

Contents Are Primary Consideration. — The term "general circulation," when applied to newspapers, refers not so much to the numerical or geographic distribution of the newspaper as it does to the contents of the paper itself. The primary consideration is whether the newspaper contains information of general interest. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

But Quantitative Aspects Also Considered. — Although courts have focused on content in defining "general circulation," the term is not devoid of quantitative aspects. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

More Than De Minimis Number of Readers Required. — In order to satisfy the quantitative considerations inherent in the term "general circulation," a newspaper must enjoy more than a de minimis number of readers in the taxing unit; this number must not be so insignificant that the newspaper simply fails to reach a diverse group of people in the area prescribed. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

Need for more than de minimis number of paid subscribers does not mean that those subscribers must be evenly distributed in every city, town or section of the county or taxing unit, nor must publication be in the paper with the widest geographical distribution in the county. Neither G.S. 1-597 nor subsection (d) of this section so require. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

Whether newspaper has de minimis number of subscribers must always be determined in context. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

Only Actual Paid Subscribers May Be Considered. — To determine whether more than a de minimis number of readers exists, only actual paid subscribers may be considered. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

Cancellation of Lien on Specific Parcel. — Any time before the taxes have been reduced to a judgment, one may pay the real property taxes accrued on a specific parcel, with a prorata portion of any personal property taxes and advertising expenses, and have that parcel released from all tax liens. Goldsboro Milling Co. v. Reaves, 804 F. Supp. 762 (E.D.N.C. 1991).

Cited in Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976); Henderson County v. Osteen, 292 N.C. 692, 235 S.E.2d 166 (1977); Onslow County v. Phillips, 123 N.C. App. 317, 473 S.E.2d 643 (1996), modified on other grounds, 346 N.C. 265, 485 S.E.2d 618 (1997); Stafford v. County of Bladen, 163 N.C. App. 149, 592 S.E.2d 711, 2004 N.C. App. LEXIS 305 (2004), appeal dismissed sub nom. Stafford v. Bladen Co., cert. denied, 358 N.C. 545, 599 S.E.2d 409 (2004).

§§ 105-370 through 105-372: Repealed by Session Laws 1983, c. 808, ss. 2-4.

Editor's Note. — Session Laws 1983, c. 808, s. 12, provided that the act would not affect the validity of any tax lien sale held before July 1, 1983.

Session Laws 1983, c. 808, s. 13, provided: "Anything in this act to the contrary notwithstanding, any person, firm, or corporation who purchased or took assignment of a tax lien sale certificate before July 1, 1983, pursuant to statutes amended or repealed by this act may initiate a foreclosure action under G.S. 105-374 no earlier than six months after the date of the original lien sale."

§ 105-373. Settlements.

(a) Annual Settlement of Tax Collector. —

(1) Preliminary Report. — After July 1 and before he is charged with

taxes for the current fiscal year, the tax collector shall make a sworn report to the governing body of the taxing unit showing:

a. A list of the persons owning real property whose taxes for the preceding fiscal year remain unpaid and the principal amount owed by each person; and

b. A list of the persons not owning real property whose personal property taxes for the preceding fiscal year remain unpaid and the principal amount owed by each person. (To this list the tax collector shall append his statement under oath that he has made diligent efforts to collect the taxes due from the persons listed out of their personal property and by other means available to him for collection, and he shall report such other information concerning these taxpayers as may be of interest to or required by the governing body, including a report of his efforts to make collection outside the taxing unit under the provisions of G.S. 105-364.) The governing body of the taxing unit may publish this list in any newspaper in the taxing unit. The cost of publishing this list shall be paid by the taxing unit.

(2) Insolvents. — Upon receiving the report required by subdivision (a)(1), above the governing body of the taxing unit shall enter upon its minutes the names of persons owing taxes (but who listed no real property) whom it finds to be insolvent, and it shall by resolution designate the list entered in its minutes as the insolvent list to be credited to the tax collector in his settlement.

(3) Settlement for Current Taxes. — After July 1 and before he is charged with taxes for the current fiscal year, the tax collector shall make full settlement with the governing body of the taxing unit for all taxes in his hands for collection for the preceding fiscal year.

a. In the settlement the tax collector shall be charged with:

1. The total amount of all taxes in his hands for collection for the year, including amounts originally charged to him and all amounts subsequently charged on account of discoveries;
2. All penalties, interest, and costs collected by him in connection with taxes for the current year; and
3. All other sums collected by him.

b. The tax collector shall be credited with:

1. All sums representing taxes for the year deposited by him to the credit of the taxing unit or receipted for by a proper official of the unit;
2. Releases duly allowed by the governing body;
3. The principal amount of taxes constituting liens on real property;
4. The principal amount of taxes included in the insolvent list determined in accordance with subdivision (a)(2), above;
5. Discounts allowed by law;
6. Commissions (if any) lawfully payable to the tax collector as compensation; and
7. The principal amount of taxes for any assessment appealed to the Property Tax Commission when the appeal has not been finally adjudicated.

The tax collector shall be liable on his bond for both honesty and faithful performance of duty; for any deficiencies; and, in addition, for all criminal penalties provided by law.

The settlement, together with the action of the governing body with respect thereto, shall be entered in full upon the minutes of the governing body.

(4) Disposition of Tax Receipts after Settlement. — Uncollected taxes allowed as credits in the settlement prescribed in subdivision (a)(3), above, whether represented by tax liens held by the taxing unit or included in the list of insolvents, shall, for purposes of collection, be recharged to the tax collector or charged to some other person designated by the governing body of the taxing unit under statutory authority. The person charged with uncollected taxes shall:

a. Give bond satisfactory to the governing body;
b. Receive the tax receipts and tax records representing the uncollected taxes;
c. Have and exercise all powers and duties conferred or imposed by law upon tax collectors; and
d. Receive compensation as determined by the governing body.

(b) Settlements for Delinquent Taxes. — Annually, at the time prescribed for the settlement provided in subdivision (a)(3), above, all persons having in their hands for collection any taxes for years prior to the year involved in the settlement shall settle with the governing body of the taxing unit for collections made on each such year's taxes. The settlement for the taxes for prior years shall be made in whatever form is satisfactory to the chief accounting officer and the governing body of the taxing unit, and it shall be entered in full upon the minutes of the governing body.

(c) Settlement at End of Term. — Whenever any tax collector fails to succeed himself at the end of his term of office, he shall, on the last business day of his term, make full and complete settlement for all taxes (current or delinquent) in his hands and deliver the tax records, tax receipts, tax sale certificates, and accounts to his successor in office. The settlement shall be made in whatever form is satisfactory to the chief accounting officer and the governing body of the taxing unit, and it shall be entered in full upon the minutes of the governing body.

(d) Settlement upon Vacancy during Term. — When a tax collector voluntarily resigns, he shall, upon his last day in office, make full settlement (in the manner provided in subsection (c), above) for all taxes in his hands for collection. In default of such a settlement, or in case of a vacancy occurring during a term for any reason, it shall be the duty of the chief accounting officer or, in the discretion of the governing body, of some other qualified person appointed by it immediately to prepare and submit to the governing body a report in the nature of a settlement made on behalf of the former tax collector. The report, together with the governing body's action with respect thereto, shall be entered in full upon the minutes of the governing body. Whenever a settlement must be made in behalf of a former tax collector, as provided in this subsection (d), the governing body may deliver the tax receipts, tax records, and tax sale certificates to a successor collector immediately upon the occurrence of the vacancy, or it may make whatever temporary arrangements for the collection of taxes as may be expedient, but in no event shall any person be permitted to collect taxes until he has given bond satisfactory to the governing body.

(e) Effect of Approval of Settlement. — Approval of any settlement by the governing body does not relieve the tax collector or his bondsmen of liability for any shortage actually existing at the time of the settlement and thereafter discovered; nor does it relieve the collector of any criminal liability.

(f) Penalties. — In addition to any other civil or criminal penalties provided by law, any member of a governing body of a taxing unit, tax collector, or chief accounting officer who fails to perform any duty imposed upon him by this section shall be guilty of a Class 1 misdemeanor.

(g) Relief from Collecting Insolvents. — The governing body of any taxing unit may, in its discretion, relieve the tax collector of the charge of taxes owed by persons on the insolvent list that are five or more years past due when it appears to the governing body that such taxes are uncollectible.

(h) Relief from Collecting Taxes on Classified Motor Vehicles. The board of county commissioners may, in its discretion, relieve the tax collector of the charge of taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) that are one year or more past due when it appears to the board that the taxes are uncollectible. This relief, when granted, shall include municipal and special district taxes charged to the collector. (1939, c. 310, s. 1719; 1945, c. 635; 1947, c. 484, ss. 3, 4; 1951, c. 300, s. 1; c. 1036, s. 1; 1953, c. 176, s. 2; 1955, c. 908; 1967, c. 705, s. 1; 1971, c. 806, s. 1; 1983, c. 670, s. 22; c. 808, ss. 5-7; 1987, c. 16; 1991, c. 624, s. 3; 1991 (Reg. Sess., 1992), c. 961, s. 10; 1993, c. 539, s. 726; 1994, Ex. Sess., c. 24, s. 14(c); 1997-456, s. 27; 2006-30, s. 7.)

Editor's Note. — Session Laws 1983, c. 808, which amended this section, provided in s. 12 that the act would not affect the validity of any tax lien sale held before July 1, 1983, and in s. 13 provided: "Anything in this act to the contrary notwithstanding, any person, firm, or corporation who purchased or took assignment of a tax lien sale certificate before July 1, 1983, pursuant to statutes amended or repealed by this act may initiate a foreclosure action under G.S. 105-374 no earlier than six months after the date of the original lien sale."

In subdivision (a)(3), the first subdivisions (a)(3)a. through (a)(3)c. were redesignated as subdivisions (a)(3)a.1. through (a)(3)a.3., and the second subdivisions (a)(3)a. through (a)(3)f. were redesignated as subdivisions (a)(3)b.1. through (a)(3)b.6. pursuant to Session Laws 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designations that is incompatible with the General Assembly's computer database.

Effect of Amendments. — Session Laws 2006-30, s. 7, effective June 29, 2006, added subdivision (a)(3)b.7; and made related changes.

CASE NOTES

Legislative Power to Penalize. — The legislature has the power to impose penalties on the tax collector for his delay or failure to make settlement with the proper county authorities within a stated time. The power to coerce prompt collection and settlement of taxes is no less necessary than the power to levy and assess them, and both are essential to the maintenance of the government. State ex rel. Lovingood v. Gentry, 183 N.C. 825, 112 S.E. 427 (1922).

An extension of time, within which a sheriff may settle State taxes, does not exonerate the sureties upon his bond. Worth v. Cox, 89 N.C. 44 (1883), decided under former statute.

§ 105-374. Foreclosure of tax lien by action in nature of action to foreclose a mortgage.

(a) General Nature of Action. — The foreclosure action authorized by this section shall be instituted in the appropriate division of the General Court of Justice in the county in which the real property is situated and shall be an action in the nature of an action to foreclose a mortgage.

(b) Taxing units may proceed under this section, either on the original tax lien created by G.S. 105-355(a) or on the lien acquired at a tax lien sale held under former G.S. 105-369 before July 1, 1983, with or without a lien sale certificate; and the amount of recovery in either case shall be the same. To this end, it is hereby declared that the original attachment of the tax lien under G.S. 105-355(a) is sufficient to support a tax foreclosure action by a taxing unit, that the issuance of a lien sale certificate to the taxing unit for lien sales held before July 1, 1983, is a matter of convenience in record keeping within the discretion of the governing body of the taxing unit, and that issuance of such certificates is not a prerequisite to perfection of the tax lien.

(c) Parties; Summonses. — The owner of record as of the date the taxes became delinquent and spouse (if any), any subsequent owner, all other taxing units having tax liens, all other lienholders of record, and all persons who would be entitled to be made parties to a court action (in which no deficiency judgment is sought) to foreclose a mortgage on such property, shall be made parties and served with summonses in the manner provided by G.S. 1A-1, Rule 4.

The fact that the owner of record as of the date the taxes became delinquent, any subsequent owner, or any other defendant is a minor, is incompetent, or is under any other disability shall not prevent or delay the tax lien sale or the foreclosure of the tax lien; and all such persons shall be made parties and served with summons in the same manner as in other civil actions.

Persons who have disappeared or who cannot be located and persons whose names and whereabouts are unknown, and all possible heirs or assignees of such persons, may be served by publication; and such persons, their heirs, and assignees may be designated by general description or by fictitious names in such an action.

(c1) Lienholders Separately Designated. — The word "lienholder" shall appear immediately after the name of each lienholder (including trustees and beneficiaries in deeds of trust, and holders of judgment liens) whose name appears in the caption of any action instituted under the provisions of this section. Such designation is intended to make clear to the public the capacity of such persons which necessitated their having been made parties to such action. Failure to add such designation to captions shall not constitute grounds for attacking the validity of actions brought under this section, or titles to real property derived from such actions.

(d) Complaint as Lis Pendens. — The complaint in an action brought under this section shall, from the time it is filed in the office of the clerk of superior court, serve as notice of the pendency of the foreclosure action, and every person whose interest in the real property is subsequently acquired or whose interest therein is subsequently registered or recorded shall be bound by all proceedings taken in the foreclosure action after the filing of the complaint in the same manner as if those persons had been made parties to the action. It shall not be necessary to have the complaint cross-indexed as a notice of action pending to have the effect prescribed by this subsection (d).

(e) Subsequent Taxes. — The complaint in a tax foreclosure action brought under this section by a taxing unit shall, in addition to alleging the tax lien on which the action is based, include a general allegation of subsequent taxes which are or may become a lien on the same real property in favor of the plaintiff unit. Thereafter it shall not be necessary to amend the complaint to incorporate the subsequent taxes by specific allegation. In case of redemption before confirmation of the foreclosure sale, the person redeeming shall be required to pay, before the foreclosure action is discontinued, at least all taxes on the real property which have at the time of discontinuance become due to the plaintiff unit, plus penalties, interest, and costs thereon. Immediately prior to judgment ordering sale in a foreclosure action (if there has been no redemption prior to that time), the tax collector or the attorney for the plaintiff unit shall file in the action a certificate setting forth all taxes which are a lien on the real property in favor of the plaintiff unit (other than taxes the amount of which has not been definitely determined).

Any plaintiff in a tax foreclosure action (other than a taxing unit) may include in his complaint, originally or by amendment, all other taxes and special assessments paid by him which were liens on the same real property.

(f) Joinder of Parcels. — All real property within the taxing unit subject to liens for taxes levied against the same taxpayer for the first year involved in the foreclosure action may be joined in one action. However, if real property is transferred by the listing taxpayer subsequent to the first year involved in the foreclosure action, all subsequent taxes, penalties, interest, and costs (for which the property is ordered sold under the terms of this Subchapter) shall be prorated to such property in the same manner as if payments were being made to release such property from the tax lien under the provisions of G.S. 105-356(b).

(g) Special Benefit Assessments. — A cause of action for the foreclosure of the lien of any special benefit assessments may be included in any complaint filed under this section.

(h) Joint Foreclosure by Two or More Taxing Units. — Liens of different taxing units on the same parcel of real property, representing taxes in the hands of the same tax collector, shall be foreclosed in one action. Liens of different taxing units on the same parcel of real property, representing taxes in the hands of different tax collectors, may be foreclosed in one action in the discretion of the governing bodies of the taxing units.

The lien of any taxing unit made a party defendant in any foreclosure action shall be alleged in an answer filed by the taxing unit, and the tax collector of each answering unit shall, prior to judgment ordering sale, file a certificate of subsequent taxes similar to that filed by the tax collector of the plaintiff unit, and the taxes of each answering unit shall be of equal dignity with the taxes of the plaintiff unit. Any answering unit may, in case of payment of the plaintiff unit's taxes, continue the foreclosure action until all taxes due to it have been paid, and it shall not be necessary for any answering unit to file a separate foreclosure action or to proceed under G.S. 105-375 with respect to any such taxes.

If a taxing unit properly served as a party defendant in a foreclosure action fails to answer and file the certificate provided for in the preceding paragraph, all of its taxes shall be barred by the judgment of sale except to the extent that the purchase price at the foreclosure sale (after payment of costs and of the liens of all taxing units whose liens are properly alleged by complaint or answer and certificates) may be sufficient to pay such taxes. However, if a defendant taxing unit is plaintiff in another foreclosure action pending against the same property, or if it has begun a proceeding under G.S. 105-375, its answer may allege that fact in lieu of alleging its liens, and the court, in its discretion, may order consolidation of such actions or such other disposition thereof (and such disposition of the costs therein) as it may deem advisable. Any such order may be made by the clerk of the superior court, subject to appeal as provided in G.S. 1-301.1.

(i) Costs. — Subject to the provisions of this subsection (i), costs may be taxed in any foreclosure action brought under this section in the same manner as in other civil actions. When costs are collected, either by payment prior to the sale or upon payment of the purchase price at the foreclosure sale, the fees allowed officers shall be paid to those entitled to receive them. In foreclosure actions in which the plaintiff is a taxing unit, no prosecution bond shall be required.

The word "costs," as used in this subsection (i), shall be construed to include one reasonable attorney's fee for the plaintiff in such amount as the court shall, in its discretion, determine and allow. When a taxing unit is made a party defendant in a tax foreclosure action and files answer therein, there may be included in the costs an attorney's fee for the defendant unit in such amount as the court shall, in its discretion, determine and allow. The governing body of any taxing unit may, in its discretion, pay a smaller or greater sum than that allowed as costs to its attorney as a suit fee, and the governing body may allow a reasonable commission to its attorney on taxes collected by him after they have been placed in his hands; or the governing body may arrange with its attorney for the handling of tax foreclosure suits on a salary basis or may make any other reasonable agreement with its attorney or attorneys. Any arrangement made between a taxing unit and its attorney may provide that attorneys' fees collected as costs in foreclosure actions be collected for the use of the taxing unit.

In any foreclosure action in which real property is actually sold after judgment, costs shall include a commissioner's fee to be fixed by the court, not exceeding five percent (5%) of the purchase price; and in case of redemption between the date of sale and the order of confirmation, the fee shall be added to the amount otherwise necessary for redemption. In case more than one sale is made of the same property in any action, the commissioner's fee may be based on the highest amount bid, but the commissioner shall not be allowed a separate fee for each such sale. The governing body of any plaintiff unit may request the court to appoint as commissioner a salaried official, attorney, or employee of the unit and, when the requested appointment is made, may require that the commissioner's fees, when collected, be paid to the plaintiff unit for its use.

(j) Contested Actions. — Any action brought under this section in which an answer raising an issue requiring trial is filed within the time allowed by law shall be entitled to a preference as to time of trial over all other civil actions.

(k) Judgment of Sale. — Any judgment in favor of the plaintiff or any defendant taxing unit in an action brought under this section shall order the sale of the real property or as much as may be necessary for the satisfaction of all of the following:

(1) Taxes adjudged to be liens in favor of the plaintiff (other than taxes the amount of which has not been definitely determined) together with penalties, interest, and costs thereon.

(2) Taxes adjudged to be liens in favor of other taxing units (other than taxes the amount of which has not yet been definitely determined) if those taxes have been alleged in answers filed by the other taxing units, together with penalties, interest, and costs thereon.

The judgment shall appoint a commissioner to conduct the sale and shall order that the property be sold in fee simple, free and clear of all interests, rights, claims, and liens whatever except that the sale shall be subject to taxes the amount of which cannot be definitely determined at the time of the judgment, taxes and special assessments of taxing units which are not parties to the action, and, in the discretion of the court, taxes alleged in other tax foreclosure actions or proceedings pending against the same real property.

In all cases in which no answer is filed within the time allowed by law, and in cases in which answers filed do not seek to prevent sale of said property, the clerk of the superior court may enter the judgment, subject to appeal as provided in G.S. 1-301.1.

(*l*) Advertisement of Sale. — The sale shall be advertised, and all necessary resales shall be advertised, in the manner provided by Article 29A of Chapter 1 of the General Statutes or by any statute enacted in substitution therefor.

(m) Sale. — The sale shall be by public auction to the highest bidder and shall, in accordance with the judgment, be held at the courthouse door on any day of the week except a Sunday or legal holiday when the courthouse is closed for transactions. (In actions brought by a municipality that is not a county seat, the court may, in its discretion, direct that the sale be held at the city or town hall door.) The commissioner conducting the sale may, in his discretion, require from any successful bidder a deposit equal to not more than twenty percent (20%) of his bid, which deposit, in the event that the bidder refuses to take title and a resale becomes necessary, shall be applied to pay the costs of sale and any loss resulting. (However, this provision shall not deprive the commissioner of his right to sue for specific performance of the contract.) No deposit shall be required of a taxing unit that has made the highest bid at the foreclosure sale.

(n) Report of Sale. — Within three days following the foreclosure sale the commissioner shall report the sale to the court giving full particulars thereof.

(o) Exceptions and Increased Bids. — At any time within 10 days after the commissioner files his report of the foreclosure sale, any person having an interest in the real property may file exceptions to the report, and at any time within that 10-day period an increased bid may be filed in the amount specified by and subject to the provisions (other than provisions in conflict herewith) of Article 29A of Chapter 1 of the General Statutes or the provisions (other than provisions in conflict herewith) of any law enacted in substitution therefor. In the absence of exceptions or increased bids, the court may, whenever it deems such action necessary for the best interests of the parties, order resale of the property.

(p) Judgment of Confirmation. — At any time after the expiration of 10 days from the time the commissioner files his report, if no exception or increased bid has been filed, the commissioner may apply for judgment of confirmation, and in like manner he may apply for such a judgment after the court has passed upon exceptions filed, or after any necessary resales have been held and reported and 10 days have elapsed. The judgment of confirmation shall direct the commissioner to deliver the deed upon payment of the purchase price. This judgment may be entered by the clerk of superior court subject to appeal as provided in G.S. 1-301.1.

(q) Application of Proceeds; Commissioner's Final Report. — After delivery of the deed and collection of the purchase price, the commissioner shall apply the proceeds as follows:

(1) First, to payment of all costs of the action, including the commissioner's fee and the attorney's fee, which costs shall be paid to the officials or funds entitled thereto;

(2) Then to the payment of taxes, penalties, and interest for which the real property was ordered to be sold, and in case the funds remaining are insufficient for this purpose, they shall be distributed pro rata to the various taxing units for whose taxes the property was ordered sold;

(3) Then pro rata to the payment of any special benefit assessments for which the property was ordered sold, together with interest and costs thereon;

(4) Then pro rata to payment of taxes, penalties, interest, and costs of taxing units that were parties to the foreclosure action but which filed no answers therein;

(5) Then pro rata to payment of special benefit assessments of taxing units that were parties to the foreclosure action but which filed no answers therein, together with interest and costs thereon;

(6) And any balance then remaining shall be paid in accordance with any directions given by the court and, in the absence of such directions, shall be paid into court for the benefit of the persons entitled thereto. (If the clerk is in doubt as to who is entitled to the surplus or if any adverse claims are asserted thereto, the clerk shall hold the surplus until rights thereto are established in a special proceeding pursuant to G.S. 1-339.71.)

Within five days after delivering the deed, the commissioner shall make a full report to the court showing delivery of the deed, receipt of the purchase price, and the disbursement of the proceeds, accompanied by receipts evidencing all such disbursements.

(r) Purchase and Resale by Taxing Unit. — The rights of a taxing unit to purchase real property at a foreclosure sale and resell it are governed by G.S. 105-376. (1939, c. 310, s. 1719; 1945, c. 635; 1947, c. 484, ss. 3, 4; 1951, c. 300, s. 1; c. 1036, s. 1; 1953, c. 176, s. 2; 1955, c. 908; 1967, c. 705, s. 1; 1971, c. 806, s. 1; 1973, c. 788, s. 1; 1981, c. 580; 1983, c. 808, s. 8; 1999-216, ss. 14-16; 2003-337, s. 11; 2006-106, s. 3.)

Editor's Note. — Session Laws 1983, c. 808, which amended this section, provided in s. 12 that the act would not affect the validity of any tax lien sale held before July 1, 1983, and in s. 13 provided: "Anything in this act to the contrary notwithstanding, any person, firm, or corporation who purchased or took assignment of a tax lien sale certificate before July 1, 1983, pursuant to statutes amended or repealed by this act may initiate a foreclosure action under G.S. 105-374 no earlier than six months after the date of the original lien sale."

Effect of Amendments. — Session Laws 2006-106, s. 3, effective for taxes imposed for taxable years beginning on or after July 1, 2006, in subsection (c), substituted "owner of record as of the date the taxes became delinquent" for "listing taxpayer" and "any subsequent owner" for "the current owner" in the first sentence and substituted "owner of record as of the date the taxes became delinquent, any subsequent owner" for "listing taxpayer" in the first sentence of the second paragraph.

Legal Periodicals. — For survey of 1977 law on taxation, see 56 N.C.L. Rev. 1128 (1978).

CASE NOTES

I. General Consideration.
II. Parties to Actions.
III. Adequacy of Purchase Price.
IV. Exceptions.
V. Redemption.
VI. Attorneys' Fee.

I. GENERAL CONSIDERATION.

Editor's Note. — *Some of the cases cited below were decided under former similar provisions.*

Section 105-375 was enacted as an alternative to this section which authorizes tax foreclosures by actions in nature of action to foreclose mortgage. Jenkins v. Richmond County, 99 N.C. App. 717, 394 S.E.2d 258 (1990), discretionary review denied, 328 N.C. 572, 403 S.E.2d 512 (1991).

There are two distinct alternate methods provided by statute for the foreclosure of a tax sale certificate or the lien evidenced thereby: 1. After the land has been sold by the tax collector and a certificate of sale has been issued, the purchaser may institute an action to foreclose the lien evidenced by the certificate. This section provides the regulations and procedure respecting an action instituted pursuant to this method. 2. Under G.S. 105-375 the taxing unit may file in the office of the clerk of the superior court a certificate of sale of land to satisfy taxes. Thereupon, the clerk must docket the certificate upon his judgment docket. It then has the full force and effect of a judgment, and execution may issue thereon against the property of the tax debtor. Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952).

Prescribed Remedy Optional with State. — The fact that the Revenue Act prescribes a specific remedy for the collection of taxes does not restrict the State to pursue that method, nor preclude it from seeking the aid of the superior court through a creditor's suit. The specific remedy pointed out restricts only the officers who collect only the revenue and not the sovereign. State v. Georgia Co., 112 N.C. 34, 17 S.E. 10 (1893).

Summary Proceeding Unnecessary. — Where the legislature has authorized a municipality to collect back taxes, and in an action for that purpose it appears that the taxes of the defendant are due, and were properly assessed against lots of land within the limits of the municipality subject to the lien therefor it is not necessary that the plaintiffs should first have resorted to the summary method of levy and sale, for recourse may be had directly by suit to foreclose the lien, under this section. City of Wilmington v. Moore, 170 N.C. 52, 86 S.E. 775 (1915); Muddy Creek Drainage Comm'n v. Epley, 190 N.C. 672, 130 S.E. 497 (1925).

Suit for foreclosure of tax liens is a civil action, and not a special proceeding. This is made plain by the specific declaration of this section that "the foreclosure action . . . shall be an action in the nature of an action to foreclose a mortgage." Chappell v. Stallings, 237 N.C. 213, 74 S.E.2d 624 (1953).

Consolidation of Actions. — Where actions are pending in the same court, at the same time, between the same parties and involving substantially the same facts, they may be consolidated. The principle applies to tax foreclosure suits. McIver Park v. Brinn, 223 N.C. 502, 27 S.E.2d 548 (1943).

Effect of Failure of Owners to List Property for Taxes. — The jurisdiction of the superior court to determine the liability of the land for taxes was not defeated by a finding that the owners — defendants in the action — had not listed the property for taxes. County of Franklin v. Jones, 245 N.C. 272, 95 S.E.2d 863 (1957).

Benefits of subsection (e) apply only to taxing units, not private citizens. Keener v. Korn, 46 N.C. App. 214, 264 S.E.2d 829 (1980).

Taxes Due after Commencement of Action. — Where a county brings suit to foreclose a tax lien on the lands of the taxpayer and draws its complaint according to the provisions of this section, other taxes due after the commencement of the action are properly included in the judgment therein rendered in its favor. New Hanover County v. Whiteman, 190 N.C. 332, 129 S.E. 808 (1925).

Tax Collector Has No Lien Where Check Returned Unpaid. — The fact that a county tax collector accepted a check in payment for taxes, and the check was returned unpaid, and the collector in his settlement with the county paid the taxes in question, does not give him a lien which may be enforced under this section. The collector having failed to correct the tax record so as to show the check returned and the taxes unpaid, the tax lien was not reinstated. Miller v. Neal, 222 N.C. 540, 23 S.E.2d 852 (1943).

Taxes Not Subject to Setoff or Counterclaim. — Taxes are not debts in the ordinary sense of the word and they do not rest upon contract or consent of the taxpayer. Pleas of setoff and counterclaim are not allowed because to do so would delay the collection and payment of taxes, and would deprive the government of means of performing its functions. State ex rel. Graded Sch. v. McDowell, 157 N.C. 316, 72 S.E. 1083 (1911); Commissioners of Yancey County v. Hall, 177 N.C. 490, 99 S.E. 372 (1919).

In a suit by a town against defendants to foreclose a tax lien where defendants set up defense by answer and also a counterclaim, motion to strike the counterclaim and order thereon was proper, but the other defenses were unaffected thereby. Town of Apex v. Templeton, 223 N.C. 645, 27 S.E.2d 617 (1943).

Amount of Interest Recoverable. — Since no rate of interest was fixed by the section, only six percent interest was held recoverable. City of Wilmington v. Stolter, 122 N.C. 395, 30 S.E. 12 (1898).

Judgment Is Lien in Rem. — In an action to foreclose a lien for delinquent taxes or special assessments, the judgment obtained in said action constitutes a lien in rem, and the owner of the property is not personally liable for the payment thereof. Town of Apex v. Templeton, 223 N.C. 645, 27 S.E.2d 617 (1943).

Order of Foreclosure Restricted to Land Described in Complaint. — Where the complaint describes the real estate sought to be foreclosed to enforce the tax lien, the order of foreclosure is restricted to the described parcels, and so much of the judgment as authorizes the sale of other lands is in excess of the jurisdiction of the court. Miller v. McConnell, 226 N.C. 28, 36 S.E.2d 722 (1946).

Sale with No Other Notice Than Posting and Publication Offends Due Process. — Where the statutory alternative to foreclosure by court action as prescribed in G.S. 105-391 (now this section), is a sale without any notice except by posting and publication, the statutory alternative offends the fundamental concept of due process of law. Henderson County v. Osteen, 292 N.C. 692, 235 S.E.2d 166 (1977).

Effect of Failure to Allege Collection of Costs and Fees. — In an action by an ex clerk of the superior court against a county for the recovery of fees allegedly due such clerk in tax foreclosure suits by the county, the complaint, alleging that all of the tax suits in question were prosecuted to judgment against the various defendants, without any allegation or admission that in any of the suits the costs or fees were collected and turned over to the county, is demurrable as not stating a cause of action, the county being under no obligation to pay costs and officer's fees in advance, or ever unless collected. Watson v. Lee County, 224 N.C. 508, 31 S.E.2d 535 (1944).

Purported Adverse Possessor Not Entitled to Personal Notice. — Where a city, in a foreclosure action, gave personal notice to all the record owners of the property in question and notice by publication to all others having an interest in the disputed property who could not with due diligence be located, it was not required to give personal notice to a purported adverse possessor whose purported interest was not recorded. Overstreet v. City of Raleigh, 75 N.C. App. 351, 330 S.E.2d 643 (1985).

Judgment Foreclosing Tax Lien Extinguished All Rights. — The effect of a judgment foreclosing a tax lien on real property was to extinguish all rights, title and interests in the property subject to foreclosure, including a claim based on adverse possession. The interest in the disputed property acquired by the purchaser at the tax foreclosure sale was fee simple and the purchaser's title defeated the claims of ownership based on adverse possession. Overstreet v. City of Raleigh, 75 N.C. App. 351, 330 S.E.2d 643 (1985).

Failure to Notify Party with Interest. — In an action to foreclose a tax lien, all persons having an interest in the equity of redemption should be made parties by name, and judgment rendered in such proceeding is void as to any person having such interest who are not made parties; furthermore, one who purchases at a tax sale does so without warranty, is chargeable with knowledge that a commissioner's deed is no more than a quitclaim deed, and has the duty to investigate, or cause to be investigated, all sources of title. Thus, a county foreclosure action was void where a mortgagor and a second mortgagee, both being the only record interest holders at the time the action was commenced, and the buyers were charged with constructive notice of the recorded interests and, therefore, were unable to avail themselves to any argument as being a good faith purchaser for value. Beneficial Mortg. Co. of N.C., Inc. v. Barrington & Jones Law Firm, P.A., 164 N.C. App. 41, 595 S.E.2d 705, 2004 N.C. App. LEXIS 727 (2004).

Applied in Keener v. Korn, 46 N.C. App. 214, 264 S.E.2d 829 (1980); Guilford County v. Boyan, 49 N.C. App. 430, 272 S.E.2d 1 (1980); City of Durham v. Hicks, 135 N.C. App. 699, 522 S.E.2d 583, 1999 N.C. App. LEXIS 1227 (1999).

Cited in Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976); Bradbury v. Cummings, 68 N.C. App. 302, 314 S.E.2d 568 (1984).

II. PARTIES TO ACTIONS.

Necessary Parties. — In an action to foreclose a tax lien all persons having an interest in the equity of redemption must be made parties by name, and judgment rendered in such proceeding is void as to persons having such interest who are not made parties. City of Wilmington v. Merrick, 231 N.C. 297, 56 S.E.2d 643 (1949).

Owner of remainder subject to a life estate is a necessary party in an action to foreclose a tax lien. Board of Comm'rs v. Bumpass, 233 N.C. 190, 63 S.E.2d 144 (1951).

Class Representation of Contingent Remaindermen. — In an action to enforce the lien for taxes against lands affected by a contingent limitation over, in which each class of contingent remaindermen is represented by defendants actually served and answering, the judgment is binding upon all contingent remaindermen by class representation. Rodman v. Norman, 221 N.C. 320, 20 S.E.2d 294 (1942).

Failure to Join Heirs and Devisees Where Owners Deceased. — In an action to enforce the lien for taxes, each person having an estate in the land is a necessary party if his equity of redemption is to be barred, and where at the time of the institution of the proceeding the persons named in the summons and complaint as owners of the land are dead, and their heirs or devisees are not made parties, judgment of foreclosure and sale of the land thereunder cannot divest the title of the heirs or devisees. Page v. Miller, 252 N.C. 23, 113 S.E.2d 52 (1960).

Tax Sale of Land Owned by Minors. — A judgment decreeing foreclosure and ordering sale of land for taxes was not void on the ground that three of the defendants were minors where the court upon learning of such fact appointed a guardian ad litem for the minors who filed an answer prior to the date of the tax sale. County of Franklin v. Jones, 245 N.C. 272, 95 S.E.2d 863 (1957).

Receiver of a drainage district may proceed in an action in the nature of an action to foreclose a mortgage under this section for the collection of such drainage assessments. Nesbit v. Kafer, 222 N.C. 48, 21 S.E.2d 903 (1942).

III. ADEQUACY OF PURCHASE PRICE.

Court has authority to reject bid made at foreclosure sale of a tax sale certificate and order a resale, even in the absence of exceptions of an increased bid, under the provisions of subsection (o). Bladen County v. Squires, 219 N.C. 649, 14 S.E.2d 665 (1941).

Finding of Inadequacy Five Years Later. — A tax sale confirmed by the court was not rendered void by a finding five years later that the purchase price was unjust and inadequate. County of Franklin v. Jones, 245 N.C. 272, 95 S.E.2d 863 (1957).

Fraud, Suppression, or Unfairness Must Be Shown. — In an action to foreclose a tax lien on land, the mere inadequacy of the price bid therefor is not sufficient to avoid the sale and cancel the deed to the purchaser, unless some element of fraud, suppression of bidding, or other unfairness in the sale appears. Duplin County v. Ezzell, 223 N.C. 531, 27 S.E.2d 448 (1943).

IV. EXCEPTIONS.

When Exceptions Must Be Filed. — It is manifest that subsections (n), (o) and (p) require a person having an interest in the property involved in a tax foreclosure action to file exceptions to the report of a particular sale and to appeal from an adverse ruling on such exceptions when, and only when, his exceptions challenge the validity of the steps taken by the commissioner in conducting the particular sale, or the fairness of the particular sale in respect to price or other factors to the parties concerned. Chappell v. Stallings, 237 N.C. 213, 74 S.E.2d 624 (1953).

Subsections (n), (o) and (p) do not apply to objections which are addressed to the validity of the judgment of sale itself. In consequence, a person having an interest in the property involved in a tax foreclosure action does not lose the benefit of an aptly taken objection to the validity of the judgment of sale by failing to file exceptions to the report of a particular sale made under it, or by failing to take a specific appeal from an order confirming such particular sale. A proper legal objection to the validity of a judgment of sale in and of itself puts in issue the validity of all proceedings under it. Chappell v. Stallings, 237 N.C. 213, 74 S.E.2d 624 (1953).

V. REDEMPTION.

Owner's right of redemption is recognized in express terms in this section. The owner has the right to redeem his land from the lien of unpaid taxes by paying the taxes with accrued interest, penalties and costs, and the court costs at any time before the entry of a valid judgment in a tax foreclosure action confirming the judicial sale of the land for the satisfaction of the lien. Chappell v. Stallings, 237 N.C. 213, 74 S.E.2d 624 (1953).

Ample Opportunity Given to Redeem. — Where the judgment of foreclosure in a tax suit authorized a sale, in default of payment of all taxes, etc., on or before 60 days from the date of the judgment, and the original sale was held within 60 days of such date, and after two resales, the last of which was held more than three months after the date of the judgment, the sale was finally consummated, there was ample opportunity to redeem, and sale and confirmation were valid. McIver Park v. Brinn, 223 N.C. 502, 27 S.E.2d 548 (1943).

VI. ATTORNEYS' FEE.

Construed together, § 160A-233(c) and subsection (i) of this section provide for an award of one reasonable attorneys' fee, in the court's discretion, in a foreclosure of an assessment lien by action in nature of action to foreclose a mortgage. Guilford County v. Boyan, 42 N.C. App. 627, 257 S.E.2d 463 (1979).

Award of Attorneys' Fee Not Limited by § 6-21.2. — The amount of an attorneys' fee awarded in a tax foreclosure proceeding under this section is to be determined pursuant to subsection (i) in the discretion of the trial court and is not limited by the provisions of G.S. 6-21.2. Town of Sylva v. Gibson, 51 N.C. App. 545, 277 S.E.2d 115, cert. denied and appeal dismissed, 303 N.C. 319, 281 S.E.2d 659 (1981).

Attorney Fees Properly Awarded to Defendant in Proceeding Under Chapter 156. — Assuming subsection (i) of this section is incorporated by reference into Chapter 156, that the section provides for attorney fees for taxing authorities does not mean it prohibits attorney fees being taxed as part of costs for members of drainage districts. Northampton County Drainage Dist. Number One v. Bailey, 326 N.C. 742, 392 S.E.2d 352 (1990).

Determination of Fee by Defendants. — Where plaintiff was the party seeking attorney's fees, defendants could proceed by counterclaim for a determination of what constituted a reasonable attorney's fee and were not required to file a motion in the cause under subsection (i). Onslow County v. Phillips, 123 N.C. App. 317, 473 S.E.2d 643 (1996), modified on other grounds, 346 N.C. 265, 485 S.E.2d 618 (1997).

Refusal to Release Tax Lien Improper. — Section 105-362(a) and subsection (e) of this section do not specifically include attorney's fees as "costs" and subsection (i) of this section contemplates attorney's fees as they are awarded by the court in its discretion; thus, plaintiff acted improperly by refusing to release tax lien against defendants' property until attorney's fees were paid. Onslow County v. Phillips, 123 N.C. App. 317, 473 S.E.2d 643 (1996), modified on other grounds, 346 N.C. 265, 485 S.E.2d 618 (1997).

OPINIONS OF ATTORNEY GENERAL

Proper Court for Tax Foreclosure Suit. — See opinion of Attorney General to Mr. James R. Sugg, Craven County Attorney, 40 N.C.A.G. 808 (1970).

Foreclosure of Liens on Same Parcel by Different Taxing Units; Mandatory Procedure. — See opinion of Attorney General to Mr. Michael D. Lea, 41 N.C.A.G. 337 (1971).

§ 105-375. In rem method of foreclosure.

(a) Intent of Section. — It is hereby declared to be the intention of this section that proceedings brought under it shall be strictly in rem. It is further declared to be the intention of this section to provide, as an alternative to G.S. 105-374, a simple and inexpensive method of enforcing payment of taxes necessarily levied, to the knowledge of all persons, for the requirements of local governments in this State; and to recognize, in authorizing this proceeding, that all persons owning interests in real property know or should know that the tax lien on their real property may be foreclosed and the property sold for failure to pay taxes.

(b) Docketing Certificate of Taxes as Judgment. — In lieu of following the procedure set forth in G.S. 105-374, the governing body of any taxing unit may direct the tax collector to file with the clerk of superior court, no earlier than 30 days after the tax liens were advertised, a certificate showing the following: the name of the taxpayer as defined in G.S. 105-273(17), for each parcel on which the taxing unit has a lien for unpaid taxes, together with the amount of taxes, penalties, interest, and costs that are a lien thereon; the year or years for which the taxes are due; and a description of the property sufficient to permit its identification by parol testimony. The fees for docketing and indexing the certificate shall be payable to the clerk of superior court at the time the taxes are collected or the property is sold.

(c) Notice to Taxpayer and Others. —

(1) Notice required. — The tax collector filing the certificate provided for in subsection (b) of this section, shall, at least 30 days prior to docketing the judgment, send notice of the tax lien foreclosure to the taxpayer, as defined in G.S. 105-273(17), at the taxpayer's last known address, and to all lienholders of record who have a lien against the taxpayer (including any liens referred to in the conveyance of the property to the taxpayer).

(2) Contents of notice. — All notice required by this subsection shall state that a judgment will be docketed and the proposed date of the docketing, that execution will be issued as provided by law, a brief description of the real property affected, and that the lien may be satisfied prior to judgment being entered.

(3) Service of notice. — The notice required by this subsection shall be sent to the taxpayer by registered or certified mail, return receipt requested.

(4) Additional efforts may be required. — If within 10 days following the mailing of the notice, a return receipt has not been received by the tax collector indicating receipt of the notice, then the tax collector shall do both of the following:

a. Make reasonable efforts to locate and notify the taxpayer and all lienholders of record prior to the docketing of the judgment and the issuance of the execution. Reasonable efforts may include posting the notice in a conspicuous place on the property, or, if the property has an address to which mail may be delivered, mailing the notice by first-class mail to the attention of the occupant.

b. Have a notice published in a newspaper of general circulation in the county once a week for two consecutive weeks directed to, and naming, all unnotified lienholders and the taxpayer that a judgment will be docketed against the taxpayer.

(5) Costs of notice added to lien. — All costs of mailing and publication, plus a charge of fifty dollars ($50.00) to defray administrative costs, shall be added to the amount of taxes that are a lien on the real property and shall be paid by the taxpayer to the taxing unit at the time the taxes are collected or the property is sold.

(d) Effect of Docketing Certificate of Taxes Due. — Immediately upon the docketing and indexing of a certificate as provided in subsection (b), above, the taxes, penalties, interest, and costs shall constitute a valid judgment against the real property described therein, with the priority provided for tax liens in G.S. 105-356. The judgment, except as expressly provided in this section, shall have the same force and effect as a duly rendered judgment of the superior court directing sale of the property for the satisfaction of the tax lien, and it shall bear interest at an annual rate of eight percent (8%).

(e) Special Assessments. — Street, sidewalk, and other special assessments may be included in any judgment for taxes taken under this section, or the special assessments may be included in a separate judgment docketed under this section. The tax collector may use such a judgment as a method of foreclosing the lien of special assessments. When used to foreclose the lien of special assessments, the procedure may be instituted at any time after the assessment or installment falls due and remains unpaid; the waiting period required by subsection (b) of this section does not apply to the foreclosure of special assessments.

(f) Motion to Set Aside. — At any time prior to the issuance of execution, any person having an interest in the real property to be foreclosed may appear before the clerk of superior court and move to set aside the judgment on the ground that the tax has been paid or that the tax lien on which the judgment is based is invalid.

(g) Cancellation upon Payment. — Upon payment in full of any judgment docketed under this section, together with interest thereon and costs accrued to the date of payment, the tax collector receiving payment shall certify the fact thereof to the clerk of superior court and cancel the judgment.

(h) Relationship between G.S. 105-374 and This Section. — If, before the issuance of execution on the judgment under subsection (i), below, the taxing unit is made a defendant in a foreclosure action brought against the property under G.S. 105-374, it shall file an answer in that proceeding and thereafter all proceedings shall be governed by order of the court in accordance with that section.

(i) Issuance of Execution. — At any time after three months and before two years from the indexing of the judgment as provided in subsection (b), above, execution shall be issued at the request of the tax collector in the same manner as executions are issued upon other judgments of the superior court, and the real property shall be sold by the sheriff in the same manner as other real property is sold under execution with the following exceptions:

(1) No debtor's exemption shall be allowed.
(2) In lieu of personal service of notice on the taxpayer, the sheriff shall send notice by registered or certified mail, return receipt requested, to the taxpayer at the taxpayer's last known address at least 30 days prior to the day fixed for the sale. If within 10 days following the mailing of the notice, a return receipt has not been received by the sheriff indicating receipt of the notice, then the sheriff shall make additional efforts to locate and notify the taxpayer and all lienholders of record of the sale under execution in accordance with subdivision (4) of subsection (c) of this section.
(3) The sheriff shall add to the amount of the judgment as costs of the sale any postage expenses incurred by the tax collector and the sheriff in foreclosing under this section.
(4) In any advertisement or posted notice of sale under execution, the sheriff may (and at the request of the governing body shall) combine the advertisements or notices for properties to be sold under executions against the properties of different taxpayers in favor of the same taxing unit or group of units; however, the property included in each judgment shall be separately described and the name of the taxpayer specified in connection with each.

The purchaser at the execution sale shall acquire title to the property in fee simple free and clear of all claims, rights, interests, and liens except the liens of other taxes or special assessments not paid from the purchase price and not included in the judgment.

(j) Attorney's Fee. — The governing body of the taxing unit may make whatever arrangement it deems satisfactory for compensating an attorney rendering assistance or advice in foreclosure proceedings brought under this section, but the attorney's fee shall not be added to the judgment as part of the costs of the action.

(k) Consolidation of Liens. — By agreement between the governing bodies, two or more taxing units may consolidate their tax liens for the purpose of docketing a judgment, or may have one execution issued for separate judgments, against the same property. In like manner, one execution may issue for separate judgments in favor of one or more taxing units against the same property for different years' taxes.

(*l*) Purchase and Resale by Taxing Unit. — The rights of a taxing unit to purchase real property at a foreclosure sale and resell it are governed by G.S. 105-376.

(m) Procedure if Section Declared Unconstitutional. — If any provisions of this section are declared invalid or unconstitutional by the Supreme Court of North Carolina, a United States district court of three judges, the United States Circuit Court of Appeals, or the United States Supreme Court, all taxing units that have proceeded under this section shall have five years from the date of the filing of the opinion (or, in the case of appeal, from the date of the filing of the opinion on appeal) in which to institute foreclosure actions under G.S. 105-374 for all taxes included in judgments taken under this section and for subsequent taxes due or which, but for purchase of the property by the taxing unit, would have become due; and such judicial decision shall not have the effect of invalidating the tax lien or disturbing its priority. (1939, c. 310, s. 1720; 1945, c. 646; 1957, cc. 91, 1262; 1971, c. 806, s. 1; 1973, c. 108, s. 52; c. 681, ss. 1, 2; 1983, c. 808, s. 9; c. 855, ss. 1, 2; 1987, c. 450; 1989, c. 37, s. 7; c. 682; 1999-439, ss. 2, 3; 2001-139, s. 9; 2006-106, ss. 4-6.)

Editor's Note. — Session Laws 1983, c. 808, which amended this section, provided in s. 12 that the act would not affect the validity of any tax lien sale held before July 1, 1983, and in s. 13 provided: "Anything in this act to the contrary notwithstanding, any person, firm, or corporation who purchased or took assignment of a tax lien sale certificate before July 1, 1983, pursuant to statutes amended or repealed by this act may initiate a foreclosure action under G.S. 105-374 no earlier than six months after the date of the original lien sale."

Effect of Amendments. — Session Laws 2006-106, ss. 4 - 6, effective for taxes imposed for taxable years beginning on or after July 1, 2006, substituted "as defined in G.S. 105-273(17), for each parcel on which the taxing unit has a lien for unpaid taxes" for "listing real property on which the taxes are a lien" in subsection (b), and rewrote subsection (c) and subdivision (i)(2).

Legal Periodicals. — For survey of 1977 law on taxation, see 56 N.C.L. Rev. 1128 (1978).

CASE NOTES

This section was enacted as an alternative to § 105-374, which authorizes tax foreclosures by actions in nature of action to foreclose mortgage. Jenkins v. Richmond County, 99 N.C. App. 717, 394 S.E.2d 258 (1990), discretionary review denied, 328 N.C. 572, 403 S.E.2d 512 (1991).

Notices Indispensable to Valid Sale. — The giving of the notices of the docketing of the judgment and of the sale under execution, required by this section, is indispensable to a valid sale under that statute and the provision of G.S. 105-394, to the contrary, is in conflict with N.C. Const., Art. I, § 19. Henderson County v. Osteen, 292 N.C. 692, 235 S.E.2d 166 (1977).

The giving of the notice of sale under execution, by mailing a copy of the notice to the listing taxpayer at his last known address at least one week prior to the day fixed for the sale, as required by subdivision (i)(2) of this section, is constitutionally indispensable to a valid sale. Annas v. Davis, 40 N.C. App. 51, 252 S.E.2d 28 (1979).

Notice and Opportunity to Object. — It is axiomatic that prior to action affecting property, State must provide notice reasonably calculated, under all circumstances, to apprise interested parties of pendency of action and afford them opportunity to present objections. Jenkins v. Richmond County, 99 N.C. App. 717, 394 S.E.2d 258 (1990), discretionary review denied, 328 N.C. 572, 403 S.E.2d 512 (1991).

Execution Sale Invalid Due to County's Failure to Provide Attempt to Provide Notice to Property Owners. — Defendant county made no effort to determine location of or to send tax notice to three out of four current owners of real property in question, all of whom were listed on deed. This failure of the county to attempt to send mailed notices to each individual taxpayer rendered subsequent execution sale invalid. Jenkins v. Richmond County, 99 N.C. App. 717, 394 S.E.2d 258 (1990), discretionary review denied, 328 N.C. 572, 403 S.E.2d 512 (1991).

Due Process Satisfied. — When notice of the execution sale is sent by registered or certified mail to the listing taxpayer at his last known address, as is required by this section, such notice, in conjunction with the posting and publication also required by the statute, would be sufficient to satisfy the fundamental concept of due process of law and therefore, to comply with N.C. Const., Art. I, § 19, and the due process clause of U.S. Const., Amend. XIV. Henderson County v. Osteen, 292 N.C. 692, 235 S.E.2d 166 (1977).

Presumption of Regularity of Official Acts Applies to Mailing of Notice. — Under this section the taxpayer has constructive notice of the tax lien. Before the tax sale can take place, however, the sheriff is required to mail notice of the sale to the taxpayer at his last known address. The presumption of regularity of official acts should be applicable to the mailing of this notice by the sheriff's office. Henderson County v. Osteen, 297 N.C. 113, 254 S.E.2d 160 (1979).

While strict compliance with the notice provisions of this section is essential to a valid sale, the purchaser at a sale under the statute is entitled to rely on the presumption that official duties in connection with the sale were regularly and properly performed until a party challenging the validity of the sale has produced ample evidence to the contrary. Henderson County v. Osteen, 297 N.C. 113, 254 S.E.2d 160 (1979).

Foreclosure Sale Permissible After Death of Judgment Debtor. — Foreclosure of a tax lien by judgment and execution, pursuant to this section, is an exception to the general rule that land may not be sold under an execution issued after the death of the judgment debtor. Henderson County v. Osteen, 292 N.C. 692, 235 S.E.2d 166 (1977).

Mailing of Notice to Last Known Address Required. — When a county which has purchased a tax lien at a valid sale thereof and which, after notice to the listing taxpayer, has docketed a judgment and issued execution in accordance with the procedures prescribed in this section, the county may not, after the death of the taxpayer, without mailing notice to his last known address by registered or certified mail, as specified in the statute, sell his land, at a sale otherwise held in conformity to the statute, and convey a valid title to the purchaser for the reason that the provision of G.S. 105-394 declaring the failure so to mail the prescribed notice to the listing taxpayer a mere irregularity, not affecting the validity of the deed, is unconstitutional. Henderson County v. Osteen, 292 N.C. 692, 235 S.E.2d 166 (1977).

The county tax department provided a foreign taxpayer with sufficient notice of a tax foreclosure sale by mailing notice to the taxpayer's last known address in England and by publishing notice of the sale in the local newspaper, even though it could have gotten the taxpayer's new address by calling the country club where the lot was located, since such a call would place an "intolerable burden" on the local taxing unit. Hardy v. Moore County, 133 N.C. App. 321, 515 S.E.2d 84 (1999), aff'd, 351 N.C. 185, 522 S.E.2d 582 (1999).

Tenancy by Entireties. — Where, tax foreclosure proceedings under this section are instituted in regard to land held by husband and wife by the entireties, but the proceedings are solely against the husband without notice to the wife, the tax sale on the certificate-judgment is wholly ineffectual, since the wife is not bound thereby and the husband has no divisible interest in the property which is subject to execution. Edwards v. Arnold, 250 N.C. 500, 109 S.E.2d 205 (1959) (decided under former similar provisions).

Burden of proof is on party attacking validity of tax foreclosure sale. Henderson County v. Osteen, 297 N.C. 113, 254 S.E.2d 160 (1979).

Judgment Foreclosing Tax Lien Extinguished All Rights. — The effect of a judgment foreclosing a tax lien on real property was to extinguish all rights, title and interests in the property subject to foreclosure, including a claim based on adverse possession. The interest in the disputed property acquired by the purchaser at the tax foreclosure sale was fee simple and the purchaser's title defeated the claims of ownership based on adverse possession. Overstreet v. City of Raleigh, 75 N.C. App. 351, 330 S.E.2d 643 (1985).

Failure to Serve Owner. — Where the evidence clearly showed that there was no personal service upon defendant-owner and that plaintiff town knew that defendant no longer resided at recorded address, trial court unerringly ruled that the judgment entered in the action was void. Town of Cary v. Stallings, 97 N.C. App. 484, 389 S.E.2d 143 (1990).

Applied in Howell v. Treece, 70 N.C. App. 322, 319 S.E.2d 301 (1984); Murray v. Cumberland County, 98 N.C. App. 143, 389 S.E.2d 616 (1990).

Cited in Harden v. Marshall, 69 N.C. App. 489, 317 S.E.2d 116 (1984).

OPINIONS OF ATTORNEY GENERAL

Surplus Proceeds of Execution Sale May Not Be Paid for Taxes Not Included in the Judgment. — See opinion of Attorney General to Mr. John T. Page, Jr., Richmond County Attorney, 40 N.C.A.G. 778 (1970), issued under former similar provisions.

Circumstances When Clerk Authorized to Issue Execution; Necessity of Description of Property. — See opinion of Attorney General to Mr. Edwin Roland, 41 N.C.A.G. 427 (1971), issued under former similar provisions.

§ 105-376. Taxing unit as purchaser at foreclosure sale; payment of purchase price; resale of property acquired by taxing unit.

(a) Taxing Unit as Purchaser. — Any taxing unit (or two or more taxing units jointly) may bid at a foreclosure sale conducted under G.S. 105-374 or G.S. 105-375, and any taxing unit that becomes the successful bidder may assign its bid at any time by private sale for not less than the amount of the bid.

(b) Payment of Purchase Price by Taxing Units; Status of Property Purchased by Taxing Units. — Any taxing unit that becomes the purchaser at a tax foreclosure sale may, in the discretion of its governing body, pay only that part of the purchase price that would not be distributed to it and other taxing units on account of taxes, penalties, interest, and such costs as accrued prior to the initiation of the foreclosure action under G.S. 105-374 or docketing of a judgment under G.S. 105-375. Thereafter, in such a case, the purchasing taxing unit shall hold the property for the benefit of all taxing units that have an interest in the property as defined in this subsection (b). All net income from real property so acquired and the proceeds thereof, when resold, shall be first used to reimburse the purchasing unit for disbursements actually made by it in connection with the foreclosure action and the purchase of the property, and any balance remaining shall be distributed to the taxing units having an interest therein in proportion to their interests. The total interest of each taxing unit, including the purchasing unit, shall be determined by adding:

(1) The taxes of the unit, with penalties, interest, and costs (other than costs already reimbursed to the purchasing unit) to satisfy which the property was ordered sold;
(2) Other taxes of the unit, with penalties, interest, and costs which would have been paid in full from the purchase price had the purchase price been paid in full;
(3) Taxes of the unit, with penalties, interest, and costs to which the foreclosure sale was made subject; and
(4) The principal amount of all taxes which became liens on the property after purchase at the foreclosure sale or which would have become liens thereon but for the purchase, but no amount shall be included for taxes for years in which (on the day as of which property was to be listed for taxation) the property was being used by the purchasing unit for a public purpose.

If the amount of net income and proceeds of resale distributable exceeds the total interests of all taxing units defined in this subsection (b), the remainder shall be applied to any special benefit assessments to satisfy which the sale was ordered or to which the sale was made subject, and any balance remaining shall accrue to the purchasing unit.

When any real property that has been purchased as provided in this section is permanently dedicated to use for a public purpose, the purchasing unit shall make settlement with other taxing units having an interest in the property (as defined in this subsection) in such manner and in such amount as may be agreed upon by the governing bodies; and if no agreement can be reached, the amount to be paid shall be determined by a resident judge of the superior court in the district in which the property is situated.

Nothing in this section shall be construed as requiring the purchasing unit to secure the approval of other interested taxing units before reselling the property or as requiring the purchasing unit to pay other interested taxing units in full if the net income and resale price are insufficient to make such payments.

Any taxing unit purchasing property at a foreclosure sale may, in the discretion of its governing body, instead of following the foregoing provisions of this section, make full payment of the purchase price, and thereafter it shall hold the property as sole owner in the same manner as it holds other real property, subject only to taxes and special assessments, with penalties, interest, and costs, to which the sale was made subject.

(c) Resale of Real Property Purchased by Taxing Units. — Real property purchased at a tax foreclosure sale by a taxing unit may be resold at any time (for such price as the governing body of the taxing unit may approve) at a sale conducted in the manner provided by law for sales of other real property of the taxing unit. However, a purchasing taxing unit, in the discretion of its governing body, may resell such property to the former owner or to any other person formerly having an interest in the property at private sale for an amount not less than the taxing unit's interest therein if it holds the property as sole owner or for an amount not less than the total interests of all taxing units (other than special assessments due the taxing unit holding title) if it holds the property for the benefit of all such units. (1939, c. 310, s. 1719; 1945, c. 635; 1947, c. 484, ss. 3, 4; 1951, c. 300, s. 1; c. 1036, s. 1; 1953, c. 176, s. 2; 1955, c. 908; 1967, c. 705, s. 1; 1971, c. 806, s. 1.)

Local Modification. — Avery: 1973, c. 313.

§ 105-377. Time for contesting validity of tax foreclosure title.

Notwithstanding any other provisions of law prescribing the period for commencing an action, no action or proceeding shall be brought to contest the validity of any title to real property acquired by a taxing unit or by a private purchaser in any tax foreclosure action or proceeding authorized by this Subchapter or by other laws of this State in force at the time the title was acquired, nor shall any motion to reopen or set aside the judgment in any such tax foreclosure action or proceeding be entertained after one year from the date on which the deed is recorded. (1939, c. 310, s. 1721; 1971, c. 806, s. 1; 1977, c. 886, s. 2.)

CASE NOTES

A remainderman, who has been served only by publication based upon a fatally defective affidavit, may attack the tax foreclosure more than one year afterward, since neither this section nor any statute of limitations can bar the right to attack a judgement for want of jurisdiction. Board of Comm'rs v. Bumpass, 233 N.C. 190, 63 S.E.2d 144 (1951).

Motion to Set Aside Tax Sale Held Not Barred by This Section. — A judgment having been entered in favor of a county against the defendants for ad valorem taxes, and the land in question having been sold and conveyed pursuant to an execution, a motion properly filed by the defendants in the cause seeking to set aside the tax sale was not barred by former G.S. 105-393 (the predecessor to this section) since the motion in the cause was not an action or proceeding brought to contest the validity of a title to real property, nor a motion to reopen or set aside the judgment pursuant to which the tax sale was held. Henderson County v. Osteen, 292 N.C. 692, 235 S.E.2d 166 (1977).

Where city became record owner of property pursuant to tax foreclosure sale, and while purported adverse possessors brought their action to quiet title beyond the one year statute of limitation contained in this section, there were no genuine issues of material fact and the city was entitled to summary judgment. Overstreet v. City of Raleigh, 75 N.C. App. 351, 330 S.E.2d 643 (1985).

Applied in Howell v. Treece, 70 N.C. App. 322, 319 S.E.2d 301 (1984).

§ 105-378. Limitation on use of remedies.

(a) Use of Remedies Barred. — No county or municipality may maintain an action or procedure to enforce any remedy provided by law for the collection of taxes or the enforcement of any tax liens (whether the taxes or tax liens are evidenced by the original tax receipts, tax sales certificates, or otherwise) unless the action or procedure is instituted within 10 years from the date the taxes became due.

(b) Not Applicable to Special Assessments. — The provisions of subsection (a), above, shall not be construed to apply to the lien of special assessments.

(c) Repealed by Session Laws 1998-98, s. 26, effective August 14, 1998.

(d) Enforcement and Collection Delayed Pending Appeal. — When the board of county commissioners or municipal governing body delivers a tax receipt to a tax collector for any assessment that has been or is subsequently appealed to the Property Tax Commission, the tax collector may not seek collection of taxes or enforcement of a tax lien resulting from the assessment until the appeal has been finally adjudicated. The tax collector, however, may send an initial bill or notice to the taxpayer. (1933, c. 181, s. 7; c. 399; 1945, c. 832; 1947, c. 1065, s. 1; 1949, cc. 60, 269, 735; 1951, cc. 71, 306, 572; 1953, cc. 381, 427, 538, 645, 656, 752, 775, 1008; 1955, c. 1087; 1957, cc. 53, 678, 1123; 1959, cc. 373, 608; 1961, cc. 542, 695, 885; 1965, cc. 129, 294; 1967, c. 242; c. 321, s. 1; c. 422, s. 1; 1969, c. 96; 1971, c. 806, s. 1; 1998-98, s. 26; 2006-30, s. 6.)

Effect of Amendments. — Session Laws 2006-30, s. 6, effective June 29, 2006, added subsection (d).

CASE NOTES

The legislature did not intend for taxing units to assign barred claims to individuals who would then serve as collection agents for the taxing unit and thereby circumvent the limitation placed on the taxing units by this section. Bradbury v. Cummings, 68 N.C. App. 302, 314 S.E.2d 568 (1984).

Private Holders of Tax Lien Sale Certificates. — Although private holders of tax lien sale certificates are not mentioned in this section, the statute nevertheless applies to private holders. Bradbury v. Cummings, 68 N.C. App. 302, 314 S.E.2d 568 (1984).

ARTICLE 27.

Refunds and Remedies.

§ 105-379. Restriction on use of injunction and claim and delivery.

(a) Grounds for Injunction. — No court may enjoin the collection of any tax, the sale of any tax lien, or the sale of any property for nonpayment of any tax imposed under the authority of this Subchapter except upon a showing that the tax (or some part thereof) is illegal or levied for an illegal or unauthorized purpose.

(b) No Order in Claim and Delivery. — No court may issue any order in claim and delivery proceedings or otherwise for the taking of any personal property levied on or attached by the tax collector under the authority of this Subchapter. (1901, c. 558, s. 30; Rev., s. 2855; C.S., s. 7979; 1971, c. 806, s. 1.)

CASE NOTES

Editor's Note. *— Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968), cited below, was decided under former provisions similar to subsection (a) of this section.*

A distinction between an erroneous tax

and an illegal or invalid tax is recognized by this section and North Carolina case law. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

An illegal or invalid tax results when the taxing body seeks to impose a tax without authority, as in cases where it is asserted that the rate is unconstitutional, or that the subject is exempt from taxation. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

When Injunction Will Lie. — Injunction will lie when the tax or assessment is itself invalid or illegal. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

Cited in Reeves Bros. v. Town of Rutherfordton, 282 N.C. 559, 194 S.E.2d 129 (1973); Cedar Creek Enters., Inc. v. State Dep't of Motor Vehicles, 290 N.C. 450, 226 S.E.2d 336 (1976); Bailey v. State, 330 N.C. 227, 412 S.E.2d 295 (1991), cert. denied, 504 U.S. 911, 112 S. Ct. 1942, 118 L. Ed. 2d 547 (1992), overruled on other grounds, 348 N.C. 130, 500 S.E.2d 54 (1998); City of Durham v. Hicks, 135 N.C. App. 699, 522 S.E.2d 583, 1999 N.C. App. LEXIS 1227 (1999).

§ 105-380. No taxes to be released, refunded, or compromised.

(a) The governing body of a taxing unit is prohibited from releasing, refunding, or compromising all or any portion of the taxes levied against any property within its jurisdiction except as expressly provided in this Subchapter.

(b) Taxes that have been released, refunded, or compromised in violation of this section shall be deemed to be unpaid and shall be collectible by any means provided by this Subchapter, and the existence and priority of any tax lien on property shall not be affected by the unauthorized release, refund, or compromise of the tax liability.

(c) Any tax that has been released, refunded, or compromised in violation of this section may be recovered from any member or members of the governing body who voted for the release, refund, or compromise by civil action instituted by any resident of the taxing unit, and when collected, the recovered tax shall be paid to the treasurer of the taxing unit. The costs of bringing the action, including reasonable attorneys' fees, shall be allowed the plaintiff in the event the tax is recovered.

(d) The provisions of this section are not intended to restrict or abrogate the powers of a board of equalization and review or any agency exercising the powers of such a board. (1901, c. 558, s. 31; Rev., s. 2854; C.S., s. 7976; 1971, c. 806, s. 1; 1973, c. 564, s. 2.)

Local Modification. — Town of Stoneville: 1975, c. 336.

Editor's Note. — Session Laws 2003-250, s. 1, provides: "Notwithstanding the provisions of G.S. 105-380 and G.S. 105-381, for the 2002-2003 tax year a taxing unit shall release or refund the portion of property taxes paid on real property that is attributable to the erroneous inclusion of a septic or well system in the valuation of the property. For the purposes of this act, "erroneous inclusion of a septic or well system" means the inclusion in the valuation of real property of the value of a septic or well system that is not in fact a component part of the real property. The term does not include any other errors related to septic or well systems in the valuation of real property."

Session Laws 2006-72, s. 1, provides: "A taxing unit's governing body may by resolution provide that, notwithstanding the provisions of G.S. 105-360 regarding the due date and accrual of interest, G.S. 105-380 and G.S. 105-381 regarding the release, refund, and compromise of taxes, and G.S. 160A-58.10 regarding the taxation of newly annexed property, property taxes for the partial fiscal year October 1, 2005, through June 30, 2006, shall be collected over a three-year period with one-third due and payable on September 1, 2006, one-third due and payable on September 1, 2007, and the remaining one-third due and payable on September 1, 2008. The resolution may provide that interest accrues on unpaid property taxes only to the extent that the property taxes have become due and payable under the payment schedule set out in the resolution. To the extent property taxes are due and payable pursuant to a resolution adopted under this act, interest accruing on taxes that remain unpaid shall be computed according to the schedule stated in G.S. 105-360. A resolution adopted pursuant to this act applies only to taxes for the partial fiscal year

October 1, 2005, through June 30, 2006, on property located in an area that was annexed between January 1, 2003, and January 1, 2006, and for which effective date of the annexation was set by judicial order."

Session Laws 2006-72, s. 2, provides: "If a resolution adopted by a taxing unit's governing body pursuant to this act delays the due date, accrual of interest, or both for any property taxes, the tax collector's obligations under G.S. 160A-58.10 and G.S. 105-360 with respect to those taxes are delayed to the same extent."

CASE NOTES

Duty of Commissioners to Rescind Order Releasing Tax. — It is not only competent, but the duty of county commissioners to rescind an order improvidently granted to release one from the assessment of a legal tax upon property. Lemly v. Commissioners of Forsyth, 85 N.C. 379 (1881), decided under former similar provisions.

§ 105-381. Taxpayer's remedies.

(a) Statement of Defense. — Any taxpayer asserting a valid defense to the enforcement of the collection of a tax assessed upon his property shall proceed as hereinafter provided.

(1) For the purpose of this subsection, a valid defense shall include the following:
  a. A tax imposed through clerical error;
  b. An illegal tax;
  c. A tax levied for an illegal purpose.

(2) If a tax has not been paid, the taxpayer may make a demand for the release of the tax claim by submitting to the governing body of the taxing unit a written statement of his defense to payment or enforcement of the tax and a request for release of the tax at any time prior to payment of the tax.

(3) If a tax has been paid, the taxpayer, at any time within five years after said tax first became due or within six months from the date of payment of such tax, whichever is the later date, may make a demand for a refund of the tax paid by submitting to the governing body of the taxing unit a written statement of his defense and a request for refund thereof.

(b) Action of Governing Body. — Upon receiving a taxpayer's written statement of defense and request for release or refund, the governing body of the taxing unit shall within 90 days after receipt of such request determine whether the taxpayer has a valid defense to the tax imposed or any part thereof and shall either release or refund that portion of the amount that is determined to be in excess of the correct tax liability or notify the taxpayer in writing that no release or refund will be made. The governing body may, by resolution, delegate its authority to determine requests for a release or refund of tax of less than one hundred dollars ($100.00) to the finance officer, manager, or attorney of the taxing unit. A finance officer, manager, or attorney to whom this authority is delegated shall monthly report to the governing body the actions taken by him on requests for release or refund. All actions taken by the governing body or finance officer, manager, or attorney on requests for release or refund shall be recorded in the minutes of the governing body. If a release is granted or refund made, the tax collector shall be credited with the amount released or refunded in his annual settlement.

(c) Suit for Recovery of Property Taxes. —

(1) Request for Release before Payment. — If within 90 days after receiving a taxpayer's request for release of an unpaid tax claim under (a) above, the governing body of the taxing unit has failed to grant the

release, has notified the taxpayer that no release will be granted, or has taken no action on the request, the taxpayer shall pay the tax. He may then within three years from the date of payment bring a civil action against the taxing unit for the amount claimed.

(2) Request for Refund. — If within 90 days after receiving a taxpayer's request for refund under (a) above, the governing body has failed to refund the full amount requested by the taxpayer, has notified the taxpayer that no refund will be made, or has taken no action on the request, the taxpayer may bring a civil action against the taxing unit for the amount claimed. Such action may be brought at any time within three years from the expiration of the period in which the governing body is required to act.

(d) Civil Actions. — Civil actions brought pursuant to subsection (c) above shall be brought in the appropriate division of the general court of justice of the county in which the taxing unit is located. If, upon the trial, it is determined that the tax or any part of it was illegal or levied for an illegal purpose, or excessive as the result of a clerical error, judgment shall be rendered therefor with interest thereon at six percent (6%) per annum, plus costs, and the judgment shall be collected as in other civil actions. (1901, c. 558, s. 30; Rev., s. 2855; C. S., s. 7979; 1971, c. 806, s. 1; 1973, c. 564, s. 3; 1977, c. 946, s. 2; 1985, c. 150, s. 1; 1987, c. 127.)

Local Modification. — Forsyth: 1981 (Reg. Sess., 1982), c. 1154; 1985, c. 150, s. 2.

Editor's Note. — Session Laws 2003-250, s. 1, provides: "Notwithstanding the provisions of G.S. 105-380 and G.S. 105-381, for the 2002-2003 tax year a taxing unit shall release or refund the portion of property taxes paid on real property that is attributable to the erroneous inclusion of a septic or well system in the valuation of the property. For the purposes of this act, "erroneous inclusion of a septic or well system" means the inclusion in the valuation of real property of the value of a septic or well system that is not in fact a component part of the real property. The term does not include any other errors related to septic or well systems in the valuation of real property."

Session Laws 2006-72, s. 1, provides: "A taxing unit's governing body may by resolution provide that, notwithstanding the provisions of G.S. 105-360 regarding the due date and accrual of interest, G.S. 105-380 and G.S. 105-381 regarding the release, refund, and compromise of taxes, and G.S. 160A-58.10 regarding the taxation of newly annexed property, property taxes for the partial fiscal year October 1, 2005, through June 30, 2006, shall be collected over a three-year period with one-third due and payable on September 1, 2006, one-third due and payable on September 1, 2007, and the remaining one-third due and payable on September 1, 2008. The resolution may provide that interest accrues on unpaid property taxes only to the extent that the property taxes have become due and payable under the payment schedule set out in the resolution. To the extent property taxes are due and payable pursuant to a resolution adopted under this act, interest accruing on taxes that remain unpaid shall be computed according to the schedule stated in G.S. 105-360. A resolution adopted pursuant to this act applies only to taxes for the partial fiscal year October 1, 2005, through June 30, 2006, on property located in an area that was annexed between January 1, 2003, and January 1, 2006, and for which effective date of the annexation was set by judicial order."

Session Laws 2006-72, s. 2, provides: "If a resolution adopted by a taxing unit's governing body pursuant to this act delays the due date, accrual of interest, or both for any property taxes, the tax collector's obligations under G.S. 160A-58.10 and G.S. 105-360 with respect to those taxes are delayed to the same extent."

Legal Periodicals. — For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

CASE NOTES

I. General Consideration.
II. Demand.
III. Injunctions.

I. GENERAL CONSIDERATION.

Editor's Note. — *Many of the cases cited below were decided under former similar provisions.*

Constitutionality of Provisions. — See Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891); Kirkpatrick v. Currie, 250 N.C. 213, 108 S.E.2d 209 (1959).

Jurisdiction which § 105-290 confers upon State Board of Assessment (now Property Tax Commission) is not exclusive. The provisions of this section are still open to a taxpayer if he prefers them. In re Pilot Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

Taxpayers in North Carolina have an alternative to administrative review. They can seek judicial review of an assessment directly in superior or district court by paying taxes and then bringing a suit against the taxing unit for recovery of taxes paid. In order to have such an action, the taxpayer must first have filed a written statement of a valid defense to the tax with the governing body of the taxing unit and a request for release or refund of the tax. A valid defense is either that: (1) the tax was imposed through clerical error, (2) the tax was an "illegal tax," or (3) the tax was levied for an illegal purpose. Within 90 days of receiving the taxpayer's statement and request, the governing body of the taxing unit must act. If it denies the request or does not act within that time, then the taxpayer may bring a civil suit, provided he has paid the taxes assessed. The trial court will allow recovery of the taxes if it finds that one or more of the defenses exists. Johnston v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381 (1984), cert. denied, 313 N.C. 508, 329 S.E.2d 392 (1985).

Commission's Decisions Subject to Judicial Review. — The administrative decisions of the State Board of Assessment (now Property Tax Commission) are always subject to review by the superior court. Under both G.S. 105-290 and this section, if either the taxpayer or the taxing authority wants judicial review, it is available. In re Pilot Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

Clerical Error. — The meaning of clerical error in this section is not ambiguous and applies only to transcription errors. Ammons v. County of Wake, 127 N.C. App. 426, 490 S.E.2d 569 (1997), cert. denied, 347 N.C. 670, 500 S.E.2d 84 (1998).

To qualify as a clerical error, the mistake must ordinarily be apparent on the face of the instrument and a clerical error must be unintended. Ammons v. County of Wake, 127 N.C. App. 426, 490 S.E.2d 569 (1997), cert. denied, 347 N.C. 670, 500 S.E.2d 84 (1998).

Clerical Error Not Shown. — Assessor's allegedly inaccurate assertion that plaintiffs' property failed to qualify for present use value taxation did not constitute clerical error. Ammons v. County of Wake, 127 N.C. App. 426, 490 S.E.2d 569 (1997), cert. denied, 347 N.C. 670, 500 S.E.2d 84 (1998).

Ordinarily, sovereign may not be denied or delayed in enforcement of its right to collect revenue upon which its very existence depends. This rule applies to municipalities and other subdivisions of the State government. If a tax is levied against a taxpayer which he deems unauthorized or unlawful, he must pay the same under protest and then sue for its recovery. And if the statute provides an administrative remedy, he must first exhaust that remedy before resorting to the courts for relief. Moreover, as broad and comprehensive as it is, even the Declaratory Judgment Act does not supersede the rule or provide an additional or concurrent remedy. Bragg Dev. Co. v. Braxton, 239 N.C. 427, 79 S.E.2d 918 (1954).

Section Not to Preclude Counterclaim. — This section provides a mechanism by which a taxpayer can sue a taxing unit and prevent foreclosure without impeding the collection of tax revenue needed. It should not be applied to preclude a counterclaim in a foreclosure proceeding. Onslow County v. Phillips, 123 N.C. App. 317, 473 S.E.2d 643 (1996), modified on other grounds, 346 N.C. 265, 485 S.E.2d 618 (1997).

Adequate Remedy at Law. — Under this section the taxpayer has an adequate remedy at law by first paying the tax and then suing to recover it. Henrietta Mills v. Rutherford County, 281 U.S. 121, 50 S. Ct. 270, 74 L. Ed. 737 (1930); Fox v. Board of Comm'rs, 244 N.C. 497, 94 S.E.2d 482 (1956).

Exclusiveness of Statutory Remedy. — The taxpayer is restricted to the remedy provided by the statute, and, in order to avail himself of it, he must comply with all the requirements thereof. Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891); Wilson v. Green, 135 N.C. 343, 47 S.E. 469 (1904).

Where a corporation, under Session Laws 1925, c. 102, submitted its report to the Department of Revenue, and the Department in accordance with the statute certified to the register of deeds of the county where the property was situated the corporate excess liable for local taxation, the exclusive remedy of the corporation if dissatisfied with the report of the Department was to file exceptions with the Department in accordance with the statute, with the right of appeal from the Department upon a hearing by it, and the corporation could not pay the tax under protest and seek to recover it under the provisions of this section. Garysburg Mfg. Co. v. Board of Comm'rs, 196 N.C. 744, 147 S.E. 284, appeal dismissed, 280 U.S. 520, 50 S. Ct. 67, 74 L. Ed. 589 (1929).

Assumpsit for money had and received does not lie to recover improperly listed taxables. Huggins v. Hinson, 61 N.C. 126 (1867).

Quo warranto is the sole remedy to test the validity of an election to public office, but not to test the validity of a tax even though it is levied under the authority of a popular election. Barbee v. Board of Comm'rs, 210 N.C. 717, 188 S.E. 314 (1936).

Where a town ordinance imposes a license tax upon those selling at wholesale or peddling therein, and provides that its violation is punishable as a misdemeanor, the remedy to test the validity of the ordinance is to pay the tax under protest and bring action to recover it back, in accordance with this section, and equity will not enjoin the town from executing its threat to arrest for violations of the ordinance, it not appearing that the plaintiff would be irreparably damaged by the payment of the tax, and the legal remedy to recover the tax affording adequate relief. Loose-Wiles Biscuit Co. v. Town of Sanford, 200 N.C. 467, 157 S.E. 432 (1931).

Compliance with this section is prerequisite to right of action for recovery of taxes or any part thereof. Taxes paid voluntarily and without objection or compulsion cannot be recovered, even though the tax be levied unlawfully. Middleton v. Wilmington, B. & S.R.R., 224 N.C. 309, 30 S.E.2d 42 (1944).

Party Seeking Relief Under (c)(2) Must Assert Valid Defense. — A party seeking relief under subdivision (c)(2) of this section must assert a valid defense, as that term is defined in subdivision (a)(1) of this section, in their initial statement to the governing body of the taxing unit as a prerequisite to the later filing of a civil action. Kinro, Inc. v. Randolph County, 108 N.C. App. 334, 423 S.E.2d 513 (1992).

Payment Under Protest. — Where the owner resists the payment of taxes as unlawful, he is required to pay them under his protest and sue to recover them. Carstarphen v. Town of Plymouth, 186 N.C. 90, 118 S.E. 905 (1923); Galloway v. Board of Educ., 184 N.C. 245, 114 S.E. 165 (1922). See also State v. Snipes, 161 N.C. 242, 76 S.E. 243 (1912).

To test the legality of a tax imposed, the taxpayer should pay the same and sue to recover it in accordance with the provisions of this section. Southeastern Express Co. v. City of Charlotte, 186 N.C. 668, 120 S.E. 475 (1923).

Payment of Tax But Not Attorney's Fees Prerequisite. — Payment of tax, even an allegedly illegal tax, is a prerequisite for filing suit under this statute; however, payment of attorney's fees not assessed by the court was not a prerequisite. Onslow County v. Phillips, 123 N.C. App. 317, 473 S.E.2d 643 (1996), modified on other grounds, 346 N.C. 265, 485 S.E.2d 618 (1997).

Right to Sue. — Upon the failure of the county treasurer to refund within 90 days, the person so paying the tax may maintain an action against the county, including in his demand both the State and county taxes. Brunswick-Balke-Collender Co. v. County of Mecklenburg, 181 N.C. 386, 107 S.E. 317 (1921).

Distinction between an erroneous tax and an illegal or invalid tax is recognized by this section and North Carolina case law. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

Illegal or invalid tax results when taxing body seeks to impose tax without authority, as in cases where it is asserted that the rate is unconstitutional, or that the subject is exempt from taxation. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968); Reeves Bros. v. Town of Rutherfordton, 15 N.C. App. 385, 190 S.E.2d 345 (1972), rev'd on other grounds, 282 N.C. 559, 194 S.E.2d 129 (1973).

A tax or assessment is invalid or illegal only when the taxing body lacks the authority to impose the tax, as where the rate is unconstitutional or the subject is exempt from taxation. Reeves Bros. v. Town of Rutherfordton, 15 N.C. App. 385, 190 S.E.2d 345 (1972), rev'd on other grounds, 282 N.C. 559, 194 S.E.2d 129 (1973).

Burden on Taxpayer. — Where a taxpayer seeks equitable relief against the alleged unlawful assessment of taxes against its property by the county authorities, it must allege and show that the amount claimed as excessive was in fact an excessive valuation. Norfolk-Southern R.R. v. Board of Comm'rs, 188 N.C. 265, 124 S.E. 560 (1924).

Statute Inapplicable to Service Charges and Fees. — Landfill fees, like sewer service charges, are neither taxes nor assessments, but are tolls or rents for benefits received by the use of the landfill. Therefore, the statute is inapplicable to landfill fees and campground owners did not preserve their right to challenge payment of county landfill fees by writing that they paid the fees under protest on their check to the county. Stafford v. County of Bladen, 163 N.C. App. 149, 592 S.E.2d 711, 2004 N.C. App. LEXIS 305 (2004), appeal dismissed sub nom. Stafford v. Bladen Co., cert. denied, 358 N.C. 545, 599 S.E.2d 409 (2004).

Applied in Adams-Millis Corp. v. Town of Kernersville, 281 N.C. 147, 187 S.E.2d 704 (1972); Town of Bladenboro v. McKeithan, 44 N.C. App. 459, 261 S.E.2d 260 (1980).

Cited in Raintree Corp. v. City of Charlotte, 49 N.C. App. 391, 271 S.E.2d 524 (1980); MAO/Pines Assocs. v. New Hanover County Bd. of Equalization, 116 N.C. App. 551, 449 S.E.2d 196 (1994); Edward Valves, Inc. v. Wake County, 343 N.C. 426, 471 S.E.2d 342 (1996), cert. denied, 519 U.S. 1112, 117 S. Ct. 952, 136 L. Ed. 2d 839 (1997); State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875, 2000 N.C. App. LEXIS 1103 (2000).

II. DEMAND.

Demand for Refund Required. — The General Assembly, as far back as 1887, enacted that demand for the return of taxes must be made within the prescribed time after payment, and it was held in Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891), and Teeter v. Wallace, 138 N.C. 264, 50 S.E. 701 (1905), that the statute applied to all taxes, that the remedy provided was exclusive, and that a failure to make demand within the time prescribed was fatal to the right to maintain an action to recover the tax. Blackwell v. City of Gastonia, 181 N.C. 378, 107 S.E. 218 (1921).

The requirement of making a demand within the prescribed time is mandatory. Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891).

It must also be made in writing. Bristol v. Commissioners of Morganton, 125 N.C. 365, 34 S.E. 512 (1899).

Requirement of demand is not confined to claim for refunding any particular tax or taxes alleged to be invalid on any particular account. Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891).

Alleging Demand. — A complaint which fails to allege that the demand was made within the prescribed time is insufficient on demurrer. Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891). See Hunt v. Cooper, 194 N.C. 265, 139 S.E. 446 (1927).

III. INJUNCTIONS.

When Injunction Will Lie. — Injunction will lie when the tax or assessment is itself invalid or illegal. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968); Reeves Bros. v. Town of Rutherfordton, 15 N.C. App. 385, 190 S.E.2d 345 (1972), rev'd on other grounds, 282 N.C. 559, 194 S.E.2d 129 (1973).

An injunction will lie to restrain the collection of taxes and to restrain the sale of property under distraint, for three reasons, to wit: (1) If the taxes or any part thereof be assessed for an illegal or unauthorized purpose. (2) If the tax itself be illegal or invalid. (3) If the assessment of the tax be illegal or invalid. Purnell v. Page, 133 N.C. 125, 45 S.E. 534 (1903); Sherrod v. Dawson, 154 N.C. 525, 70 S.E. 739 (1911).

The remedy of injunction is available to a taxpayer when a tax levy or assessment, or some part thereof, is challenged on the ground (1) the tax or assessment is itself illegal or invalid, or (2) for an illegal or unauthorized purpose. Wynn v. Trustees of Charlotte Community College Sys., 255 N.C. 594, 122 S.E.2d 404 (1961).

The equitable remedy of injunction is proper where it is contended that the taxing body is without authority to impose the tax because of a constitutional exemption. Reeves Bros. v. Town of Rutherfordton, 15 N.C. App. 385, 190 S.E.2d 345 (1972), rev'd on other grounds, 282 N.C. 559, 194 S.E.2d 129 (1973).

Injunction is the appropriate relief to prevent the collection of an illegal and invalid tax. This constitutes the exception in the statute and gives the taxpayer an additional remedy (see Purnell v. Page, 133 N.C. 125, 45 S.E. 534 (1903)) to test the validity of a tax. Wrought Iron Range Co. v. Carver, 118 N.C. 328, 24 S.E. 352 (1896).

Only collection of tax will be enjoined, until the merits of the controversy can be determined. North Carolina R.R. v. Commissioners of Alamance, 82 N.C. 259 (1880).

Failure to Give Taxpayer Notice. — An injunction will be granted to the hearing against the sheriff for collecting back taxes on a solvent credit, upon the ground that the plaintiff was not given notice of the assessment or opportunity to be heard before the board of assessors or the tribunal having the power to list or assess such property. Caldwell Land & Lumber Co. v. Smith, 146 N.C. 199, 59 S.E. 653 (1907).

Special Assessment for Improvements. — Where an owner of a town lot resists payment of an assessment of his property for the cost of paving or laying down a sidewalk on the ground of excessive cost, discrimination, or for other causes, the remedy of injunction is an improper one, for the owner should pay, under protest, the assessment levied and bring his action to recover it or the excess over a proper charge. Marion v. Town of Pilot Mt., 170 N.C. 118, 87 S.E. 53 (1915).

Levy for School Purposes. — Injunctive relief is not available to the taxpayers of a county, where a tax levy for school purposes has been made, when it appears that under the levy complained of the moneys have been raised and distributed to the branches of government entitled thereto, some of which are not parties to the suit. Semble, the only remedy for the injured taxpayers is to pay the illegal tax under protest and sue to recover the same, as provided by statute. Galloway v. Board of Educ., 184 N.C. 245, 114 S.E. 165 (1922).

Parties to Suit for Injunction. — The sheriff (tax collector) is the proper party defendant to a suit to enjoin the collection of taxes, but the commissioners may make themselves parties if they think the rights of the county require it. Caldwell Land & Lumber Co. v. Smith, 146 N.C. 199, 59 S.E. 653 (1907).

Necessary Allegations. — In order to enjoin the collection of taxes on land, it is necessary to allege that the taxes sought to be recovered were illegally imposed or unlawfully collected. Hunt v. Cooper, 194 N.C. 265, 139 S.E. 446 (1927).

Injunction Granted. — For case in which injunctive relief against the collection of taxes was granted, see Barber v. Town of Benson, 200 N.C. 683, 158 S.E. 245 (1931).

Portion of Levy Enjoined. — The courts will not enjoin the collection of an entire levy of taxes if the portion conceded to be valid can be separated from the portion alleged to be unconstitutional. Southern Ry. v. Board of Comm'rs, 148 N.C. 220, 61 S.E. 690 (1908).

§ 105-382: Repealed by Session Laws 1977, c. 946, s. 3.

Article 28.

Special Duties to Pay Taxes.

§ 105-383. Fiduciaries to pay taxes.

(a) Duty to Pay. — It shall be the duty of every guardian, executor, administrator, agent, trustee, receiver, or other fiduciary having care or control of any real or personal property to pay the taxes thereon out of the trust funds in his hands.

(b) Liability for Failure to Pay. — Any fiduciary who fails to pay the taxes on property in his care or control when trust funds are available to him for that purpose shall be personally liable for the taxes. This liability may be enforced by a civil action brought in the name of the tax collector of the taxing unit to which the taxes are owed against the fiduciary in an appropriate division of the General Court of Justice of the county in which the taxing unit is located.

(c) Liability for Sale of Property. — Any fiduciary who suffers property in his care or control to be sold by reason of his negligence in failing to pay the taxes thereon when available funds were in his hands shall be liable to his ward, principal, or cestui que trust for all actual damages incurred as a result of his neglect.

(d) Effect of Section. — This section shall not have the effect of relieving property and estates held in trust or under the control of fiduciaries from the lien of property taxes. (1762, c. 69, s. 14; R.C., c. 54, s. 27; 1868-9, c. 201, s. 32; 1879, c. 71, s. 53; Code, ss. 1595, 3698; Rev., s. 2862; C.S., s. 7985; 1971, c. 806, s. 1.)

CASE NOTES

Applied in City of Durham v. Hicks, 135 N.C. App. 699, 522 S.E.2d 583, 1999 N.C. App. LEXIS 1227 (1999).

§ 105-384. Duties and liabilities of life tenant.

(a) If real or personal property is held by a tenant for life or by a tenant for the life of another, it shall be the duty of the life tenant to pay the taxes imposed on the property.

(b) Any remainderman or reversioner of real or personal property who pays the taxes thereon may recover the money so paid in an action against the life tenant of the property; in the case of real property, the action may be brought only in the appropriate division of the General Court of Justice of the county in which the real property is located.

(c) Any tenant for life of real or personal property who suffers the property to be foreclosed and sold or sold under levy for failure to pay the taxes thereon shall be liable to the remainderman or to the reversioner for any damages incurred. (1879, c. 71, ss. 53, 54; Code, ss. 3698, 3699; 1901, c. 558, s. 45; Rev., s. 2859; C.S., s. 7982; 1971, c. 806, s. 1.)

CASE NOTES

Life tenant cannot defeat the estate of the remainderman by allowing the land to be sold for taxes and taking title in himself by purchase at the tax sale. Thompson v. Watkins, 285 N.C. 616, 207 S.E.2d 740 (1974).

Life tenant's purchase at tax sale is regarded as payment of tax, and the owner of the future interest is regarded as still holding under his original title. Thompson v. Watkins, 285 N.C. 616, 207 S.E.2d 740 (1974).

Life tenant has obligation to list and pay taxes on the property. Thompson v. Watkins, 285 N.C. 616, 207 S.E.2d 740 (1974).

§ 105-385. Duty to pay taxes on real property; judicial sales; sales under powers; governmental purchasers.

(a) Judicial Sales. — In all civil actions and special proceedings in which the sale of any real property is ordered, the judgment shall provide for the payment of all taxes then constituting a lien upon the property and all special assessments or installments thereof then due, and the tax liens and special assessments shall be satisfied from the proceeds of the sale before the proceeds are disbursed. The judgment in such a civil action or special proceeding shall adjust the disbursements for taxes and special assessments between the parties to the action or special proceeding in accordance with their respective rights.

(b) Sales under Powers. — Any person who sells real property under a power of sale conferred upon him by a deed, will, power of attorney, mortgage, deed of trust, or assignment for the benefit of creditors shall from the proceeds of the sale first satisfy all taxes constituting a lien upon the real property and all special assessments or installments thereof then due unless the notice of sale provided that the property would be sold subject to tax liens and special assessments, and it was so sold.

(c) Governmental Purchasers. — Any agency, department, or institution of the State of North Carolina and any county or municipal corporation that purchases real property shall satisfy all taxes constituting a lien upon the property purchased and all special assessments or installments thereof then due by deducting the amount of the taxes and special assessments from the purchase price and paying it to the proper taxing unit or units. Any agency, department, or institution of the State and any county or municipal corporation that fails to make the deductions and payments required by this subsection (c) shall be liable to the taxing unit or units to which the taxes and special assessments are owed for the amount thereof. This liability may be enforced in a civil action brought by the taxing unit or units to which the taxes and special assessments are owed in the appropriate trial division of the General Court of Justice of the county in which the property is located; this remedy shall be in addition to any remedies the taxing unit may have against the grantor of the property. (1901, c. 558, s. 47; Rev., s. 2857; C.S., s. 7980; 1929, c. 231, s. 1; 1951, c. 252, s. 1; 1971, c. 806, s. 1.)

§ 105-386. Tax paid by holder of lien; remedy.

If any person having a lien or encumbrance of any kind upon real property shall pay the taxes that constitute a lien upon the real property:

(1) He shall thereby acquire a lien upon the real property from the time of payment, which lien shall be superior to all other liens and which may

be enforced by an action in the appropriate division of the General Court of Justice of the county in which the real property is situated.

(2) He may, by an action for moneys paid to the use of the owner of the real property at the time of payment, recover the amount paid. (1879, c. 71, s. 55; Code, s. 3700; 1901, c. 558, s. 46; Rev., s. 2858; C.S., s. 7981; 1971, c. 806, s. 1.)

CASE NOTES

Cited in City of Charlotte v. Little McMahan Properties, Inc., 52 N.C. App. 464, 279 S.E.2d 104 (1981); Goldsboro Milling Co. v. Reaves, 804 F. Supp. 762 (E.D.N.C. 1991).

ARTICLE 29.

Validations.

§§ 105-387 through 105-392: Recodified as §§ 47-108.21 to 47-108.26 by Session Laws 1987, c. 777, s. 4(1).

§ 105-393: Repealed by Session Laws 1987, c. 777, s. 4(2).

ARTICLE 30.

General Provisions.

§ 105-394. Immaterial irregularities.

Immaterial irregularities in the listing, appraisal, or assessment of property for taxation or in the levy or collection of the property tax or in any other proceeding or requirement of this Subchapter shall not invalidate the tax imposed upon any property or any process of listing, appraisal, assessment, levy, collection, or any other proceeding under this Subchapter.

The following are examples of immaterial irregularities:

(1) The failure of list takers, tax supervisors, or members of boards of equalization and review to take and subscribe the oaths required of them.

(2) The failure to sign the affirmation required on the abstract.

(3) The failure to list, appraise, or assess any property for taxation or to levy any tax within the time prescribed by law.

(4) The failure of the board of equalization and review to meet or to adjourn within the time prescribed by law or to give any required notice of its meetings and adjournment.

(5) Any defect in the description upon any abstract, tax receipt, tax record, notice, advertisement, or other document, of real or personal property, if the description be sufficient to enable the tax collector or any person interested to determine what property is meant by the description. (In such cases the tax supervisor or tax collector may correct the description on the documents bearing the defective description, and the correct description shall be used in any documents later issued in tax foreclosure proceedings authorized by this Subchapter.)

(6) The failure of the collector to advertise any tax lien.

(7) Repealed by Session Laws 1983, c. 808, s. 11.

(8) Any irregularity or informality in the order or manner in which tax liens on real property are offered for sale.

(9) The failure to make or serve any notice mentioned in this Subchapter.

(10) The omission of a dollar mark or other designation descriptive of the value of figures upon any document required by this Subchapter.

(11) Any other immaterial informality, omission, or defect on the part of any person in any proceeding or requirement of this Subchapter. (1939, c. 310, s. 1715; 1965, c. 192, ss. 1, 2; 1971, c. 806, s. 1; 1983, c. 808, ss. 10, 11.)

Editor's Note. — Session Laws 1983, c. 808, which amended this section, provided in s. 12 that the act would not affect the validity of any tax lien sale held before July 1, 1983, and in s. 13 provided: "Anything in this act to the contrary notwithstanding, any person, firm, or corporation who purchased or took assignment of a tax lien sale certificate before July 1, 1983, pursuant to statutes amended or repealed by this act may initiate a foreclosure action under G.S. 105-374 no earlier than six months after the date of the original lien sale."

Legal Periodicals. — For survey of 1977 law on taxation, see 56 N.C.L. Rev. 1128 (1978).

CASE NOTES

Purpose. — This section contains a broad statement that is intended to cover cases where there is no dispute that but for a clerical error, the tax would have been valid. In re Notice of Attachment & Garnishment Issued by Catawba County Tax Collector, 59 N.C. App. 332, 296 S.E.2d 499 (1982), cert. denied, 307 N.C. 576, 299 S.E.2d 645 (1983).

Constitutionality of Notice Provisions. — The giving of the notices of the docketing of the judgment and of the sale under execution, required by G.S. 105-375, is indispensable to a valid sale under that statute and the provision of this section, to the contrary, is in conflict with N.C. Const., Art. I, § 19. Henderson County v. Osteen, 292 N.C. 692, 235 S.E.2d 166 (1977).

When a county which has purchased a tax lien at a valid sale thereof and which, after notice to the listing taxpayer, has docketed a judgment and issued execution in accordance with the procedures prescribed in G.S. 105-375, the county may not, after the death of the taxpayer, without mailing to his last known address by registered or certified mail, as specified in the statute, sell his land, at a sale otherwise held in conformity to the statute, and convey a valid title to the purchaser for the reason that the provision of this section declaring the failure so to mail the prescribed notice to the listing taxpayer a mere irregularity, not affecting the validity of the deed, is unconstitutional. Henderson County v. Osteen, 292 N.C. 692, 235 S.E.2d 166 (1977).

Section Not Limited to Procedures Incident to Sale of Tax Liens. — Former G.S. 105-397.1 was originally a subparagraph in the section entitled, "Sales of Tax Liens on Real Property for Failure to Pay Taxes." (former G.S. 105-387(j)). The legislature of 1965 took this provision out of that section and, with minor modifications, made it a separate section in Article 28 (now Article 30) of Chapter 105 of the General Statutes. This would indicate a legislative intent to free this provision from any possible limitation of it to procedures incident to the sale of tax liens so as to extend it to procedures for foreclosure thereof as well. Henderson County v. Osteen, 292 N.C. 692, 235 S.E.2d 166 (1977).

Immaterial irregularities in notice do not invalidate taxes imposed. In re Pilot Freight Carriers, Inc., 28 N.C. App. 400, 221 S.E.2d 378 (1976).

Failure to Levy Assessments by Prescribed Date as Immaterial Irregularity. — Section 156-105 provides that assessments shall be collected "in the same manner and by the same officers as the state and county taxes are collected," and subdivision (3) of this section provides that "[t]he failure to list, appraise, or assess any property for taxation or to levy any tax within the time prescribed by law" is an immaterial irregularity that does not affect the validity of the assessment; therefore, plaintiff drainage district's failure to levy annual assessments for 1974 and 1983 by the first Monday in September of those years did not bar later collection of the assessments. Northampton County Drainage Dist. Number One v. Bailey, 92 N.C. App. 68, 373 S.E.2d 560 (1988), rev'd on other grounds, 326 N.C. 742, 392 S.E.2d 352 (1990), modified on other grounds, 326 N.C. 742, 392 S.E.2d 352.

Section Not to Be Strictly Construed against Taxing Authority. — Tax statutes are to be strictly construed against the taxing authority; but that is only when the statute is susceptible of two constructions, unlike this section, which is clear and uncomplicated. In re Notice of Attachment & Garnishment Issued by

Catawba County Tax Collector, 59 N.C. App. 332, 296 S.E.2d 499 (1982), cert. denied, 307 N.C. 576, 299 S.E.2d 645 (1983).

Clerical error by a tax supervisor's office is an immaterial irregularity under this section so as not to invalidate the tax levied on the property. In re Notice of Attachment & Garnishment Issued by Catawba County Tax Collector, 59 N.C. App. 332, 296 S.E.2d 499 (1982), cert. denied, 307 N.C. 576, 299 S.E.2d 645 (1983).

The failure by a county tax assessor due to an administrative error to include on homeowner's tax bill an assessment for the improvements to the lot was an immaterial irregularity and did not, contrary to the homeowner's contention, invalidate the tax owed on the house. In re Dickey, 110 N.C. App. 823, 431 S.E.2d 203 (1993).

Applied in Harden v. Marshall, 69 N.C. App. 489, 317 S.E.2d 116 (1984).

Cited in Annas v. Davis, 40 N.C. App. 51, 252 S.E.2d 28 (1979).

§ 105-395. Application and effective date of Subchapter.

(a) The provisions of G.S. 105-333 through 105-344 (being Article 23 in this Subchapter) shall first be applicable to public service company property to be listed or reported for taxation as of January 1, 1972. Unless otherwise specifically provided herein, all other provisions of this Machinery Act (being Subchapter II of Chapter 105 of the General Statutes) shall become effective July 1, 1971, and shall apply to all taxes due and uncollected as of that date as well as to those that shall become due thereafter.

(b) Repealed by Session Laws 1998-98, s. 27, effective August 14, 1998.

(c) It is the intent of the General Assembly to make the provisions of this Subchapter uniformly applicable throughout the State, and to assure this objective all laws and clauses of laws, including private and local acts, other than local acts relating to the selection of tax collectors, in conflict with this Subchapter are repealed effective July 1, 1971. As used in this section, the term "local acts" means any acts of the General Assembly that apply to one or more counties by name, to one or more municipalities by name, or to all municipalities within one or more named counties. (1971, c. 806, s. 1; 1993, c. 485, s. 19; 1998-98, s. 27.)

Legal Periodicals. — For survey of 1976 case law on taxation, see 55 N.C.L. Rev. 1083 (1977).

CASE NOTES

Retroactive Effect. — The intention of the legislature to give the new Machinery Act of 1971 retroactive effect is expressly declared in this section. In re Pilot Freight Carriers, Inc., 28 N.C. App. 400, 221 S.E.2d 378 (1976).

Applied in In re McLean Trucking Co., 281 N.C. 375, 189 S.E.2d 194 (1972).

OPINIONS OF ATTORNEY GENERAL

Provisions for selection of tax collectors do not repeal or affect collection of tax collector in a county that has a local law on the subject. See opinion of Attorney General to Mr. Warren H. Pritchard, 41 N.C.A.G. 589 (1971).

§ 105-395.1. Applicable date when due date falls on weekend or holiday.

When the last day for doing an act required or permitted by this Subchapter falls on a Saturday, Sunday, or holiday, the act is considered to be done within the prescribed time limit if it is done on the next business day. (1987, c. 777, s. 5.)

CASE NOTES

Cited in In re Hotel L'Europe, 116 N.C. App. 651, 448 S.E.2d 865 (1994), cert. denied, 339 N.C. 612, 454 S.E.2d 252 (1995).

§§ **105-396 through 105-398:** Repealed by Session Laws 1971, c. 806, s. 1.

SUBCHAPTER III. COLLECTION OF TAXES.

FORMER ARTICLE 30.

General Provisions.

§§ **105-399 through 105-403:** Repealed by Session Laws 1971, c. 806, s. 3.

§ **105-404:** Transferred to G.S. 105-32 by Session Laws 1971, c. 806, s. 2.

§ **105-405:** Repealed by Session Laws 1963, c. 548.

§§ **105-405.1, 105-406:** Repealed by Session Laws 1971, c. 806, s. 3.

§ **105-407:** Transferred to G.S. 105-267.1 by Session Laws 1971, c. 806, s. 2.

ARTICLE 31.

Rights of Parties Adjusted.

§§ **105-408 through 105-411:** Repealed by Session Laws 1971, c. 806, s. 3.

§ **105-412:** Transferred to G.S. 105-207 by Session Laws 1971, c. 806, s. 2.

Editor's Note. — Section 105-207 was repealed by Session Laws, 1995, c. 41, s. 1(b).

ARTICLE 32.

Tax Liens.

§§ **105-413, 105-414:** Repealed by Session Laws 1971, c. 806, s. 3.

ARTICLE 33.

Time and Manner of Collection.

§§ **105-415 through 105-417:** Repealed by Session Laws 1971, c. 806, s. 3.

ARTICLE 33A.

Agreements with United States or Other States.

§§ **105-417.1 through 105-417.3:** Transferred to G.S. 105-268.1 through 105-268.3 by Session Laws 1971, c. 806, s. 2.

ARTICLE 34.

Tax Sales.

Part 1. Sale of Realty.

§§ **105-418 through 105-421:** Repealed by Session Laws 1971, c. 806, s. 3.

Part 2. Refund of Tax Sales Certificates.

§ **105-422:** Repealed by Session Laws 1971, c. 806, s. 3.

Cross References. — For present provisions covering the subject matter of the repealed section, see G.S. 105-355 through 105-378.

§ **105-423:** Repealed by Session Laws 1947, c. 1065, s. 2.

§ **105-423.1:** Repealed by Session Laws 1971, c. 806, s. 3.

ARTICLE 35.

Sheriff's Settlement of Taxes.

§ **105-424:** Repealed by Session Laws 1971, c. 806, s. 3.

SUBCHAPTER IV. LISTING OF AUTOMOBILES.

ARTICLE 35A.

Listing of Automobiles in Certain Counties.

§§ **105-425 through 105-429:** Repealed by Session Laws 1971, c. 806, s. 3.

SUBCHAPTER V. MOTOR FUEL TAXES.

ARTICLE 36.

Gasoline Tax.

§§ **105-430 through 105-435:** Repealed by Session Laws 1995, c. 390, s. 2.

§ **105-436:** Repealed by Session Laws 1991, c. 193, s. 5.

§ **105-436.1:** Repealed by Session Laws 1985, c. 261, s. 1.

§ **105-437:** Repealed by Session Laws 1963, c. 1169, s. 6.

§§ **105-438 through 105-441.1:** Repealed by Session Laws 1995, c. 390, s. 2.

§ **105-442:** Repealed by Session Laws 1991 (Reg. Sess., 1992), c. 913, s. 3. s. 3.

§ **105-443:** Repealed by Session Laws 1963, c. 1169, s. 5.

§§ **105-444 through 105-446.3:** Repealed by Session Laws 1995, c. 390, s. 2.

§ **105-446.3.1:** Repealed by Session Laws 1985, c. 261, s. 1.

§ **105-446.4:** Repealed by Session Laws 1977, c. 802, s. 50.10.

§§ **105-446.5 through 105-449A:** Repealed by Session Laws 1995, c. 390, s. 2.

§ **105-449.01:** Repealed by Session Laws 1983 (Regular Session, 1984), c. 1004, s. 1.

ARTICLE 36A.

Special Fuels Tax.

§§ **105-449.1 through 105-449.27:** Repealed by Session Laws 1995, c. 390, s. 2.

§ **105-449.28:** Repealed by Session Laws 1981, c. 105, s. 4.

§ **105-449.29:** Repealed by Session Laws 1995, c. 390, s. 2.

§§ 105-449.30, 105-449.31: Repealed by Session Laws 1985 (Regular Session, 1986), c. 937, s. 19.

Editor's Note. — Sections 105-449.30 and 105-449.31 were also repealed by Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 15, effective July 15, 1986.

§ 105-449.32: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 745, s. 27.

§§ 105-449.33 through 105-449.35: Repealed by Session Laws 1995, c. 390, s. 2.

§ 105-449.36: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1004, s. 1.

Article 36B.

Tax on Carriers Using Fuel Purchased Outside State.

§ 105-449.37. Definitions; tax liability.

(a) Definitions. — The following definitions apply in this Article:

(1) Motor carrier. — A person who operates or causes to be operated on any highway in this State a motor vehicle that is a qualified motor vehicle under the International Fuel Tax Agreement. The term does not include the United States, the State, or a political subdivision of the State.

(1a) Motor vehicle. — A motor vehicle as defined in G.S. 105-164.3 other than special mobile equipment as defined in G.S. 105-164.3.

(2) Operations. — Operations of all motor vehicles described in subdivision (1), whether loaded or empty and whether or not operated for compensation.

(2a) Person. — Defined in G.S. 105-228.90.

(3) Secretary. — The Secretary of Revenue.

(b) Liability. — A motor carrier who operates on one or more days of a reporting period is liable for the tax imposed by this Article for that reporting period and is entitled to the credits allowed for that reporting period. (1955, c. 823, s. 1; 1973, c. 476, s. 193; 1983, c. 713, s. 55; 1989, c. 7, s. 1; 1991, c. 182, s. 2; c. 487, s. 2; 1991 (Reg. Sess., 1992), c. 913, s. 8; 1993, c. 354, s. 28; 1999-337, s. 36; 2000-140, s. 74.)

§ 105-449.38. Tax levied.

A road tax for the privilege of using the streets and highways of this State is imposed upon every motor carrier on the amount of motor fuel or alternative fuel used by the carrier in its operations within this State. The tax shall be at the rate established by the Secretary pursuant to G.S. 105-449.80 or G.S. 105-449.136, as appropriate. This tax is in addition to any other taxes imposed on motor carriers (1955, c. 823, s. 2; 1969, c. 600, s. 22; 1981, c. 690, s. 3; 1985 (Reg. Sess., 1986), c. 982, s. 16; 1995, c. 390, s. 16; 2001-205, s. 2.)

§ 105-449.39. Credit for payment of motor fuel tax.

Every motor carrier subject to the tax levied by this Article is entitled to a credit on its quarterly report for tax paid by the carrier on fuel purchased in the State. The amount of the credit is determined using the flat cents-per-gallon rate plus the variable cents-per-gallon rate of tax in effect during the quarter covered by the report. To obtain a credit, the motor carrier must furnish evidence satisfactory to the Secretary that the tax for which the credit is claimed has been paid.

If the amount of a credit to which a motor carrier is entitled for a quarter exceeds the motor carrier's liability for that quarter, the excess is refundable in accordance with G.S. 105-241.7. (1955, c. 823, s. 3; 1969, c. 600, s. 22; c. 1098; 1973, c. 476, s. 193; 1979, 2nd Sess., c. 1098; 1981, c. 690, s. 3; 1985 (Reg. Sess., 1986), c. 982, s. 17; 1987, c. 315; 1989, c. 692, s. 5.7; 1991, c. 182, s. 3; c. 487, s. 3; 1998-146, s. 1; 1999-337, s. 37; 2005-435, s. 3; 2007-491, s. 40.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2005-435, s. 3, effective September 27, 2005, substituted "carrier in accordance with G.S. 105-266(a)(3)" for "carrier" in the last paragraph.

Session Laws 2007-491, s. 40, effective January 1, 2008, substituted "excess is refundable in accordance with G.S. 105-241.7" for "Secretary must refund the excess to the motor carrier in accordance with G.S. 105-266(a)(3)" in the second paragraph. For applicability, see Editor's note.

§ 105-449.40. Secretary may require bond.

(a) Authority. — The Secretary may require a motor carrier to furnish a bond when any of the following occurs:

(1) The motor carrier fails to file a report within the time required by this Article.

(2) The motor carrier fails to pay a tax when due under this Article.

(3) After auditing the motor carrier's records, the Secretary determines that a bond is needed to protect the State from loss in collecting the tax due under this Article.

(b) Amount. — A bond required of a motor carrier under this section may not be more than the larger of the following amounts:

(1) Five hundred dollars ($500.00).

(2) Four times the motor carrier's average tax liability or refund for a reporting period.

A bond must be in the form required by the Secretary. (1955, c. 823, s. 4; 1967, c. 1110, s. 15; 1973, c. 476, s. 193; 1991, c. 487, s. 4.)

§ 105-449.41: Repealed by Session Laws 2002-108, s. 2, effective January 1, 2003.

§ 105-449.42. Payment of tax.

The tax levied by this Article is due when a motor carrier files a quarterly report under G.S. 105-449.45. The amount of tax due is calculated on the amount of motor fuel or alternative fuel used by the motor carrier in its operations within this State during the quarter covered by the report. (1955, c. 823, s. 6; 1973, c. 476, s. 193; 1979, 2nd Sess., c. 1086, s. 2; 1983, c. 29, s. 2; 1991, c. 182, s. 4; 1999-337, s. 38.)

§ 105-449.42A. Leased motor vehicles.

(a) Lessor in Leasing Business. — A lessor who is regularly engaged in the business of leasing or renting motor vehicles without drivers for compensation is the motor carrier for a leased or rented motor vehicle unless the lessee of the leased or rented motor vehicle gives the Secretary written notice, by filing a report or otherwise, that the lessee is the motor carrier. In that circumstance, the lessee is the motor carrier for the leased or rented motor vehicle.

Before a lessee gives the Secretary written notice under this subsection that the lessee is the motor carrier, the lessee and lessor must make a written agreement for the lessee to be the motor carrier. Upon request of the Secretary, the lessee must give the Secretary a copy of the agreement.

(b) Independent Contractor. — The lessee of a motor vehicle that is leased from an independent contractor is the motor carrier for the leased motor vehicle unless either of the following applies:

(1) The motor vehicle is leased for fewer than 30 days.

(2) The motor vehicle is leased for at least 30 days and the lessor gives the Secretary written notice, by filing a report or otherwise, that the lessor is the motor carrier.

If either of these circumstances applies, the lessor is the motor carrier for the leased motor vehicle.

Before a lessor gives the Secretary written notice under subdivision (2) that the lessor is the motor carrier, the lessor and lessee must make a written agreement for the lessor to be the motor carrier. Upon request of the Secretary, the lessor must give the Secretary a copy of the agreement.

(c) Liability. — An independent contractor who leases a motor vehicle to another for fewer than 30 days is liable for compliance with this Article and the person to whom the motor vehicle is leased is not liable. Otherwise, both the lessor and lessee of a motor vehicle are jointly and severally liable for compliance with this Article. (1983, c. 29, s. 3; 1985 (Reg. Sess., 1986), c. 826, s. 11; 1991, c. 487, s. 5; 1991 (Reg. Sess., 1992), c. 913, s. 9.)

§ 105-449.43. Application of tax proceeds.

Tax revenue collected under this Article and tax refunds or credits allowed under this Article shall be allocated among and charged to the funds and accounts listed in G.S. 105-449.125 in accordance with that section. (1955, c. 823, s. 7; 1981 (Reg. Sess., 1982), c. 1211, s. 3; 1989, c. 692, s. 1.16; 1995, c. 390, s. 17.)

§ 105-449.44. How to determine the amount of fuel used in the State; presumption of amount used.

(a) Calculation. — The amount of motor fuel or alternative fuel a motor carrier uses in its operations in this State for a reporting period is the number of miles the motor carrier travels in this State during that period divided by the calculated miles per gallon for the motor carrier for all qualified vehicles during that period.

(b) Presumption. — The Secretary must check reports filed under this Article against the weigh station records and other records of the Division of Motor Vehicles of the Department of Transportation concerning motor carriers to determine if motor carriers that are operating in this State are filing the reports required by this Article. The Department may assess a motor carrier for the amount payable based on the presumed mileage. A motor carrier that does either of the following for a quarter is presumed to have traveled in this State during that quarter the number of miles equal to 10 trips of 450 miles each for each of the motor carrier's vehicles:

(1) Fails to file a report for the quarter and the records of the Division indicate the carrier operated in this State during the quarter.

(2) Files a report for the quarter that, based on the records of the Division, understates by at least twenty-five percent (25%) the carrier's mileage in this State for the quarter.

(c) Vehicles. — The number of vehicles of a motor carrier that is registered under this Article is the number of identification markers issued to the carrier. The number of vehicles of a carrier that is not registered under this Article is the number of vehicles registered by the motor carrier in the carrier's base state under the International Registration Plan. (1955, c. 823, s. 8; 1995, c. 390, s. 35; 1999-337, s. 39; 2000-173, s. 12; 2005-435, s. 4.)

Effect of Amendments. — Session Laws 2005-435, s. 4, effective September 27, 2005, rewrote subsection (a).

§ 105-449.45. Reports of carriers.

(a) Report. — A motor carrier must report its operations to the Secretary on a quarterly basis unless subsection (b) of this section exempts the motor carrier from this requirement. A quarterly report covers a calendar quarter and is due by the last day in April, July, October, and January.

(b) Exemptions. — A motor carrier is not required to file a quarterly report if any of the following applies:

(1) All the motor carrier's operations during the quarter were made under a temporary permit issued under G.S. 105-449.49.

(2) The motor carrier is an intrastate motor carrier, as indicated on the motor carrier's application for registration with the Secretary.

(c) Other Reports. — A motor carrier must file with the Secretary other reports concerning its operations that the Secretary requires.

(d) Penalties. — A motor carrier that fails to file a report under this section by the required date is subject to a penalty of fifty dollars ($50.00). (1955, c. 823, s. 9; 1973, c. 476, s. 193; 1979, 2nd Sess., c. 1086, s. 2; 1981 (Reg. Sess., 1982), c. 1254, s. 2; 1989 (Reg. Sess., 1990), c. 1050, s. 1; 1991, c. 182, s. 5; 1995, c. 17, s. 13.1; 1998-212, s. 29A.14(q); 1999-337, s. 40.)

§ 105-449.46. Inspection of books and records.

The Secretary and his authorized agents and representatives shall have the right at any reasonable time to inspect the books and records of any motor carrier subject to the tax imposed by this Article or to the registration fee imposed by Article 3 of Chapter 20 of the General Statutes. (1955, c. 823, s. 10; 1973, c. 476, s. 193; 2005-435, s. 5.)

Effect of Amendments. — Session Laws 2005-435, s. 5, effective September 27, 2005, substituted "Article or to the registration fee imposed by Article 3 of Chapter 20 of the General Statutes" for "Article" at the end of the paragraph.

§ 105-449.47. Registration of vehicles.

(a) Requirement. — A motor carrier that is subject to the International Fuel Tax Agreement may not operate or cause to be operated in this State any vehicle listed in the definition of motor vehicle unless both the motor carrier and the motor vehicle are registered with the motor carrier's base state jurisdiction. A motor carrier that is not subject to the International Fuel Tax Agreement may not operate or cause to be operated in this State any vehicle listed in the definition of motor vehicle unless both the motor carrier and the motor vehicle are registered with the Secretary for purposes of the tax imposed by this Article.

(a1) Registration and Identification Marker. — When the Secretary registers a motor carrier, the Secretary must issue at least one identification marker for each motor vehicle operated by the motor carrier. A motor carrier must keep records of identification markers issued to it and must be able to account for all identification markers it receives from the Secretary. Registrations and identification markers issued by the Secretary are for a calendar year. All identification markers issued by the Secretary remain the property of the State. The Secretary may revoke a registration or an identification marker when a motor carrier fails to comply with this Article or Article 36C or 36D of this Subchapter.

A motor carrier must carry a copy of its registration in each motor vehicle operated by the motor carrier when the vehicle is in this State. A motor vehicle must clearly display an identification marker at all times. The identification marker must be affixed to the vehicle for which it was issued in the place and manner designated by the authority that issued it.

(b) Exemption. — This section does not apply to the operation of a vehicle that is registered in another state and is operated temporarily in this State by a public utility, a governmental or cooperative provider of utility services, or a contractor for one of these entities for the purpose of restoring utility services in an emergency outage. (1955, c. 823, s. 11; 1973, c. 746, s. 193; 1983, c. 713, s. 56; 1985 (Reg. Sess., 1986), c. 937, s. 20; 1989, c. 692, s. 6.2; 1991, c. 487, s. 6; 1995, c. 50, s. 5; c. 390, s. 18; 1999-337, s. 41; 2002-108, s. 3; 2004-170, s. 24; 2005-435, s. 6.)

Effect of Amendments. — Session Laws 2005-435, s. 6, effective September 27, 2005, in subsection (a1), deleted "withhold or" preceding "revoke a registration" and substituted "Article" for "Article, former Article 36 or 36A of this Subchapter" in the last sentence.

§ 105-449.47A. Reasons why the Secretary can deny an application for a registration and identification marker.

The Secretary may refuse to register and issue an identification marker to an applicant that has done any of the following:

(1) Had a registration issued under Chapter 105 or Chapter 119 of the General Statutes cancelled by the Secretary for cause.

(2) Had a registration issued by another jurisdiction, pursuant to G.S. 105-449.57, cancelled for cause.

(3) Been convicted of fraud or misrepresentation.

(4) Been convicted of any other offense that indicates that the applicant may not comply with this Article if registered and issued an identification marker.

(5) Failed to remit payment for a tax debt under Chapter 105 or Chapter 119 of the General Statutes. The term "tax debt" has the same meaning as defined in G.S. 105-243.1.

(6) Failed to file a return due under Chapter 105 or Chapter 119 of the General Statutes. (2005-435, s. 7.)

Editor's Note. — Session Laws 2005-435, s. 7, made this section effective January 1, 2006.

§ 105-449.48: Repealed by Session Laws 2006-162, s. 12(c), effective July 24, 2006.

§ 105-449.49. Temporary permits.

(a) Issuance. — Upon application to the Secretary and payment of a fee of fifty dollars ($50.00), a motor carrier may obtain a temporary permit authorizing the carrier to operate a vehicle in the State for three days without registering the vehicle in accordance with G.S. 105-449.47. A motor carrier to whom a temporary permit has been issued may elect not to report its operation of the vehicle during the three-day period. Fees collected under this subsection are credited to the Highway Fund.

(b) Refusal. — The Secretary may refuse to issue a temporary permit to any of the following:

(1) A motor carrier whose registration has been withheld or revoked.
(2) A motor carrier who the Secretary determines is evading payment of tax through the successive purchase of temporary permits. (1955, c. 823, s. 13; 1973, c. 476, s. 193; 1979, c. 11; 1981 (Reg. Sess., 1982), c. 1254, s. 1; 1983, c. 713, s. 58; 1991, c. 182, s. 6; c. 487, s. 7; 1991 (Reg. Sess., 1992), c. 913, s. 10; 2003-349, s. 10.1; 2006-162, s. 12(d).)

Effect of Amendments. — Session Laws 2006-162, s. 12(d), effective July 24, 2006, added the subsection designations and subsection catchlines; and, in present subsection (a), inserted "for three days" following "State" and deleted "for not more than three days" at the end of the first sentence and added the last sentence.

§ 105-449.50. Application blanks.

The Secretary shall prepare forms to be used in making applications in accordance with this Article and the applicant shall furnish all information required by such forms. (1955, c. 823, s. 14; 1973, c. 476, s. 193.)

§ 105-449.51. Violations declared to be misdemeanors.

Any person who operates or causes to be operated on a highway in this State a motor vehicle that does not carry a registration card as required by this Article, does not properly display an identification marker as required by this Article, or is not registered in accordance with this Article is guilty of a Class 3 misdemeanor and, upon conviction thereof, shall be fined two hundred dollars ($200.00). Each day's operation in violation of any provision of this section shall constitute a separate offense. (1955, c. 823, s. 15; 1973, c. 476, s. 193; 1983, c. 713, s. 59; 1993, c. 539, s. 734; 1994, Ex. Sess., c. 24, s. 14(c); 2005-435, s. 8.)

Effect of Amendments. — Session Laws 2005-435, s. 8, effective January 1, 2006, deleted "only" preceding "be fined" and "no less than ten dollars ($10.00) nor more than" thereafter in the introductory language.

§ 105-449.52. Civil penalties applicable to motor carriers.

(a) Penalty. — A motor carrier who does any of the following is subject to a civil penalty:

(1) Operates in this State or causes to be operated in this State a motor vehicle that either fails to carry the registration card required by this Article or fails to display an identification marker in accordance with this Article. The amount of the penalty is one hundred dollars ($100.00).

(2) Is unable to account for identification markers the Secretary issues the motor carrier, as required by G.S. 105-449.47. The amount of the penalty is one hundred dollars ($100.00) for each identification marker the carrier is unable to account for.

(3) Displays an identification marker on a motor vehicle operated by a motor carrier that was not issued to the carrier by the Secretary under G.S. 105-449.47. The amount of the penalty is one thousand dollars ($1,000) for each identification marker unlawfully obtained. Both the licensed motor carrier to whom the Secretary issued the identification marker and the motor carrier displaying the unlawfully obtained identification marker are jointly and severally liable for the penalty under this subdivision.

A penalty imposed under this section is payable to the Department of Revenue, the Department of Crime Control and Public Safety, or the Division of Motor Vehicles. When a motor vehicle is found to be operating without a registration card or an identification marker or with an identification marker the Secretary did not issue for the vehicle, the motor vehicle may not be driven for a purpose other than to park the motor vehicle until the penalty imposed under this section is paid unless the officer that imposes the penalty determines that operation of the motor vehicle will not jeopardize collection of the penalty.

(a1) Payment. — A penalty imposed under this section is payable to the agency that assessed the penalty. When a motor vehicle is found to be operating without a registration card or an identification marker or with an identification marker the Secretary did not issue for the vehicle, the motor vehicle may not be driven for a purpose other than to park the motor vehicle until the penalty imposed under this section is paid unless the officer that imposes the penalty determines that operation of the motor vehicle will not jeopardize collection of the penalty.

(b) Hearing. — The procedure set out in G.S. 105-449.119 for protesting a penalty imposed under Article 36C, Part 6, of this Chapter applies to a penalty imposed under this section. (1955, c. 823, s. 16; 1957, c. 948; 1973, c. 476, s. 193; 1975, c. 716, s. 5; 1981, c. 690, s. 18; 1983, c. 713, s. 60; 1991, c. 42, s. 14; 1991 (Reg. Sess., 1992), c. 913, s. 11; 1998-146, s. 2; 1999-337, s. 43; 2002-108, s. 4; 2004-170, s. 25; 2007-527, s. 16(a).)

Effect of Amendments. — Session Laws 2007-527, s. 16(a), effective August 31, 2007, redesignated the former second paragraph of subdivision (a)(3) as present subsection (a1); and in subsection (a1), added the subsection heading, and substituted "agency that assessed the penalty" for "Department of Revenue, the Department of Crime Control and Public Safety, or the Division of Motor Vehicles."

§ 105-449.53: Repealed by Session Laws 1963, c. 1169, s. 6.

§ 105-449.54. Commissioner of Motor Vehicles made process agent of nonresident motor carriers.

By operating a motor vehicle on the highways of this State, a nonresident motor carrier consents to the appointment of the Commissioner of Motor Vehicles as its attorney in fact and process agent for all summonses or other lawful process or notice in any action, assessment, or other proceeding under this Chapter. (1955, c. 823, s. 18; 2004-170, s. 26.)

§§ 105-449.55, 105-449.56: Repealed by Session Laws 1991, c. 42, s. 17.

Cross References. — As to enforcement of Subchapter V, see now G.S. 105-269.3.

§ 105-449.57. Cooperative agreements between jurisdictions.

(a) Authority. — The Secretary may enter into cooperative agreements with other jurisdictions for exchange of information in administering the tax imposed by this Article. No agreement, arrangement, declaration, or amendment to an agreement is effective until stated in writing and approved by the Secretary.

(b) Content. — An agreement may provide for determining the base state for motor carriers, records requirements, audit procedures, exchange of information, persons eligible for tax licensing, defining qualified motor vehicles, determining if bonding is required, specifying reporting requirements and periods, including defining uniform penalty and interest rates for late reporting, determining methods for collecting and forwarding of motor carrier taxes and penalties to another jurisdiction, and any other provisions that will facilitate the administration of the agreement.

(c) Disclosure. — In accordance with G.S. 105-259, the Secretary may, as required by the terms of an agreement, forward to officials of another jurisdiction any information in the Department's possession relative to the use of motor fuel or alternative fuel by any motor carrier. The Secretary may disclose to officials of another jurisdiction the location of offices, motor vehicles, and other real and personal property of motor carriers.

(d) Audits. — An agreement may provide for each jurisdiction to audit the records of motor carriers based in the jurisdiction to determine if the taxes due each jurisdiction are properly reported and paid. Each jurisdiction must forward the findings of the audits performed on motor carriers based in the jurisdiction to each jurisdiction in which the carrier has taxable use of motor fuel or alternative fuel. For motor carriers not based in this State, the Secretary may utilize the audit findings received from another jurisdiction as the basis upon which to propose assessments of taxes against the carrier as though the audit had been conducted by the Secretary. Penalties and interest must be assessed at the rates provided in the agreement.

No agreement entered into pursuant to this section may preclude the Department from auditing the records of any motor carrier covered by this Chapter.

The provisions of Article 9 of this Chapter apply to any assessment or order made under this section.

(e) Restriction. — The Secretary may not enter into any agreement that would increase or decrease taxes and fees imposed under Subchapter V of Chapter 105 of the General Statutes. Any provision to the contrary is void. (1989, c. 667, s. 1; 1993, c. 485, s. 36; 1995 (Reg. Sess., 1996), c. 647, s. 50; 1999-337, s. 42.)

§§ 105-449.58, 105-449.59: Reserved for future codification purposes.

ARTICLE 36C.

Gasoline, Diesel, and Blends.

Part 1. General Provisions.

§ 105-449.60. Definitions.

The following definitions apply in this Article:

(1) Biodiesel. — Any fuel or mixture of fuels derived in whole or in part from agricultural products or animal fats or wastes from these products or fats.

(1a) Biodiesel provider. — A person who does any of the following:

  a. Produces an average of no more than 500,000 gallons of biodiesel per month during a calendar year. A person who produces more than this amount is a refiner.

  b. Imports biodiesel outside the terminal transfer system by means of a marine vessel, a transport truck, a railroad tank car, or a tank wagon.

(1b) to (1d) Reserved for future codification purposes.

(1e) Blended fuel. — A mixture composed of gasoline or diesel fuel and another liquid, other than a de minimus amount of a product such as carburetor detergent or oxidation inhibitor, that can be used as a fuel in a highway vehicle.

(2) Blender. — A person who produces blended fuel outside the terminal transfer system.

(3) Bulk-end user. — A person who maintains storage facilities for motor fuel and uses part or all of the stored fuel to operate a highway vehicle.

(4) Bulk plant. — A motor fuel storage and distribution facility that is not a terminal and from which motor fuel may be removed at a rack.

(5) Code. — Defined in G.S. 105-228.90.

(6) Destination state. — The state, territory, or foreign country to which motor fuel is directed for delivery into a storage facility, a receptacle, a container, or a type of transportation equipment for the purpose of resale or use.

(7) Diesel fuel. — Any liquid, other than gasoline, that is suitable for use as a fuel in a diesel-powered highway vehicle. The term includes biodiesel, fuel oil, heating oil, high-sulfur dyed diesel fuel, and kerosene. The term does not include jet fuel sold to a buyer who is certified to purchase jet fuel under the Code.

(8) Distributor. — A person who acquires motor fuel from a supplier or from another distributor for subsequent sale.

(9) Dyed diesel fuel. — Diesel fuel that meets the dyeing and marking requirements of § 4082 of the Code.

(10) Elective supplier. — A supplier that is required to be licensed in this State and that elects to collect the excise tax due this State on motor fuel that is removed by the supplier at a terminal located in another state and has this State as its destination state.

(10a) Exempt card or code. — A credit card or an access code that enables the person to whom the card or code is issued to buy motor fuel at retail without paying the motor fuel excise tax on the fuel.

(11) Export. — To obtain motor fuel in this State for sale or other distribution in another state. In applying this definition, motor fuel delivered out-of-state by or for the seller constitutes an export by the seller and motor fuel delivered out-of-state by or for the purchaser constitutes an export by the purchaser.

(12) Fuel alcohol. — Alcohol, methanol, or fuel grade ethanol.

(13) Fuel alcohol provider. — A person who does any of the following:

a. Produces an average of no more than 500,000 gallons of fuel alcohol per month during a calendar year. A person who produces more than this amount is a refiner.

b. Imports fuel alcohol outside the terminal transfer system by means of a marine vessel, a transport truck, a railroad tank car, or a tank wagon.

(14) Gasohol. — A blended fuel composed of gasoline and fuel grade ethanol.

(15) Gasoline. — Any of the following:

a. All products that are commonly or commercially known or sold as gasoline and are suitable for use as a fuel in a highway vehicle, other than products that have an American Society for Testing Materials octane number of less than 75 as determined by the motor method.

b. A petroleum product component of gasoline, such as naptha, reformate, or toluene.

c. Gasohol.

d. Fuel alcohol.

The term does not include aviation gasoline sold for use in an aircraft motor. "Aviation gasoline" is gasoline that is designed for use in an aircraft motor and is not adapted for use in an ordinary highway vehicle.

(16) Gross gallons. — The total amount of motor fuel measured in gallons, exclusive of any temperature, pressure, or other adjustments.

(17) Highway. — Defined in G.S. 20-4.01(13).

(18) Highway vehicle. — A self-propelled vehicle that is designed for use on a highway.

(19) Import. — To bring motor fuel into this State by any means of conveyance other than in the fuel supply tank of a highway vehicle. In applying this definition, motor fuel delivered into this State from out-of-state by or for the seller constitutes an import by the seller, and motor fuel delivered into this State from out-of-state by or for the purchaser constitutes an import by the purchaser.

(19a) In-State-only supplier. — Either of the following:

a. A supplier that is required to have a license and elects not to collect the excise tax due this State on motor fuel that is removed by the supplier at a terminal located in another state and has this State as its destination state.

b. A supplier that does business only in this State.

(20) Motor fuel. — Gasoline, diesel fuel, and blended fuel.

(21) Motor fuel rate. — The rate of tax set in G.S. 105-449.80.

(22) Motor fuel transporter. — A person who transports motor fuel by pipeline or who transports motor fuel outside the terminal transfer system by means of a transport truck, a railroad tank car, or a marine vessel.

(23) Net gallons. — The amount of motor fuel measured in gallons when corrected to a temperature of 60 degrees Fahrenheit and a pressure of 14 $\frac{7}{10}$ pounds per square inch.

(24) Permissive supplier. — An out-of-state supplier that elects, but is not required, to have a supplier's license under this Article.

(25) Person. — Defined in G.S. 105-228.90.

(26) Position holder. — The person who holds the inventory position in motor fuel in a terminal, as reflected on the records of the terminal operator. A person holds the inventory position in motor fuel when that person has a contract with the terminal operator for the use of storage facilities and terminaling services for fuel at the terminal. The term includes a terminal operator who owns fuel in the terminal.

(27) Rack. — A mechanism for delivering motor fuel from a refinery, a terminal, or a bulk plant into a transport truck, a railroad tank car, or another means of transfer that is outside the terminal transfer system.

(27a) Refiner. — A person who owns, operates, or controls a refinery. The term includes a person who produces an average of more than 500,000 gallons of fuel alcohol or biodiesel a month during a calendar year.

(27b) Refinery. — A facility used to process crude oil, unfinished oils, natural gas liquids, or other hydrocarbons into motor fuel and from which fuel may be removed by pipeline or vessel or at a rack. The term does not include a facility that produces only blended fuel or gasohol.

(28) Removal. — A physical transfer other than by evaporation, loss, or destruction. A physical transfer to a transport truck or another means of conveyance outside the terminal transfer system is complete upon delivery into the means of conveyance.

(29) Retailer. — A person who maintains storage facilities for motor fuel and who sells the fuel at retail or dispenses the fuel at a retail location.

(30) Secretary. — Defined in G.S. 105-228.90.

(31) Supplier. — Any of the following:
  a. A position holder or a person who receives motor fuel pursuant to a two-party exchange.
  b. A fuel alcohol provider.
  c. A biodiesel provider.
  d. A refiner.

(32) System transfer. — Either of the following:
  a. A transfer of motor fuel within the terminal transfer system.
  b. A transfer, by transport truck or railroad tank car, of fuel grade ethanol.

(33) Tank wagon. — A truck that is not a transport truck and is designed or used to carry at least 1,000 gallons of motor fuel.

(33a) Tax. — An inspection or other excise tax on motor fuel and any other fee or charge imposed on motor fuel on a per-gallon basis.

(34) Terminal. — A motor fuel storage and distribution facility that has been assigned a terminal control number by the Internal Revenue Service, is supplied by pipeline or marine vessel, and from which motor fuel may be removed at a rack.

(35) Terminal operator. — A person who owns, operates, or otherwise controls a terminal.

(36) Terminal transfer system. — The motor fuel distribution system consisting of refineries, pipelines, marine vessels, and terminals. The term has the same meaning as "bulk transfer/terminal system" under 26 C.F.R. § 48.4081-1.

(37) Transmix. — Either of the following:
  a. The buffer or interface between two different products in a pipeline shipment.
  b. A mix of two different products within a refinery or terminal that results in an off-grade mixture.

(38) Transport truck. — A semitrailer combination rig designed or used to transport loads of motor fuel over a highway.

(39) Trustee. — A person who is licensed as a supplier, an elective supplier, or a permissive supplier and who receives tax payments from and on behalf of a licensed distributor.

(40) Two-party exchange. — A transaction in which motor fuel is transferred from one licensed supplier to another licensed supplier pursuant to an exchange agreement under which the supplier that is the position holder agrees to deliver motor fuel to the other supplier or the other supplier's customer at the rack of the terminal at which the delivering supplier is the position holder.

(41) User. — A person who owns or operates a licensed highway vehicle that has a registered gross vehicle weight of at least 10,001 pounds and who does not maintain storage facilities for motor fuel. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, ss. 1, 2; 1998-146, s. 3; 2000-173, ss. 13(a), 14(a); 2001-414, s. 27; 2002-108, ss. 5, 6; 2003-349, s. 10.2; 2004-170, s. 27; 2006-162, s. 14(a).)

Editor's Note. — Session Laws 1998-146, s. 13, applicable to transactions occurring on or after January 1, 1999, substituted "transaction" for "exchange" in subdivision (31)a., and rewrote subdivision (40). Session Laws 2000-173, s. 13(a) amended subdivisions (31) and (40) to restore the pre-1998 wording.

Session Laws 2004-124, s. 30.9, provides: "Any funds received by the Department of Transportation as a result of the Department of Revenue's Fuel Tax Action Plan in an amount greater than the costs of administering the program during the 2004-2005 fiscal year shall be distributed equally among the 14 Highway Divisions. One-half of the funds distributed to each Highway Division shall be used for contract resurfacing and the remaining one-half of the funds distributed to each Highway Division shall be used for highway maintenance.

"The Department of Revenue shall submit periodic reports to the Joint Legislative Transportation Oversight Committee and the Joint Legislative Commission on Governmental Operations on the implementation of the Department's Fuel Tax Action Plan. The initial report shall describe the plan, the steps the Department intends to take to implement the plan, the timetable for implementation of the steps, and the amount of revenue the Department expects to generate. Subsequent reports shall describe the Department's progress in implementing the plan, the number of newly authorized positions that have been filled, and the amount and source of revenue generated from implementation. The Department shall submit the initial report August 1, 2004. Subsequent reports shall be submitted every three months starting November 1, 2004, until the end of the plan. The Department shall not distribute revenue generated by the Fuel Tax Action Plan until the revenue has been included in a report submitted under this section."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

Effect of Amendments. — Session Laws 2006-162, s. 14(a), effective January 1, 2007, and applicable to motor fuel purchased on or after January 1, 2007, added subdivision (10a). See Editor's note.

CASE NOTES

Editor's Note. — *The case below was decided under repealed Article 36 of this chapter.*

Tax is payable by the first distributor. In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965).

§ 105-449.61. Tax restrictions; administration.

(a) No Local Tax. — A county or city may not impose a tax on the sale, distribution, or use of motor fuel.

(b) No Double Tax. — The tax imposed by this Chapter applies only once on the same motor fuel.

(c) Administration. — Article 9 of this Chapter applies to this Article. (1995, c. 390, s. 3.)

§ 105-449.62. Nature of tax.

This Article imposes a tax on motor fuel to provide revenue for the State's transportation needs and for the other purposes listed in Part 7 of this Article. The tax is collected from the supplier or importer of the fuel because this method is the most efficient way to collect the tax. The tax is designed, however, to be paid ultimately by the person who consumes the fuel. The tax becomes a part of the cost of the fuel and is consequently paid by those who subsequently purchase and consume the fuel. (1997-60, s. 1.)

§§ 105-449.63 through 105-449.64: Reserved for future codification purposes.

Part 2. Licensing.

§ 105-449.65. List of persons who must have a license.

(a) License. — A person may not engage in business in this State as any of the following unless the person has a license issued by the Secretary authorizing the person to engage in that business:

(1) A refiner.
(2) A supplier.
(3) A terminal operator.
(4) An importer.
(5) An exporter.
(6) A blender.
(7) A motor fuel transporter.
(8) Repealed by Session Laws 1999-438, s. 20, effective August 10, 1999.
(9) Repealed by Session Laws 1999-438, s. 21, effective August 10, 1999.
(10) A distributor who purchases motor fuel from an elective or permissive supplier at an out-of-state terminal for import into this State.

(b) Multiple Activity. — A person who is engaged in more than one activity for which a license is required must have a separate license for each activity, unless this subsection provides otherwise. A person who is licensed as a supplier is considered to have a license as a distributor. A person who is licensed as an occasional importer or a tank wagon importer is not required to obtain a separate license as a distributor unless the importer is also purchasing motor fuel, at the terminal rack, from an elective or permissive supplier who is authorized to collect and remit the tax to the State. A person who is licensed as a distributor is not required to obtain a separate license as an importer if the distributor acquires fuel for import only from an elective supplier or a permissive supplier and is not required to obtain a separate license as an exporter. A person who is licensed as a distributor or a blender and who transports fuel is considered to be licensed as a motor fuel transporter. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 3; 1997-60, s. 2; 1999-438, ss. 20, 21; 2003-349, s. 10.3; 2005-435, s. 9; 2006-162, s. 13(a).)

Effect of Amendments. — Session Laws 2005-435, s. 9, effective January 1, 2006, rewrote the second and third sentences of subsection (b).

Session Laws 2006-162, s. 13(a), effective July 1, 2007, and applicable to motor fuel transported on or after that date, substituted "and who transports fuel is considered to be licensed as motor fuel transporter" for "is not required to obtain a separate license as a motor fuel transporter if the distributor or blender does not transport motor fuel for others for hire" at the end of the last sentence in subsection (b).

§ 105-449.66. Types of importers; restrictions on who can get a license as an importer.

(a) Types. — An applicant for a license as an importer must indicate the type of importer license sought. The types of importers are as follows:

(1) Bonded importer. — A bonded importer is a person, other than a supplier, who imports, by transport truck or another means of transfer outside the terminal transfer system, motor fuel removed from a terminal located in another state in any of the following circumstances:

a. The state from which the fuel is imported does not require the seller of the fuel to collect motor fuel tax on the removal either at that state's rate or the rate of the destination state.

b. The supplier of the fuel is not an elective supplier.

c. The supplier of the fuel is not a permissive supplier.

(2) Occasional importer. — An occasional importer is any of the following that imports motor fuel by any means outside the terminal transfer system:

a. A distributor that imports motor fuel on an average basis of no more than once a month during a calendar year.

b. A bulk-end user that acquires motor fuel for import from a bulk plant and is not required to be licensed as a bonded importer.

c. A distributor that imports motor fuel for use in a race car.

(3) Tank wagon importer. — A tank wagon importer is a person who imports, only by means of a tank wagon, motor fuel that is removed from a terminal or a bulk plant located in another state.

(b) Restrictions. — A person may not be licensed as more than one type of importer. A bulk-end user that imports motor fuel from a terminal of a supplier that is not an elective or a permissive supplier must be licensed as a bonded importer. A bulk-end user that imports motor fuel from a bulk plant and is not required to be licensed as a bonded importer must be licensed as an occasional importer. A bulk-end user that imports motor fuel only from a terminal of an elective or a permissive supplier is not required to be licensed as an importer. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 4; 1997-60, s. 3.)

§ 105-449.67. List of persons who may obtain a license.

A person who is engaged in business as any of the following may obtain a license issued by the Secretary for that business:

(1) A distributor who is not required to be licensed under G.S. 105-449.65.

(2) A permissive supplier. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 5; 1997-60, s. 4; 2003-349, s. 10.4.)

§ 105-449.68. Restrictions on who can get a license as a distributor.

A bulk-end user of motor fuel may not be licensed as a distributor unless the bulk-end user also acquires motor fuel from a supplier or from another distributor for subsequent sale. This restriction does not apply to a bulk-end user that was licensed as a distributor on January 1, 1996. If a distributor license held by a bulk-end user on January 1, 1996, is subsequently cancelled, the bulk-end user is subject to the restriction set in this section. (1995, c. 390, s. 3; 2000-173, s. 14(b).)

§ 105-449.69. How to apply for a license.

(a) General. — To obtain a license, an applicant must file an application with the Secretary on a form provided by the Secretary. An application must include the applicant's name, address, federal employer identification number, and any other information required by the Secretary.

(b) Most Licenses. — An applicant for a license as a refiner, a supplier, a terminal operator, an importer, a blender, or a distributor must meet the following requirements:

(1) If the applicant is a corporation, the applicant must either be incorporated in this State or be authorized to transact business in this State.

(2) If the applicant is a limited liability company, the applicant must either be organized in this State or be authorized to transact business in this State.

(3) If the applicant is a limited partnership, the applicant must either be formed in this State or be authorized to transact business in this State.

(4) If the applicant is an individual or a general partnership, the applicant must designate an agent for service of process and give the agent's name and address.

(c) Federal Certificate. — An applicant for a license as a refiner, a supplier, a terminal operator, a blender, or a permissive supplier must have a federal Certificate of Registry that is issued under § 4101 of the Code and authorizes the applicant to enter into federal tax-free transactions in taxable motor fuel in the terminal transfer system. An applicant that is required to have a federal Certificate of Registry must include the registration number of the certificate on the application for a license under this section.

An applicant for a license as an importer, an exporter, or a distributor that has a federal Certificate of Registry issued under § 4101 of the Code must include the registration number of the certificate on the application for a license under this section.

(d) Import Activity. — An applicant for a license as an importer or as a distributor must list on the application each state from which the applicant intends to import motor fuel and, if required by a state listed, must be licensed or registered for motor fuel tax purposes in that state. If a state listed requires the applicant to be licensed or registered, the applicant must give the applicant's license or registration number in that state.

(e) Export Activity. — An applicant for a license as an exporter must designate an agent located in North Carolina for service of process and must give the agent's name and address. An applicant for a license as an exporter or as a distributor must list on the application each state to which the applicant intends to export motor fuel received in this State by means of a transfer that is outside the terminal transfer system and, if required by a state listed, must be licensed or registered for motor fuel tax purposes in that state. If a state listed requires the applicant to be licensed or registered, the applicant must give the applicant's license or registration number in that state. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 6; 2003-349, s. 10.5; 2005-435, s. 10.)

Effect of Amendments. — Session Laws 2005-435, s. 10, effective September 27, 2005, deleted "a bulk-end user of undyed diesel fuel, a retailer of undyed diesel fuel" following "an importer" in subsection (b).

§ 105-449.70. Supplier election to collect tax on out-of-state removals.

(a) Election. — An applicant for a license as a supplier may elect on the application to collect the excise tax due this State on motor fuel that is removed by the supplier at a terminal located in another state and has this State as its destination state. The Secretary must provide for this election on the application form. A supplier that makes the election allowed by this section is an elective supplier. A supplier that does not make the election allowed by this section is an in-State-only supplier.

A supplier that does not make the election on the application for a supplier's license may make the election later by completing an election form provided by the Secretary. A supplier that does not make the election may not act as an elective supplier for motor fuel that is removed at a terminal in another state and has this State as its destination state.

(b) Effect. — A supplier that makes the election allowed by this section agrees to all of the following with respect to motor fuel that is removed by the supplier at a terminal located in another state and has this State as its destination state:

(1) To collect the excise tax due this State on the fuel and to waive any defense that the State lacks jurisdiction to require the supplier to collect the excise tax due this State under this Article on the fuel.

(2) To report and pay the tax due on the fuel in the same manner as if the removal had occurred at a terminal located in this State.

(3) To keep records of the removal of the fuel and submit to audits concerning the fuel as if the removal had occurred at a terminal located in this State.

(4) To report removals of fuel received by a person who is not licensed in the state where the removal occurred.

(c) Limited Jurisdiction. — A supplier that makes the election allowed by this section acknowledges that the State imposes the requirements listed in subsection (b) of this section on the supplier under its general police power set out in Article 3 of Chapter 119 of the General Statutes to regulate the quality of motor fuel and thereby promote public health and safety. A supplier that makes the election allowed by this section submits to the jurisdiction of the State only for the administration of this Article. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, ss. 7, 8.)

§ 105-449.71. Permissive supplier election to collect tax on out-of-state removals.

(a) Election. — An out-of-state supplier that is not required to have a license under this Part may elect to have a license and thereby become a permissive supplier. An out-of-state supplier that does not make this election may not act as a permissive supplier for motor fuel that is removed at a terminal in another state and has this State as its destination state.

(b) Effect. — By obtaining a license as a permissive supplier, the permissive supplier agrees to be subject to the same requirements as a supplier and to all of the following with respect to motor fuel that is removed by the permissive supplier at a terminal located in another state and has this State as its destination state:

(1) To collect the excise tax due this State on the fuel and to waive any defense that the State lacks jurisdiction to require the supplier to collect the excise tax due this State under this Article on the fuel.

(2) To report and pay the tax due on the fuel in the same manner as if the removal had occurred at a terminal located in this State.

(3) To keep records of the removal of the fuel and submit to audits concerning the fuel as if the removal had occurred at a terminal located in this State.

(4) To report removals of fuel received by a person who is not licensed in the state where the removal occurred.

(c) Limited Jurisdiction. — A supplier that makes the election allowed by this section acknowledges that the State imposes the requirements listed in subsection (b) of this section on the supplier under its general police power set out in Article 3 of Chapter 119 of the General Statutes to regulate the quality of motor fuel and thereby promote public health and safety. A supplier that makes the election allowed by this section submits to the jurisdiction of the State only for the administration of this Article. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 9.)

§ 105-449.72. Bond or letter of credit required as a condition of obtaining and keeping certain licenses or of applying for certain refunds.

(a) Initial Bond. — An applicant for a license as a refiner, a terminal operator, a supplier, an importer, a blender, a permissive supplier, or a distributor must file with the Secretary a bond or an irrevocable letter of credit. A bond or an irrevocable letter of credit must be conditioned upon compliance with the requirements of this Article, be payable to the State, and be in the form required by the Secretary. The amount of the bond or irrevocable letter of credit is determined as follows:

(1) For an applicant for a license as any of the following, the amount is two million dollars ($2,000,000):
   a. A refiner.
   b. A terminal operator.
   c. A supplier that is a position holder or a person that receives motor fuel pursuant to a two-party exchange.
   d. A bonded importer.
   e. A permissive supplier.

(2) For an applicant for a license as any of the following, the amount is two times the applicant's average expected monthly tax liability under this Article, as determined by the Secretary. The amount may not be less than two thousand dollars ($2,000) and may not be more than five hundred thousand dollars ($500,000):
   a. Repealed by Session Laws 2007-527, s. 17(a), effective October 1, 2007.
   b. An occasional importer.
   c. A tank wagon importer.
   d. A distributor.
   e. Repealed by Session Laws 1997-60, s. 5, effective October 5, 1997.

(3) For an applicant for a license as any of the following, a bond is required only if the applicant's average expected annual tax liability under this Article, as determined by the Secretary, is at least two thousand dollars ($2,000). When a bond is required, the bond amount is the same as under subdivision (2) of this subsection.
   a. A blender.
   b. A supplier that is a fuel alcohol provider or a biodiesel provider but is neither a position holder nor a person that receives motor fuel pursuant to a two-party exchange.

(b) Multiple Activity. — An applicant for a license as a distributor and as a bonded importer must file only the bond required of a bonded importer. An applicant for two or more of the licenses listed in subdivision (a)(2) or (a)(3) of this section may file one bond that covers the combined liabilities of the applicant under all the activities. A bond for these combined activities may not exceed the maximum amount set in subdivision (a)(2) of this subsection.

(c) Adjustment to Bond. — When notified to do so by the Secretary, a person that has filed a bond or an irrevocable letter of credit and that holds a license listed in subdivision (a)(2) of this section must file an additional bond or irrevocable letter of credit in the amount requested by the Secretary. The person must file the additional bond or irrevocable letter of credit within 30 days after receiving the notice from the Secretary. The amount of the initial bond or irrevocable letter of credit and any additional bond or irrevocable letter of credit filed by the license holder, however, may not exceed the limits set in subdivision (a)(2) of this section.

(d) Replacements. — When a license holder files a bond or an irrevocable letter of credit as a replacement for a previously filed bond or letter of credit and the license holder has paid all taxes and penalties due under this Article, the Secretary must take one of the following actions:

(1) Return the previously filed bond or letter of credit.
(2) Notify the person liable on the previously filed bond that the person is released from liability on the bond.

(e) Credit Card Companies. — The Secretary may require a credit card company to file with the Secretary a bond if the company applies for a refund under G.S. 105-449.105(a) and the Secretary determines after an audit that a bond is needed to protect the State from loss in collecting any additional tax due pursuant to the audit. The bond must be conditioned upon compliance with the requirements of this Article, be payable to the State, and be in the form required by the Secretary. The amount of a bond required under this subsection is two times the average monthly refund due, subject to the minimum and maximum amounts provided in subdivision (a)(2) of this section. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 10; 1997-60, s. 5; 1998-146, s. 4; 2001-205, s. 5; 2002-108, ss. 7, 8; 2003-349, s. 10.6; 2004-170, s. 28; 2007-527, s. 17(a).)

Effect of Amendments. — Session Laws 2007-527, s. 17(a), effective October 1, 2007, deleted subdivision (a)(2)a; in the introductory language of subdivision (a)(3), substituted "as any of the following," for "as a blender"; and added sub-subdivisions (a)(3)a. and (a)(3)b.

§ 105-449.73. Reasons why the Secretary can deny an application for a license.

The Secretary may refuse to issue a license to an applicant that has done any of the following:

(1) Had a license or registration issued under this Article or former Article 36 or 36A of this Chapter cancelled by the Secretary for cause.
(1a) Had a motor fuel license or registration issued by another state cancelled for cause.
(2) Had a federal Certificate of Registry issued under § 4101 of the Code, or a similar federal authorization, revoked.
(3) Been convicted of fraud or misrepresentation.
(4) Been convicted of any other offense that indicates that the applicant may not comply with this Article if issued a license.
(5) Failed to remit payment for a tax debt under Chapter 105 or Chapter 119 of the General Statutes. The term "tax debt" has the same meaning as defined in G.S. 105-243.1.
(6) Failed to file a return due under Chapter 105 or Chapter 119 of the General Statutes. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 11; 2003-349, s. 10.7; 2005-435, s. 11.)

Editor's Note. — The subsection designation (1a) was assigned by the Revisor of Statutes, the designation in Session Laws 1995 (Reg. Sess., 1996), c. 647, s. 11, having been (2). The remaining subsections designations are unchanged.

Effect of Amendments. — Session Laws 2005-435, s. 11, effective September 27, 2005, rewrote the first paragraph, substituted "a tax debt" for "an overdue tax debt" twice in subdivision (5).

§ 105-449.74. Issuance of license.

Upon approval of an application, the Secretary must issue a license to the applicant. A supplier's license must indicate the category of the supplier. A license holder must maintain and display a copy of the license issued under this Part in a conspicuous place at each place of business of the license holder. A license is not transferable and remains in effect until surrendered or cancelled. (1995, c. 390, s. 3; 2004-170, s. 29.)

§ 105-449.75. License holder must notify the Secretary of discontinuance of business.

A license holder that stops engaging in this State in the business for which the license was issued must give the Secretary written notice of the change and must surrender the license to the Secretary. The notice must give the date the change takes effect and, if the license holder has transferred the business to another by sale or otherwise, the date of the transfer and the name and address of the person to whom the business is transferred.

If the license holder is a supplier, all taxes for which the supplier is liable under this Article but are not yet due become due on the date of the change. If the supplier has transferred the business to another and does not give the notice required by this section, the person to whom the supplier has transferred the business is liable for the amount of any tax the supplier owed the State on the date the business was transferred. The liability of the person to whom the business is transferred is limited to the value of the property acquired from the supplier. (1995, c. 390, s. 3.)

§ 105-449.76. Reasons why the Secretary can cancel a license.

The Secretary may cancel a license issued under this Article upon the written request of the license holder. The Secretary may summarily cancel the license of a license holder when the Secretary finds that the license holder is incurring liability for the tax imposed under this Article after failing to pay a tax when due under this Article. In addition, the Secretary may cancel the license of a license holder that commits one or more of the acts listed in G.S. 105-449.120 after holding a hearing on whether the license should be cancelled.

The Secretary must send a person whose license is summarily cancelled a notice of the cancellation and must give the person an opportunity to have a hearing on the cancellation within 10 days after the cancellation. The Secretary must give a person whose license may be cancelled after a hearing at least 10 days' written notice of the date, time, and place of the hearing. A notice of a summary license cancellation and a notice of hearing must be sent by registered mail to the last known address of the license holder.

When the Secretary cancels a license and the license holder has paid all taxes and penalties due under this Article, the Secretary must take one of the following actions concerning a bond or an irrevocable letter of credit filed by the license holder:

(1) Return an irrevocable letter of credit to the license holder.
(2) Return a bond to the license holder or notify the person liable on the bond and the license holder that the person is released from liability on the bond. (1995, c. 390, s. 3.)

§ 105-449.77. Records and lists of license applicants and license holders.

(a) Records. — The Secretary must keep a record of the following:
(1) Applicants for a license under this Article.
(2) Persons to whom a license has been issued under this Article.
(3) Persons that hold a current license issued under this Article, by license category.

(b) Lists. — The Secretary must annually give a list to each license holder of all the license holders under this Article. The list must state the name, account number, and business address of each license holder on the list. The Secretary must send a monthly update of the list to each licensed refiner or licensed supplier and to any other license holder that requests a copy of the list.

(c) Repealed by Session Laws 2002-108, s. 9, effective January 1, 2003. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 12; 1997-60, s. 6; 2002-108, s. 9.)

§§ 105-449.78, 105-449.79: Reserved for future codification purposes.

Part 3. Tax and Liability.

§ 105-449.80. Tax rate.

(a) Rate. — The motor fuel excise tax rate is a flat rate of seventeen and one-half cents (17 1/2¢) a gallon plus a variable wholesale component. The variable wholesale component is either three and one-half cents (3 1/2¢) a gallon or seven percent (7%) of the average wholesale price of motor fuel for the applicable base period, whichever is greater.

The two base periods are six-month periods; one ends on September 30 and one ends on March 31. The Secretary must set the tax rate twice a year based on the wholesale price for each base period. A tax rate set by the Secretary using information for the base period that ends on September 30 applies to the six-month period that begins the following January 1. A tax rate set by the Secretary using information for the base period that ends on March 31 applies to the six-month period that begins the following July 1.

(b) Wholesale Price. — The Secretary must determine the average wholesale price of motor fuel for each base period. To do this, the Secretary must use information on refiner and gas plant operator sales prices of finished motor gasoline and No. 2 diesel fuel for resale, published by the United States Department of Energy in the "Monthly Energy Review", or equivalent data.

The Secretary must compute the average sales price of finished motor gasoline for the base period, compute the average sales price for No. 2 diesel fuel for the base period, and then compute a weighted average of the results of the first two computations based on the proportion of tax collected on each under this Article for the base period. The Secretary must then convert the weighted average price to a cents-per-gallon rate and round the rate to the nearest one-tenth of a cent (1/10¢). If the converted cents-per-gallon rate is exactly between two-tenths of a cent (2/10¢), the Secretary must round the rate up to the higher of the two.

(c) Notification. — The Secretary must notify affected taxpayers of the tax rate to be in effect for each six-month period beginning January 1 and July 1. (1995, c. 390, s. 3.)

Editor's Note. — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 2.2(g), provides: "There is created in the General Fund a Reserve for the Motor Fuels Tax Ceiling. The sum of twenty-two million nine hundred thirty-three thousand dollars ($22,933,000) is hereby transferred from the Savings Reserve Account to the Reserve for the Motor Fuels Tax Ceiling for the 2006-2007 fiscal year.

"The State Treasurer shall transfer funds reserved to hold harmless the Highway Fund and the Highway Trust Fund from the Reserve for the Motor Fuels Tax Ceiling only if the variable wholesale component of the motor fuel excise tax rate in G.S. 105-449.80 would, without the imposition of the cap imposed by Section 24.3 of this act, exceed twelve and four-tenths cents (12.4¢) a gallon. A transfer required under this subsection must be made on a monthly basis. The amount to be transferred from the Reserve for the Motor Fuels Tax Ceiling to the Highway Fund is the difference between the amount of motor fuel excise tax revenue allocated to the Highway Fund under G.S. 105-449.125 for a month and the amount that would have been allocated to it if the variable wholesale component were not capped at twelve and four-tenths cents (12.4¢) a gallon. The total amount transferred to the Highway Fund under this subsection during fiscal year 2006-2007 may not exceed seventeen million six hundred thousand dollars ($17,600,000). The amount to be transferred from the Reserve for the Motor Fuels Tax Ceiling to the Highway Trust Fund is the difference between the amount of motor fuel excise tax revenue allocated to the Highway Trust Fund under G.S. 105-449.125 for a month and the amount that would have been allocated to it if the variable wholesale component were not capped at twelve and four-tenths cents (12.4¢) a gallon. The total amount transferred to the Highway Trust Fund under this subsection during fiscal year 2006-2007 may not exceed five million seven hundred thousand dollars ($5,700,000).

"Funds remaining in the Reserve for the Motor Fuels Tax Ceiling on June 30, 2007, shall revert to the Savings Reserve Account on June 30, 2007."

Session Laws 2006-66, s. 24.3(a), provides: "Notwithstanding G.S. 105-449.80(a), for the period July 1, 2006, through June 30, 2007, the variable wholesale component of the motor fuel excise tax rate may not exceed twelve and four-tenths cents (12.4¢) a gallon."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-323, s. 31.15(a), provides: "Notwithstanding G.S. 105-449.80(a), for the period July 1, 2007, through June 30, 2009, the variable wholesale component of the motor fuel excise tax rate may not exceed twelve and four-tenths cents (12.4¢) a gallon."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 105-449.81. Excise tax on motor fuel.

An excise tax at the motor fuel rate is imposed on motor fuel that is:

(1) Removed from a refinery or a terminal and, upon removal, is subject to the federal excise tax imposed by § 4081 of the Code.

(2) Imported by a system transfer to a refinery or a terminal and, upon importation, is subject to the federal excise tax imposed by § 4081 of the Code.

(3) Imported by a means of transfer outside the terminal transfer system for sale, use, or storage in this State and would have been subject to the federal excise tax imposed by § 4081 of the Code if it had been removed at a terminal or bulk plant rack in this State instead of imported.

(3a) Repealed by Session Laws 2007-527, s. 38(a), effective January 1, 2008.

(4) Blended fuel made in this State or imported to this State.

(5) Transferred within the terminal transfer system and, upon transfer, is subject to the federal excise tax imposed by section 4081 of the Code. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 13; 2004-170, s. 30; 2007-527, s. 38(a).)

Effect of Amendments. — Session Laws 2007-527, s. 38(a), effective January 1, 2008, repealed subdivision (3a).

CASE NOTES

Editor's Note. — *The cases below were decided under repealed Article 36 of this chapter.*

Excise and Not Property Tax. — The State gasoline tax is an excise and not a property tax. Stedman v. City of Winston-Salem, 204 N.C. 203, 167 S.E. 813 (1933).

Tax imposed by this section is a privilege tax. In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965); In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

The word "receipt" means gasoline purchased for resale or for use by the purchasing distributor. In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965).

This section places the burden on the distributor to pay the tax to the Secretary of Revenue. In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

Distributor may determine his tax liability by either of two methods. He may compute his liability on his monthly sales, or on his monthly purchases. If he elects to use purchases to determine his tax liability, he is entitled to a tare on his receipts. In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

Delivery of gasoline to one oil company on a second's order constitutes technical possession and receipt by the second. In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965).

Where an oil company had oil delivered to another oil company on its order, it was held to be a distributor under this section and entitled to the tare allowed therein. In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965).

Tax May Be Levied on Political Subdivision. — Under the provisions of the N.C. Const., Art. V, § 5, the General Assembly is prohibited from levying a property tax on property owned by municipal corporations, but the prohibition does not extend to excise taxes, and under the provisions of this section, a municipality is liable for the gasoline tax on gasoline bought by it in bulk and distributed by it to its various departments for use in its governmental functions. Stedman v. City of Winston-Salem, 204 N.C. 203, 167 S.E. 813 (1933).

OPINIONS OF ATTORNEY GENERAL

Tax Accrues upon Delivery of Gasoline to Service Station Operator on Consignment. — See opinion of Attorney General to Mr. Fred W. London, Gasoline Tax Division, N.C. Department of Revenue, 43 N.C.A.G. 134 (1973) (decided under prior law).

§ 105-449.82. Liability for tax on removals from a refinery or terminal.

(a) Refinery Removal. — The excise tax imposed by G.S. 105-449.81(1) on motor fuel removed from a refinery in this State is payable by the refiner.

(b) Terminal System Removal. — The excise tax imposed by G.S. 105-449.81(1) on motor fuel removed by a system transfer from a terminal in this State is payable by the position holder for the fuel. If the position holder is not the terminal operator, the terminal operator is jointly and severally liable for the tax.

(c) Terminal Rack Removal. — The excise tax imposed by G.S. 105-449.81(1) on motor fuel removed at a terminal rack in this State is payable by the person that first receives the fuel upon its removal from the terminal. If the motor fuel is removed by an unlicensed distributor, the supplier of the fuel is jointly and severally liable for the tax due on the fuel. If the motor fuel is sold by a person who is not licensed as a supplier, as required by this Article, the terminal operator, the person selling the fuel, and the person removing the fuel are jointly and severally liable for the tax due on the fuel. If the motor fuel removed is not dyed diesel fuel but the shipping document issued for the fuel states that the fuel is dyed diesel fuel, the terminal operator, the supplier, and the person removing the fuel are jointly and severally liable for the tax due on the fuel.

If the motor fuel is removed for export by an unlicensed exporter, the exporter is liable for tax on the fuel at the motor fuel rate and at the rate of the destination state. The liability for the tax at the motor fuel rate applies when the Department assesses the unlicensed exporter for the tax. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 14; 1997-60, s. 7.)

§ 105-449.83. Liability for tax on imports.

(a) By System Transfer. — The excise tax imposed by G.S. 105-449.81(2) on motor fuel imported by a system transfer to a refinery is payable by the refiner. The excise tax imposed by that subdivision on motor fuel imported by a system transfer to a terminal is payable by the person importing the fuel and by the terminal operator, both of which are jointly and severally liable for payment of the tax due on the fuel.

(b) From Out-of-State Terminal. — The excise tax imposed by G.S. 105-449.81(3) on motor fuel that is removed from a terminal rack located in another state and has this State as its destination state is payable by the importer of the fuel as follows:

(1) If the importer of the fuel is a licensed supplier in this State and the fuel is removed for the supplier's own account for use in this State, the tax is payable by the supplier.

(2) If the supplier of the fuel is licensed in this State as an elective supplier or a permissive supplier, the tax is payable to the supplier as trustee.

(3) If no other subdivision of this subsection applies, the tax is payable by the importer when filing a return with the Secretary.

(c) From Out-of-State Bulk Plant. — The excise tax imposed by G.S. 105-449.81(3) on motor fuel that is removed from a bulk plant located in another state is payable by the person that imports the fuel. (1995, c. 390, s. 3.)

§ 105-449.83A. Liability for tax on fuel grade ethanol.

The excise tax imposed by G.S. 105-449.81(3a) on fuel grade ethanol removed from a storage facility is payable by the fuel alcohol provider. The excise tax imposed by that subdivision on fuel grade ethanol imported to this State is payable by the importer. (1995 (Reg. Sess., 1996), c. 647, s. 15.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 647 enacted this section and amended G.S. 105-449.81. As subsections in G.S. 105-449.81 were redesignated at the direction of the Revisor of Statutes the reference in this section has been changed to be consistent with those changes.

§ 105-449.84. Liability for tax on blended fuel.

(a) On Blender. — The excise tax imposed by G.S. 105-449.81(4) on blended fuel made in this State is payable by the blender. The number of gallons of blended fuel on which the tax is payable is the difference between the number of gallons of blended fuel made and the number of gallons of previously taxed motor fuel used to make the blended fuel.

(b) On Importer. — The excise tax imposed by G.S. 105-449.81(4) on blended fuel imported to this State is payable by the importer.

(c) Blends Made at Terminal. — The following blended fuel is considered to have been made by the supplier of gasoline or undyed diesel fuel used in the blend:

(1) An in-line-blend made by combining a liquid with gasoline or undyed diesel fuel as the fuel is delivered at a terminal rack into the motor fuel storage compartment of a transport truck or a tank wagon.

(2) A kerosene splash-blend made when kerosene is delivered at a terminal into a motor fuel storage compartment of a transport truck or a tank wagon and undyed diesel fuel is also delivered at that terminal into the same storage compartment, if the buyer of the kerosene notified the supplier before or at the time of delivery that the kerosene would be used to make a splash-blend. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 16.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 647, s. 16, changed the references to G.S. 105-449.81(4) to G.S. 105-449.81(5) to be consistent with amendments made to that section; however, as those subsections were redesignated at the direction of the Revisor of Statutes no changes have been made to this section.

§ 105-449.84A. Liability for tax on behind-the-rack transfers.

The excise tax imposed by G.S. 105-449.81(5) on motor fuel transferred within the terminal transfer system is payable by the supplier of the fuel, the person receiving the fuel, and the terminal operator of the terminal at which the fuel was transferred, all of whom are jointly and severally liable for the tax. (1995 (Reg. Sess., 1996), c. 647, s. 17.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 647 enacted this section and amended G.S. 105-449.81. As subsections in G.S. 105-449.81 were redesignated at the direction of the Revisor of Statutes the reference in this section has been changed to be consistent with those changes.

§ 105-449.85. Compensating tax on and liability for unaccounted for motor fuel losses at a terminal.

(a) Tax. — An excise tax at the motor fuel rate is imposed annually on unaccounted for motor fuel losses at a terminal that exceed one-half of one percent (0.5%) of the number of net gallons removed from the terminal during the year by a system transfer or at a terminal rack. To determine if this tax applies, the terminal operator of the terminal must determine the difference between the following:

(1) The amount of motor fuel in inventory at the terminal at the beginning of the year plus the amount of motor fuel received by the terminal during the year.

(2) The amount of motor fuel in inventory at the terminal at the end of the year plus the amount of motor fuel removed from the terminal during the year.

(b) Liability. — The terminal operator whose motor fuel is unaccounted for is liable for the tax imposed by this section and is liable for a penalty equal to the amount of tax payable. Motor fuel received by a terminal operator and not shown on an informational return filed by the terminal operator with the Secretary as having been removed from the terminal is presumed to be unaccounted for. A terminal operator may establish that motor fuel received at a terminal but not shown on an informational return as having been removed from the terminal was lost or part of a transmix and is therefore not unaccounted for. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 18.)

§ 105-449.86. Tax on and liability for dyed diesel fuel used to operate certain highway vehicles.

(a) Tax. — An excise tax at the motor fuel rate is imposed on dyed diesel fuel acquired to operate any of the following:
(1) Repealed by Session Laws 2003-349, s. 10.8, effective January 1, 2004.
(2) A local bus that is allowed by § 4082(b)(3) of the Code to use dyed diesel fuel.
(3) A highway vehicle that is owned by or leased to an educational organization that is not a public school and is allowed by § 4082(b)(1) or (b)(3) of the Code to use dyed diesel fuel.
(4) Repealed by Session Laws 2005-435, s. 12, effective September 27, 2005.

(b) Liability. — If the distributor of dyed diesel fuel that is taxable under this section is not liable for the tax imposed by this section, the person that acquires the fuel is liable for the tax. The distributor of dyed diesel fuel that is taxable under this section is liable for the tax imposed by this section in the following circumstances:
(1) When the person acquiring the dyed diesel fuel has storage facilities for the fuel and is therefore a bulk-end user of the fuel.
(2) When the person acquired the dyed diesel fuel from a retail outlet of the distributor by using an access card or code indicating that the person's use of the fuel is taxable under this section. (1995, c. 390, s. 3; 2003-349, s. 10.8; 2005-435, s. 12.)

Effect of Amendments. — Session Laws 2005-435, s. 11, effective September 27, 2005, rewrote subdivision (a)(2) and deleted former subdivision (a)(4), which read: "A highway vehicle that is owned by or leased to the American Red Cross and is allowed by § 4082 of the Code to use dyed diesel fuel."

§ 105-449.87. Backup tax and liability for the tax.

(a) Tax. — An excise tax at the motor fuel rate is imposed on the following:
(1) Dyed diesel fuel that is used to operate a highway vehicle for a use that is not a nontaxable use under § 4082(b) of the Code.
(2) Motor fuel that was allowed an exemption from the motor fuel tax and was then used for a taxable purpose.
(3) Motor fuel that is used to operate a highway vehicle after an application for a refund of tax paid on the motor fuel is made or allowed under G.S. 105-449.107(a) on the basis that the motor fuel was used for an off-highway purpose.
(4) Repealed by Session Laws 1995 (Regular Session, 1996), c. 647, s. 19.
(5) Motor fuel that, based on its shipping document, is destined for delivery to another state and is then diverted and delivered in this State.

(b) General Liability. — The operator of a highway vehicle that uses motor fuel that is taxable under subdivisions (a)(1) through (a)(3) of this section is liable for the tax. If the highway vehicle that uses the fuel is owned by or leased to a motor carrier, the motor carrier is jointly and severally liable for the tax. If the end seller of motor fuel taxable under this section knew or had reason to know that the motor fuel would be used for a purpose that is taxable under this section, the end seller is jointly and severally liable for the tax. If the Secretary determines that a bulk-end user or retailer used or sold untaxed dyed diesel fuel to operate a highway vehicle when the fuel is dispensed from a storage facility or through a meter marked for nonhighway use, all fuel delivered into that storage facility is presumed to have been used to operate a highway vehicle. An end seller of dyed diesel fuel is considered to have known or had reason to know that the fuel would be used for a purpose that is taxable under this section if the end seller delivered the fuel into a storage facility that was not marked as required by G.S. 105-449.123.

(c) Diverted Fuel. — The person who authorizes a change in the destination state of motor fuel from the state given on the fuel's shipping document to North Carolina is liable for the tax due on the motor fuel. If motor fuel is diverted from North Carolina to another state, only the person who authorized the fuel to be diverted is eligible for a refund of the amount of tax paid on the fuel. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 19; 1997-60, s. 8; 1998-146, s. 5; 1999-438, s. 22; 2002-108, s. 10.)

§ 105-449.88. Exemptions from the excise tax.

The excise tax on motor fuel does not apply to the following:

(1) Motor fuel removed, by transport truck or another means of transfer outside the terminal transfer system, from a terminal for export, if the motor fuel is removed by a licensed distributor or a licensed exporter and the supplier of the motor fuel collects tax on it at the rate of the motor fuel's destination state.

(1a) Motor fuel removed by transport truck from a terminal for export if the motor fuel is removed by a licensed distributor or licensed exporter, the supplier that is the position holder for the motor fuel sells the motor fuel to another supplier as the motor fuel crosses the terminal rack, the purchasing supplier or its customer receives the motor fuel at the terminal rack for export, and the supplier that is the position holder collects tax on the motor fuel at the rate of the motor fuel's destination state.

(2) Motor fuel sold to the federal government for its use.

(3) Motor fuel sold to the State for its use.

(4) Motor fuel sold to a local board of education for use in the public school system.

(5) Diesel that is kerosene and is sold to an airport.

(6) Motor fuel sold to a charter school for use for charter school purposes.

(7) Motor fuel sold to a community college for use for community college purposes.

(8) Motor fuel sold to a county or a municipal corporation for its use.

(9) Biodiesel that is produced by an individual for use in a private passenger vehicle registered in that individual's name pursuant to Chapter 20 of the General Statutes. For the purposes of this subdivision, the term "private passenger vehicle" has the same meaning as in G.S. 20-4.01. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, ss. 20, 21; 1998-98, s. 28; 1998-146, s. 6; 2000-72, s. 2; 2000-173, ss. 13(b), 15; 2001-427, s. 9(a); 2002-108, s. 11; 2007-524, s. 1.)

Editor's Note. — Session Laws 2007-524, s. 2, provides: "The Revenue Laws Study Committee and the Joint Legislative Transportation Oversight Committee shall each study the issue of providing adequate funding for transportation infrastructure development and improvement. The studies shall include discussion of ways to ensure that the costs of road construction and maintenance are borne equitably by all motorists in light of ongoing shifts from the use of traditional motor fuels to the use of alternative fuels and technologies. The Committees shall make a report on this issue, including any recommendations or legislative proposals, to the 2008 Regular Session, 2007 General Assembly."

Effect of Amendments. — Session Laws 2007-524, s. 1, effective October 1, 2007, added subdivision (9).

§ 105-449.88A. Liability for tax due on motor fuel designated as exempt by the use of cards or codes.

(a) Repealed by Session Laws 2006-162, s. 14(b), effective January 1, 2007, and applicable to motor fuel purchased on or after that date.

(b) Exempt Card or Code. — An entity that issues an exempt card or code has a duty to determine if the person to whom it is issued is exempt from the motor fuel excise tax. An entity that issues an exempt card or code to a person who is not exempt from tax is liable for tax due on motor fuel the person purchases at retail by use of the exempt card or code. If a supplier authorizes another entity to issue an exempt card or code to a person who is not exempt from tax, the supplier and the entity that issued the card are jointly and severally liable for tax due on motor fuel the person purchases at retail by use of the exempt card or code.

(c) Card Holder. — A person to whom an exempt card or code is issued is liable for any tax due on fuel purchased with the card or code for a purpose that is not exempt. A person who misuses an exempt card or code by purchasing fuel with the card or code for a purpose that is not exempt is liable for the tax due on the fuel. (1997-60, s. 9; 2001-205, s. 4; 2006-162, s. 14(b).)

Editor's Note. — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

Effect of Amendments. — Session Laws 2006-162, s. 14(b), effective January 1, 2007, and applicable to motor fuel purchased on or after that date, deleted former (a) concerning exempt cards at rack; in subsection (b), substituted "Card or Code" for "Cards at Retail" in the subsection catchline and deleted the former first sentence which read: "An 'exempt card or code' is a credit card or an access code that enables the person to whom the card or code is issued to buy motor fuel at retail without paying the motor fuel excise tax on the fuel"; in the first sentence of subsection (c), substituted "code is issued" for "exempt access card is issued for use at a terminal or at retail" near the beginning and inserted "or code" near the end.

§ 105-449.89. Removals by out-of-state bulk-end user.

An out-of-state bulk-end user may not remove motor fuel from a terminal in this State for use in the state in which the bulk-end user is located unless the bulk-end user is licensed under this Article as an exporter. An out-of-state bulk-end user that is not licensed under this Article may remove motor fuel from a bulk plant in this State. (1995 (Reg. Sess., 1996), c. 647, s. 22; 1997-60, s. 10.)

Part 4. Payment and Reporting.

§ 105-449.90. When tax return and payment are due.

(a) Filing Periods. — The excise tax imposed by this Article is payable when a return is due. A return is due annually or monthly, as specified in this section. A return must be filed with the Secretary and be in the form required by the Secretary.

An annual return is due within 45 days after the end of each calendar year. An annual return covers tax liabilities that accrue in the calendar year preceding the date the return is due.

A monthly return of a person other than an occasional importer is due within 22 days after the end of each month. A monthly return of an occasional importer is due by the 3rd of each month. A monthly return covers tax liabilities that accrue in the calendar month preceding the date the return is due.

(b) Annual Filers. — A terminal operator must file an annual return for the compensating tax imposed by G.S. 105-449.85.

(c) Repealed by Session Laws 2006-162, s. 14(c), effective January 1, 2007, and applicable to motor fuel purchased on or after that date.

(d) Monthly Filers on 22nd. — The following persons must file a monthly return by the 22nd of each month:

(1) A refiner.
(2) A supplier.
(3) A bonded importer.
(4) A blender.
(5) A tank wagon importer.
(6) A person that incurred a liability under G.S. 105-449.86 during the preceding month for the tax on dyed diesel fuel used to operate certain highway vehicles.
(7) A person that incurred a liability under G.S. 105-449.87 during the preceding month for the backup tax on motor fuel.

(e) Monthly Filers on 3rd. — An occasional importer must file a monthly return by the third day of each month. An occasional importer is not required to file a return, however, if all the motor fuel imported by the importer in a reporting period was removed at a terminal located in another state and the supplier of the fuel is an elective supplier or a permissive supplier. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 23; 1997-60, s. 11; 2006-162, s. 14(c).)

Editor's Note. — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

Effect of Amendments. — Session Laws 2006-162, s. 14(c), effective January 1, 2007, and applicable to motor fuel purchased on or after that date, in subsection (a), substituted "annually" for "annually, quarterly," near the beginning of the second sentence, and deleted the former third paragraph which read: "A quarterly return is due by the last day of the month that follows the end of a calendar quarter. A quarterly return covers tax liabilities that accrue in the calendar quarter preceding the date the return is due"; and deleted former subsection (c) which read: "Quarterly Filers. A licensed importer that removes fuel at a terminal rack of a permissive or an elective supplier and a licensed distributor must file a quarterly return under G.S. 105-449.94 to reconcile exempt sales."

§ 105-449.90A. Payment by supplier of destination state tax collected on exported motor fuel.

Tax collected by a supplier on exported motor fuel is payable by the supplier to the destination state. Payments of destination state tax are due to the destination state on the date set by the law of the destination state. (1995 (Reg. Sess., 1996), c. 647, s. 24; 2005-435, s. 13.)

Effect of Amendments. — Session Laws 2005-435, s. 13, effective September 27, 2005, rewrote the section.

§ 105-449.91. Remittance of tax to supplier.

(a) Distributor. — A distributor must remit tax due on motor fuel removed at a terminal rack to the supplier of the fuel. A licensed distributor has the right to defer the remittance of tax to the supplier, as trustee, until the date the trustee must pay the tax to this State or to another state. The time when an unlicensed distributor must remit tax to a supplier is governed by the terms of the contract between the supplier and the unlicensed distributor.

(b) Exporter. — An exporter must remit tax due on motor fuel removed at a terminal rack to the supplier of the fuel. The time when an exporter must remit tax to a supplier is governed by the law of the destination state of the exported motor fuel.

(c) Importer. — A licensed importer must remit tax due on motor fuel removed at a terminal rack of a permissive or an elective supplier to the supplier of the fuel. A licensed importer that removes fuel from a terminal rack of a permissive or an elective supplier has the right to defer the remittance of tax to the supplier until the date the supplier must pay the tax to this State.

(d) General. — The method by which a distributor, a licensed exporter, or a licensed importer must remit tax to a supplier is governed by the terms of the contract between the supplier and the distributor, exporter, or licensed importer and the supplier. G.S. 105-449.76 governs the cancellation of a license of a distributor, an exporter, and an importer. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 25; 1997-60, s. 12.)

§ 105-449.92. Notice to suppliers of cancellation or reissuance of certain licenses; effect of notice.

(a) Notice to Suppliers. — If the Secretary cancels a distributor's license, an exporter's license, or an importer's license, the Secretary must notify all suppliers of the cancellation. If the Secretary issues a license to a distributor, an exporter, or an importer whose license was cancelled, the Secretary must notify all suppliers of the issuance.

(b) Effect of Notice. — A supplier that sells motor fuel to a distributor after receiving notice from the Secretary that the Secretary has cancelled the distributor's license is jointly and severally liable with the distributor for any tax due on motor fuel the supplier sells to the distributor after receiving the notice. This joint and several liability does not apply to excise tax due on motor fuel sold to a previously unlicensed distributor after the supplier receives notice from the Secretary that the Secretary has issued another license to the distributor. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 26; 1997-60, s. 13.)

§ 105-449.93. Percentage discount for licensed distributors and some licensed importers.

(a) Repealed by Session Laws 2006-162, s. 14(d), effective January 1, 2007, and applicable to motor fuel purchased on or after that date.

(b) Percentage Discount. — A licensed distributor that pays the tax due a supplier by the date the supplier must pay the tax to the State may deduct from the amount due a discount of one percent (1%) of the amount of tax payable. A licensed importer that removes motor fuel from a terminal rack of a permissive or an elective supplier and that pays the tax due the supplier by the date the supplier must pay the tax to the State may deduct from the amount due a discount of the same amount allowed a licensed distributor. The discount covers the expense of furnishing a bond and losses due to shrinkage or evaporation. A supplier may not directly or indirectly deny this discount to a licensed distributor or licensed importer that pays the tax due the supplier by the date the supplier must pay the tax to the State. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 27; 2006-162, s. 14(d).)

Editor's Note. — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

Effect of Amendments. — Session Laws 2006-162, s. 14(d), effective January 1, 2007, and applicable to motor fuel purchased on or after that date, deleted "Exempt sale deduction and" at the beginning of the section catchline; deleted former subsection (a) which read: "Deduction. A license holder listed below may deduct from the amount of tax otherwise payable to a supplier the amount calculated on motor fuel the license holder received from the supplier and resold to a governmental unit whose purchases of motor fuel are exempt from the tax under G.S. 105-449.88 if, when removing the fuel, the license holder used an access card or code specified by the supplier to notify the supplier of the license holder's intent to resell the fuel in an exempt sale: (1) A licensed distributor. (2) A licensed importer that removed the motor fuel from a terminal rack of a permissive or an elective supplier."

§ 105-449.94: Repealed by Session Laws 2006-162, s. 14(e), effective January 1, 2007, and applicable to motor fuels purchased on or after that date.

§ 105-449.95. Quarterly hold harmless for licensed distributors and some licensed importers.

(a) Calculation. — At the end of each calendar quarter, the Secretary must review the amount of discounts each licensed distributor or licensed importer received under G.S. 105-449.93(b). The Secretary must determine if the amount of discounts the distributor or importer received under that subsection in each month of the quarter is less than the amount the distributor or importer would have received if the distributor or importer had been allowed a discount on taxable gasoline purchased by the distributor or importer from a supplier during each month of the quarter under the following schedule:

Amount of Gasoline Purchased Each Month	Percentage Discount
First 150,000 gallons	2%
Next 100,000 gallons	1 1/2%
Amount over 250,000 gallons	1%.

(b) Refund. — If the amount the licensed distributor or licensed importer received under G.S. 105-449.93(b) for a month in the quarter is less than the amount the distributor or importer would have received on the distributor's or importer's taxable gasoline purchases under the monthly schedule in subsection (a) of this section, the Secretary must send the distributor or importer a refund check for the difference. In determining the amount of discounts a distributor or importer received under G.S. 105-449.93(b) for gasoline purchased in a month, a distributor or importer is considered to have received the amount of any discounts the distributor or importer could have received under that subsection but did not receive because the distributor or importer failed to pay the tax due to the supplier by the date the supplier had to pay the tax to the State. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 29; 1997-6, s. 11.)

§ 105-449.96. Information required on return filed by supplier.

A return of a supplier must list all of the following information and any other information required by the Secretary:

(1) The number of gallons of tax-paid motor fuel received by the supplier during the month, sorted by type of fuel, seller, point of origin, destination state, and carrier.

(2) The number of gallons of motor fuel removed at a terminal rack during the month from the account of the supplier, sorted by type of fuel, person receiving the fuel, terminal code, and carrier.

(3) The number of gallons of motor fuel removed during the month for export, sorted by type of fuel, person receiving the fuel, terminal code, destination state, and carrier.

(4) The number of gallons of motor fuel removed during the month at a terminal located in another state for destination to this State, as indicated on the shipping document for the fuel, sorted by type of fuel, person receiving the fuel, terminal code, and carrier.

(5) The number of gallons of motor fuel the supplier sold during the month to any of the following, sorted by type of fuel, exempt entity, person receiving the fuel, terminal code, and carrier:

a. A governmental unit whose use of fuel is exempt from the tax.

b. A licensed distributor or importer that resold the motor fuel to a governmental unit whose use of fuel is exempt from the tax, as indicated by the distributor or importer.

c. A licensed exporter that resold the motor fuel to a person whose use of fuel is exempt from tax in the destination state, as indicated by the exporter.

(6) The amount of discounts allowed under G.S. 105-449.93(b) on motor fuel sold during the month to licensed distributors or licensed importers.

(7) The number of gallons of motor fuel the supplier exchanged during the month with another licensed supplier pursuant to a two-party exchange agreement, sorted by type of fuel, licensed supplier receiving the fuel, and terminal code. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 30; 1997-60, s. 14; 2005-435, s. 14.)

Effect of Amendments. — Session Laws 2005-435, s. 14, effective September 27, 2005, added subdivision (7).

§ 105-449.97. Deductions and discounts allowed a supplier when filing a return.

(a) Taxes Not Remitted. — When a supplier files a return, the supplier may deduct from the amount of tax payable with the return the amount of tax any of the following license holders owes the supplier but failed to remit to the supplier:

(1) A licensed distributor.

(2) A licensed importer that removed the motor fuel on which the tax is due from a terminal of an elective or a permissive supplier.

(3) Repealed by Session Laws 1995, c. 647, s. 32.

A supplier is not liable for tax a license holder listed in this subsection owes the supplier but fails to pay. If a listed license holder pays tax owed to a supplier after the supplier deducts the amount on a return, the supplier must promptly remit the payment to the Secretary.

(b) Administrative Discount. — A supplier that files a timely return and sends a timely payment may deduct from the amount of tax payable with the return an administrative discount of one-tenth of one percent (0.1%) of the amount of tax payable to this State as the trustee, not to exceed eight thousand dollars ($8,000) a month. The discount covers expenses incurred in collecting taxes on motor fuel.

(c) Percentage Discount. — A supplier that sells motor fuel directly to an unlicensed distributor or to the bulk-end user, the retailer, or the user of the fuel may take the same percentage discount on the fuel that a licensed distributor may take under G.S. 105-449.93(b) when making deferred payments of tax to the supplier.

(d) Taxes Paid on Exempt Retail Sales. — When filing a return, a supplier that issues or authorizes the issuance of an exempt card or code to a person that enables the person to buy motor fuel without paying tax on the fuel may deduct the amount of excise tax imposed on fuel purchased with the exempt card or code. The amount of excise tax imposed on fuel purchased with an exempt card or code is the amount that was imposed on the fuel when it was delivered to the retailer of the fuel. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, ss. 31, 32; 1997-60, s. 15; 1999-438, s. 23; 2000-173, s. 14(c); 2006-162, s. 14(f).)

Editor's Note. — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

Effect of Amendments. — Session Laws 2006-162, s. 14(f), effective January 1, 2007, and applicable to motor fuel purchased on or after that date, in subsection (d), deleted "an exempt access" before "code to a person," "at retail" following "buy motor fuel" and "retail" before "card or code" at the end of the first sentence and in the second sentence deleted "at retail" after "fuel purchased" and "retail" after "with an exempt."

§ 105-449.98. Duties of supplier concerning payments by distributors, exporters, and importers.

(a) As Fiduciary. — A supplier has a fiduciary duty to remit to the Secretary the amount of tax paid to the supplier by a licensed distributor, licensed exporter, or licensed importer. A supplier is liable for taxes paid to the supplier by a licensed distributor, licensed exporter, or licensed importer.

(b) Notice of Fuel Received. — A supplier must notify a licensed distributor, a licensed exporter, or a licensed importer that received motor fuel from the supplier during a reporting period of the number of taxable gallons received. The supplier must give this notice after the end of each reporting period and before the license holder must remit to the supplier the amount of tax due on the fuel.

(c) Notice to Department. — A supplier of motor fuel at a terminal must notify the Department within 10 business days after a return is due of any licensed distributors, licensed exporters, or licensed importers that did not pay the tax due the supplier when the supplier filed the return. The notice must be transmitted to the Department in the form required by the Department.

(d) Payment Application. — A supplier that receives a payment of tax from a licensed distributor, a licensed exporter, or a licensed importer may not apply the payment to a debt that person owes the supplier for motor fuel purchased from the supplier. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 33; 1997-60, s. 16.)

§ 105-449.99. Returns and discounts of importers.

(a) Return. — A monthly return of a bonded importer, an occasional importer, or a tank wagon importer must contain the following information concerning motor fuel imported during the period covered by the return:

(1) The number of gallons of imported motor fuel acquired from a supplier that collected the excise tax due this State on the fuel.

(2) The number of gallons of imported motor fuel acquired from a supplier that did not collect the excise tax due this State on the fuel, listed by source state, supplier, and terminal.

(3) The import authorization number of each import that is reported under subdivision (2) of this subsection and was removed from a terminal.

(4) For an occasional importer or a tank wagon importer, the number of gallons of imported motor fuel acquired from a bulk plant, listed by bulk plant.

(b) Discounts. — An importer may not deduct an administrative discount from the amount remitted with a return. An importer that imports motor fuel received from an elective supplier or a permissive supplier may deduct the percentage discount allowed by G.S. 105-449.93(b) when remitting tax to the supplier, as trustee, for payment to the State. An importer that imports motor fuel received from a supplier that is not an elective supplier or a permissive supplier may not deduct the percentage discount allowed by G.S. 105-449.93(b) when filing a return for the tax due. (1995, c. 390, s. 3.)

§ 105-449.100. Terminal operator to file informational return showing changes in amount of motor fuel at the terminal.

A terminal operator must file a monthly informational return with the Secretary that shows the amount of motor fuel received or removed from the terminal during the month. The return is due on the same date as a monthly return due under G.S. 105-449.90. The return must contain the following information and any other information required by the Secretary:

(1) The number of gallons of motor fuel received in inventory at the terminal during the month and each position holder for the fuel.

(2) The number of gallons of motor fuel removed from inventory at the terminal during the month and, for each removal, the position holder for the fuel and the destination state of the fuel.

(3) The number of gallons of motor fuel gained or lost at the terminal during the month. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 34; 2006-162, s. 15(a).)

Editor's Note. — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

Effect of Amendments. — Session Laws 2006-162, s. 15(a), effective January 1, 2007, and applicable to motor fuel purchased on or after that date, substituted "on the same date as a monthly return due under G.S. 105-449.90" for "by the 25th day of the month following the month covered by the return" at the end of the first sentence of the introductory paragraph.

§ 105-449.101. Motor fuel transporter to file informational return showing deliveries of motor fuel.

(a) Requirement. — A motor fuel transporter must file a monthly informational return with the Secretary that shows motor fuel transported in this State by the transporter during the month.

(b) Content. — The return required by this section must contain the following information and any other information required by the Secretary:

(1) The name and address of each person from whom the transporter received motor fuel outside the State for delivery in the State, the amount of motor fuel received, the date the motor fuel was received, and the destination state of the fuel.

(2) The name and address of each person from whom the transporter received motor fuel in the State for delivery outside the State, the amount of motor fuel delivered, the date the motor fuel was delivered, and the destination state of the fuel.

(3) The name and address of each person from whom the transporter received motor fuel in the State for delivery in the State, the amount

of motor fuel received, the date the motor fuel was received, and the destination state of the fuel.

(c) Due Date. — The return required by this section is due on the same date as a monthly return due under G.S. 105-449.90. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 35; 2002-108, s. 12; 2006-162, ss. 13(b), 15(b).)

Editor's Note. — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

Effect of Amendments. — Session Laws 2006-162, s. 13(b), effective July 1, 2007, and applicable to motor fuel transported on or after that date, deleted "imported or exported" preceding "motor fuel" in the section catchline; in subsection (a), in the first sentence, deleted "that imports motor fuel into this State or exports motor fuel from this State" following "transporter" at the beginning and substituted "transported in this State" for "received or delivered for import or export", and deleted the former last sentence which read: "This requirement does not apply to a distributor that is not required to be licensed as a motor fuel transporter"; and added subdivision (b)(3).

Session Laws 2006-162, s. 15(b), effective January 1, 2007, and applicable to motor fuel purchased on or after that date, deleted "is due by the 25th day of the month following the month covered by the return. The return" following "by this section" at the beginning of the first sentence of subsection (b) and added subsection (c).

§ 105-449.102. Distributor to file return showing exports from a bulk plant.

(a) Return. — A distributor that exports motor fuel from a bulk plant located in this State must file a monthly return with the Secretary that shows the exports. The return is due on the same date as a monthly return due under G.S. 105-449.90. The return serves as a claim for refund by the distributor for tax paid to this State on the exported motor fuel.

(b) Content. — The return must contain the following information and any other information required by the Secretary:

(1) The number of gallons of motor fuel exported during the month.

(2) The destination state of the motor fuel exported during the month.

(3) A certification that the distributor has paid to the destination state of the motor fuel exported during the month, or will pay on a timely basis, the amount of tax due that state on the fuel. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 36; 2006-162, s. 15(c).)

Editor's Note. — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

Effect of Amendments. — Session Laws 2006-162, s. 15(c), effective January 1, 2007, and applicable to motor fuel purchased on or after that date, substituted "on the same date as a monthly return due under G.S. 105-449.90" for "by the 25th day of the month following the month covered by the return" at the end of the second sentence in (a).

§ 105-449.103: Reserved for future codification purposes.

§ 105-449.104. Use of name and account number on return.

When a transaction with a person licensed under this Article is required to be reported on a return, the return must state the license holder's name and the account number used by the Department to identify the license holder. The name of a license holder and the license holder's account number is stated on the lists compiled under G.S. 105-449.77. (1995 (Reg. Sess., 1996), c. 647, s. 37.)

Part 5. Refunds.

§ 105-449.105. Refunds upon application for tax paid on exempt fuel, lost fuel, and fuel unsalable for highway use.

(a) Exempt Fuel. — An entity whose use of motor fuel is exempt from tax may obtain a refund of any motor fuel excise tax the entity pays on its motor fuel. A person who sells motor fuel to an entity whose use of motor fuel is exempt from tax may obtain a refund of any motor fuel excise tax the person pays on motor fuel it sells to the entity. A credit card company that issues a credit card to an entity whose use of motor fuel is exempt from tax may obtain a refund of any motor fuel excise tax the company pays on motor fuel the entity purchases using the credit card.

A person may obtain a refund of tax paid by the person on exported fuel, including fuel whose shipping document shows this State as the destination state but was diverted to another state in accordance with the diversion procedures established by the Secretary.

(b) Lost Fuel. — A supplier, an importer, or a distributor that loses tax-paid motor fuel due to damage to a conveyance transporting the motor fuel, fire, a natural disaster, an act of war, or an accident may obtain a refund for the tax paid on the fuel.

(c) Accidental Mixes. — A person that accidentally combines any of the following may obtain a refund for the amount of tax paid on the fuel:

(1) Dyed diesel fuel with tax-paid motor fuel.
(2) Gasoline with diesel fuel.
(3) Undyed diesel fuel with dyed kerosene.

(d) Repealed by Session Laws 1998-98, s. 29, effective August 14, 1998.

(e) Refund Amount. — The amount of a refund allowed under this section is the amount of excise tax paid, less the amount of any discount allowed on the fuel under G.S. 105-449.93. (1995, c. 390, s. 3; c. 523, ss. 32.1, 32.2; 1995 (Reg. Sess., 1996), c. 647, s. 38; 1997-6, s. 12; 1997-60, s. 17; 1998-98, s. 29; 2000-173, s. 16; 2001-205, s. 3.)

Legal Periodicals. — For survey of 1982 law on taxation, see 61 N.C.L. Rev. 1217 (1983).

§ 105-449.105A. Monthly refunds for kerosene.

(a) Refund. — A distributor who sells kerosene to any of the following may obtain a refund for the excise tax the distributor paid on the kerosene, less the amount of any discount allowed on the kerosene under G.S. 105-449.93:

(1) The end user of the kerosene, if the distributor dispenses the kerosene into a storage facility of the end user that contains fuel used only for one of the following purposes and the storage facility is installed in a manner that makes use of the fuel for any other purpose improbable:
    a. Heating.
    b. Drying crops.
    c. A manufacturing process.
(2) A retailer of kerosene, if the distributor dispenses the kerosene into a storage facility that meets both of the following conditions:
    a. It is marked with the phrase "Undyed, Untaxed Kerosene, Nontaxable Use Only" or a similar phrase that clearly indicates that the fuel is not to be used to operate a highway vehicle.

b. It either has a dispensing device that is not suitable for use in fueling a highway vehicle or is kept locked by the retailer and must be unlocked by the retailer for each sale of kerosene.

(3) An airport, if the distributor dispenses the kerosene into a storage facility that contains fuel used only for fueling airplanes and that meets at least one of the following conditions:

a. It is marked with the phrase "Undyed, Untaxed Kerosene, Nontaxable Use Only" or a similar phrase that clearly indicates that the fuel is not to be used to operate a highway vehicle.

b. It has a dispensing device that is not suitable for use in fueling a highway vehicle.

(b) Liability. — If the Secretary determines that the Department overpaid a distributor by refunding more tax to the distributor than is due under this section, the distributor is liable for the amount of the overpayment. This liability applies regardless of whether the actions of a retailer of kerosene contributed to the overpayment. (1998-146, s. 8; 2000-173, s. 17; 2001-205, s. 6; 2006-162, s. 14(g).)

Editor's Note. — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

Effect of Amendments. — Session Laws 2006-162, s. 14(g), effective January 1, 2007, and applicable to motor fuel purchased on or after that date, added subdivision (a)(3).

§ 105-449.106. Quarterly refunds for nonprofit organizations, taxicabs, and special mobile equipment.

(a) Nonprofits. — A nonprofit organization listed below that purchases and uses motor fuel may receive a quarterly refund, for the excise tax paid during the preceding quarter, at a rate equal to the amount of the flat cents-per-gallon rate plus the variable cents-per-gallon rate in effect during the quarter for which the refund is claimed, less one cent (1¢) per gallon.

An application for a refund allowed under this subsection must be made in accordance with this Part and must be signed by the chief executive officer of the organization. The chief executive officer of a nonprofit organization is the president of the organization or another officer of the organization designated in the charter or bylaws of the organization.

Any of the following entities may receive a refund under this subsection:

(1) Repealed by Session Laws 2002-108, s. 13, effective January 1, 2003.

(2) A private, nonprofit organization that transports passengers under contract with or at the express designation of a unit of local government.

(3) A volunteer fire department.

(4) A volunteer rescue squad.

(5) A sheltered workshop recognized by the Department of Health and Human Services.

(b) Taxi. — A person who purchases and uses motor fuel in a taxicab, as defined in G.S. 20-87(1), while the taxicab is engaged in transporting passengers for hire, or in a bus operated as part of a city transit system that is exempt from regulation by the North Carolina Utilities Commission under G.S. 62-260(a)(8), may receive a quarterly refund, for the excise tax paid during the preceding quarter, at a rate equal to the flat cents-per-gallon rate plus the variable cents-per-gallon rate in effect during the quarter for which the refund is claimed, less one cent (1¢) per gallon. An application for a refund must be made in accordance with this Part.

(c) Special Mobile Equipment. — A person who purchases and uses motor fuel to operate special mobile equipment off-highway may receive a quarterly refund, for the excise tax paid during the preceding quarter, at a rate equal to the flat cents-per-gallon rate plus the variable cents-per-gallon rate in effect during the quarter for which the refund is claimed, less the amount of sales and use tax or privilege tax due on the fuel under this Chapter, as determined in accordance with G.S. 105-449.107(c). An application for a refund must be made in accordance with this Part. (1995, c. 390, s. 3; 1997-6, s. 13; 1997-443, s. 11A.118(a); 1999-438, s. 24; 2002-108, s. 13; 2005-435, s. 15; 2006-162, s. 16(a).)

Effect of Amendments. — Session Laws 2005-435, s. 15, effective September 27, 2005, deleted "certain local governmental entitities" following "Quarterly refunds for" in the section catchline.

Session Laws 2006-162, s. 16(a), effective July 24, 2006, inserted "or privilege tax" near the end of the first sentence in subsection (c).

OPINIONS OF ATTORNEY GENERAL

Gasoline purchased by county board of education on behalf of extension unit of community college system located in county for use in adult driver education program is not exempt from gasoline tax. See opinion of Attorney General to Mr. Fred W. London, N.C. Department of Revenue, 40 N.C.A.G. 835 (1969) (decided under prior law).

Gasoline Tax Refunds to County Hospital. — See opinion of Attorney General to Mr. Leon M. Killian, III, 41 N.C.A.G. 306 (1971) (decided under prior law).

Where City Purchases Gasoline and Sells It to Redevelopment Commission, the Commission and Not the City Is Entitled to Gas Tax Refund. — See opinion of Attorney General to Mr. Luther J. Britt, Jr., 41 N.C.A.G. 585 (1971) (decided under prior law).

§ 105-449.107. Annual refunds for off-highway use and use by certain vehicles with power attachments.

(a) Off-Highway. — A person who purchases and uses motor fuel for a purpose other than to operate a licensed highway vehicle may receive an annual refund for the excise tax the person paid on fuel used during the preceding calendar year. The amount of refund allowed is the amount of the flat cents-per-gallon rate in effect during the year for which the refund is claimed plus the average of the two variable cents-per-gallon rates in effect during that year, less the amount of sales and use tax or privilege tax due on the fuel under this Chapter. An application for a refund allowed under this section must be made in accordance with this Part.

(b) Certain Vehicles. — A person who purchases and uses motor fuel in one of the vehicles listed below may receive an annual refund for the amount of fuel consumed by the vehicle:

(1) A concrete mixing vehicle.
(2) A solid waste compacting vehicle.
(3) A bulk feed vehicle that delivers feed to poultry or livestock and uses a power takeoff to unload the feed.
(4) A vehicle that delivers lime or fertilizer in bulk to farms and uses a power takeoff to unload the lime or fertilizer.
(5) A tank wagon that delivers alternative fuel, as defined in G.S. 105-449.130, or motor fuel or another type of liquid fuel into storage tanks and uses a power takeoff to make the delivery.
(6) A commercial vehicle that delivers and spreads mulch, soils, composts, sand, sawdust, and similar materials and that uses a power takeoff to unload, blow, and spread the materials.
(7) A commercial vehicle that uses a power takeoff to remove and dispose of septage and for which an annual fee is required to be paid to the

Department of Environment and Natural Resources under G.S. 130A-291.1.

(8) A sweeper.

The amount of refund allowed is thirty-three and one-third percent (33 1/3%) of the following: the sum of the flat cents-per-gallon rate in effect during the year for which the refund is claimed and the average of the two variable cents-per-gallon rates in effect during that year, less the amount of sales and use tax or privilege tax due on the fuel under this Chapter. An application for a refund allowed under this section must be made in accordance with this Part. This refund is allowed for the amount of fuel consumed by the vehicle in its mixing, compacting, or unloading operations, as distinguished from propelling the vehicle, which amount is considered to be one-third of the amount of fuel consumed by the vehicle.

(c) Sales Tax Amount. — Article 5 of this Chapter determines the amount of sales and use tax to be deducted under this section from a motor fuel excise tax refund. Article 5F of this Chapter determines the amount of privilege tax to be deducted under this section from a motor fuel excise tax refund. The sales price and the cost price of motor fuel to be used in determining the amount to deduct is the average of the wholesale prices used under G.S. 105-449.80 to determine the excise tax rates in effect for the two six-month periods of the year for which the refund is claimed. (1995, c. 390, s. 3; 1997-6, s. 14; 1997-423, s. 4; 2001-408, s. 1; 2005-377, s. 1; 2006-162, s. 16(b).)

Effect of Amendments. — Session Laws 2005-377, s. 1, effective September 8, 2005, and applicable to motor fuel and alternative fuel consumed on or after January 1, 2006, added subdivisions (b)(7) and (b)(8).

Session Laws 2006-162, s. 16(b), effective July 24, 2006, inserted "or privilege tax" near the end of the second sentence in subsection (a) and at the end of the first sentence of the undesignated paragraph in subsection (b), and added the second sentence of subsection (c).

§ 105-449.108. When an application for a refund is due.

(a) Due Dates. — The due dates of applications for refunds are as follows:

Refund Period	Due Date
Annual	April 15 after the end of the year
Quarterly	Last day of the month after the end of the quarter
Monthly	22nd day after the end of the month
Upon Application	Last day of the month after the month in which tax was paid or the event occurred that is the basis of the refund.

(b) Requirements. — An application for an annual refund must state whether or not the applicant has filed a North Carolina income tax return for the preceding taxable year. An application for a refund allowed under this Part must state that the applicant has paid for the fuel for which a refund is claimed or that payment for the fuel has been secured to the seller's satisfaction.

(c) Repealed by Session Laws 1998-146, s. 10, effective September 18, 1998.

(d) Late Application. — A refund applied for more than three years after the date the application is due is barred. (1995, c. 390, s. 3; 1997-6, s. 15; 1998-146, s. 10; 1998-212, s. 29A.14(r).)

§ 105-449.109: Repealed by Session Laws 1998-212, s. 29A.14(s), effective January 1, 1999.

§ 105-449.110. Review of refund application and payment of refund.

(a) Decision. — Upon determining that an application for refund is correct, the Secretary must issue the applicant a warrant upon the State Treasurer for the amount of the refund. If the Secretary determines that an application for refund is incorrect, the Secretary must send a written notice of the determination to the applicant. The notice must advise the applicant that the applicant may request a hearing on the matter in accordance with Article 9 of this Chapter.

(b) Interest. — The rate of interest payable on a refund is the rate set in G.S. 105-241.21. Interest accrues on a refund from the date that is 90 days after the later of the following:

(1) The date the application for refund was filed.

(2) The date the application for refund was due. (1995, c. 390, s. 3; 1998-98, s. 30; 2007-491, s. 44(1)a.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 491, s. 44(1)a., effective January 1, 2008, substituted "G.S. 105-241.21" for "G.S. 105-241.1(i)" in subsection (b). For applicability, see Editor's note.

§§ 105-449.111 through 105-449.113: Reserved for future codification purposes.

§ 105-449.114. Authority for agreement with Eastern Band of Cherokee Indians.

(a) By virtue of an Act of June 4, 1924, Pub. L. No. 68-191, Ch. 253, 43 Stat. 370, Congress and the United States courts have recognized the Eastern Band of Cherokee Indians as possessing sovereign legal rights over their members and their trust lands.

(b) The following definitions apply in this act:

(1) Chief. — The Principal Chief of the Eastern Band of the Cherokee Indians.

(2) Council. — The Tribal Council of the Eastern Band of the Cherokee Indians.

(3) Tribe. — The Eastern Band of the Cherokee Indians.

(c) Notwithstanding any other provision of law concerning refunds of motor fuels and alternative fuels taxes, the Department of Revenue may enter into a memorandum of understanding or an agreement with the Eastern Band of Cherokee Indians to make refunds of motor fuels and alternative fuels taxes to the Tribe in its collective capacity on behalf of its members who reside on or engage in otherwise taxable transactions within Cherokee trust lands. The memorandum or agreement shall be approved by the Council and signed by the

Chief on behalf of the Tribe and shall be signed by the Secretary of Revenue on behalf of Department of Revenue. The memorandum or agreement may not affect the right of an individual member of the Tribe to a refund and shall provide for deduction of amounts refunded to individual members of the Tribe from the amounts to be refunded to the Tribe on behalf of all members. The memorandum or agreement may be effective for a definite or indefinite period, as specified in the agreement. (1989, c. 753, ss. 1-3; 1991, c. 193, s. 6; 2002-108, s. 14.)

Editor's Note. — Session Laws 1989, c. 753, ss. 1-3, as amended by Session Laws 1991, c. 193, s. 6, were codified as this section at the direction of the Revisor of Statutes.

Part 6. Enforcement and Administration.

§ 105-449.115. Shipping document required to transport motor fuel by railroad tank car or transport truck.

(a) Issuance. — A person may not transport motor fuel by railroad tank car or transport truck unless the person has a shipping document for its transportation that complies with this section. A terminal operator and the operator of a bulk plant must give a shipping document to the person who operates a railroad tank car or a transport truck into which motor fuel is loaded at the terminal rack or bulk plant rack.

(b) Content. — A shipping document issued by a terminal operator or the operator of a bulk plant must contain the following information and any other information required by the Secretary:

(1) Identification, including address, of the terminal or bulk plant from which the motor fuel was received.
(2) The date the motor fuel was loaded.
(3) The gross gallons loaded.
(4) The destination state of the motor fuel, as represented by the purchaser of the motor fuel or the purchaser's agent.
(5) If the document is issued by a terminal operator, the document must be machine printed and it must contain the following information:
  a. The net gallons loaded.
  b. A tax responsibility statement indicating the name of the supplier that is responsible for the tax due on the motor fuel.

(c) Reliance. — A terminal operator or bulk plant operator may rely on the representation made by the purchaser of motor fuel or the purchaser's agent concerning the destination state of the motor fuel. A purchaser is liable for any tax due as a result of the purchaser's diversion of fuel from the represented destination state.

(d) Duties of Transporter. — A person to whom a shipping document was issued must do all of the following:

(1) Carry the shipping document in the conveyance for which it was issued when transporting the motor fuel described in it.
(2) Show the shipping document to a law enforcement officer upon request when transporting the motor fuel described in it.
(3) Deliver motor fuel described in the shipping document to the destination state printed on it unless the person does all of the following:
  a. Notifies the Secretary before transporting the motor fuel into a state other than the printed destination state that the person has received instructions since the shipping document was issued to deliver the motor fuel to a different destination state.

b. Receives from the Secretary a confirmation number authorizing the diversion.

c. Writes on the shipping document the change in destination state and the confirmation number for the diversion.

(4) Give a copy of the shipping document to the distributor or other person to whom the motor fuel is delivered.

(e) Duties of Person Receiving Shipment. — A person to whom motor fuel is delivered by railroad tank car or transport truck may not accept delivery of the motor fuel if the destination state shown on the shipping document for the motor fuel is a state other than North Carolina. To determine if the shipping document shows North Carolina as the destination state, the person to whom the fuel is delivered must examine the shipping document and must keep a copy of the shipping document. The person must keep a copy at the place of business where the motor fuel was delivered for 90 days from the date of delivery and must keep it at that place or another place for at least three years from the date of delivery. A person who accepts delivery of motor fuel in violation of this subsection is jointly and severally liable for any tax due on the fuel.

(f) Sanctions Against Transporter. — The following acts are grounds for a civil penalty:

(1) Transporting motor fuel in a railroad tank car or transport truck without a shipping document or with a false or an incomplete shipping document.

(2) Delivering motor fuel to a destination state other than that shown on the shipping document.

The penalty is payable to the agency that assessed the penalty and is payable by the person in whose name the conveyance is registered, if the conveyance is a transport truck, and is payable by the person responsible for the movement of motor fuel in the conveyance, if the conveyance is a railroad tank car. The amount of the penalty is five thousand dollars ($5,000). A penalty imposed under this subsection is in addition to any motor fuel tax assessed.

(g) Penalty Defense. — Compliance with the conditions set out in this subsection is a defense to a civil penalty imposed under subsection (f) of this section as a result of the delivery of fuel to a state other than the destination state printed on the shipping document for the fuel. The Secretary must waive a penalty imposed against a person under that subsection if the person establishes a defense under this subsection. The conditions for the defense are:

(1) The person notified the Secretary of the diversion and received a confirmation number for the diversion before the imposition of the penalty.

(2) Tax was timely paid on the diverted fuel, unless the person is a motor fuel transporter.

(h) Sanctions Against Terminal Operator. — The Secretary may assess a civil penalty of five thousand dollars ($5,000) against a terminal operator who intentionally issues a shipping document that does not satisfy the requirements of subsection (b) of this section. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, ss. 39, 40; 2002-108, s. 15; 2003-349, s. 10.9; 2005-435, s. 16; 2007-527, ss. 16(b), 18(a).)

Editor's Note. — Session Laws 2007-527, s. 18(b), provides that the amendments to this section by s. 18(a) are applicable to penalties assessed on or after August 31, 2007 and to refund requests that have not been finally determined as of that date.

Effect of Amendments. — Session Laws 2005-435, s. 16, effective January 1, 2006, substituted "Department of Crime Control and Public Safety" for "Department of Transportation, Division of Motor Vehicles" in subsection (f); and added subsections (g) and (h). Subsection (g) is effective September 27, 2005, and applicable to penalties imposed on or after January 1, 2005.

Session Laws 2007-527, ss. 16(b), 18(a), effective August 31, 2007, in subsection (f), deleted "payable to the Department of Crime Control and Public Safety or the Department of Revenue" following "penalty" in the first paragraph, and substituted "The penalty is payable to the agency that assessed the penalty and is payable" for "The penalty imposed under this subsection is payable" in the second paragraph; rewrote subdivision (g)(1); and in subdivision (g)(2), added "unless the person is a motor fuel transporter." For applicability, see Editor's note.

§ 105-449.115A. Shipping document required to transport fuel by tank wagon.

(a) Issuance. — A person who operates a tank wagon into which motor fuel is loaded at the terminal must comply with the document requirements in G.S. 105-449.115(b). A person who operates a tank wagon into which motor fuel is loaded from some other source must have an invoice, bill of sale, or shipping document containing the following information and any other information required by the Secretary:

(1) The name and address of the person from whom the motor fuel was received.
(2) The date the fuel was loaded.
(3) The type of fuel.
(4) The gross number of gallons loaded.

(b) Duties of Transporter. — A person to whom an invoice, bill of sale, or shipping document was issued must do all of the following:

(1) Carry the invoice, bill of sale, or shipping document in the conveyance for which it is issued when transporting the motor fuel described in it.
(2) Show the invoice, bill of sale, or shipping document upon request when transporting the motor fuel described in it.
(3) Keep a copy of the invoice, bill of sale, or shipping document at a centralized place of business for at least three years from the date of delivery.

(c) Sanctions. — Transporting motor fuel in a tank wagon without an invoice, bill of sale, or shipping document containing the information required by this section is grounds for a civil penalty. The penalty is payable to the agency that assessed the penalty and is payable by the person in whose name the tank wagon is registered. The amount of the penalty is one thousand dollars ($1,000). A penalty imposed under this subsection is in addition to any motor fuel tax assessed. (2002-108, s. 16; 2005-435, s. 17; 2007-527, s. 16(c).)

Editor's Note. — Session Laws 2002-108, s. 18(b), made this section effective January 1, 2003.

Effect of Amendments. — Session Laws 2005-435, s. 17, effective September 27, 2005, rewrote subsection (a); added subdivision (b)(3); and substituted "Department of Crime Control and Public Safety" for "Department of Transportation, Division of Motor Vehicles" in the introductory language of subsection (c).

Session Laws 2007-527, s. 16(c), effective August 31, 2007, in subsection (c), substituted "civil penalty. The penalty is payable to the agency that assessed the penalty and is payable" for "civil penalty payable to the Department of Crime Control and Public Safety or the Department of Revenue. The penalty imposed under this subsection is payable."

§ 105-449.116: Repealed by Session Laws 1999-438, s. 25, effective August 10, 1999.

§ 105-449.117. Penalties for highway use of dyed diesel or other non-tax-paid fuel.

(a) Violation. — It is unlawful to use dyed diesel fuel in a highway vehicle that is licensed or required to be licensed under Chapter 20 of the General

Statutes unless that use is allowed under section 4082 of the Code. It is unlawful to use undyed diesel fuel in a highway vehicle that is licensed or required to be licensed under Chapter 20 of the General Statutes unless the tax imposed by this Article has been paid. A person who violates this section is guilty of a Class 1 misdemeanor and is liable for a civil penalty.

(b) Civil Penalty. — The civil penalty is payable to the agency that assessed the penalty and is payable by the person in whose name the highway vehicle is registered. The amount of the penalty depends on the amount of fuel in the supply tank of the highway vehicle. The penalty is the greater of one thousand dollars ($1,000) or five times the amount of motor fuel tax payable on the fuel in the supply tank. A penalty imposed under this section is in addition to any motor fuel tax assessed.

(c) Enforcement. — The Secretary or a person designated by the Secretary may conduct investigations to identify violations of this Article. It is not a valid defense to a violation of this Article that the State is exempt from the tax imposed by this Article. (1995, c. 390, s. 3; 1997-60, s. 19; 2003-349, s. 10.10; 2007-527, s. 16(d).)

Effect of Amendments. — Session Laws 2007-527, s. 16(d), effective August 31, 2007, in subsection (b), substituted "agency that assessed the penalty" for "Department of Transportation, Division of Motor Vehicles, or the Department of Revenue."

§ 105-449.118. Civil penalty for buying or selling non-tax-paid motor fuel.

A person who dispenses non-tax-paid motor fuel into the supply tank of a highway vehicle or who allows non-tax-paid motor fuel to be dispensed into the supply tank of a highway vehicle is subject to a civil penalty of two hundred fifty dollars ($250.00) per occurrence.

The penalty is payable to the agency that assessed the penalty. Failure to pay a penalty imposed under this section is grounds under G.S. 20-88.01(b) to withhold or revoke the registration plate of the motor vehicle into which the motor fuel was dispensed. (1995, c. 390, s. 3; 2002-108, s. 17; 2007-527, s. 16(e).)

Effect of Amendments. — Session Laws 2007-527, s. 16(e), effective August 31, 2007, substituted "agency that assessed the penalty" for "Department of Transportation, Division of Motor Vehicles, or the Department of Revenue" in the second paragraph.

§ 105-449.118A. Civil penalty for refusing to allow the taking of a motor fuel sample.

A person who refuses to allow the taking of a motor fuel sample is subject to a civil penalty of one thousand dollars ($1,000). The penalty is payable to the agency that assessed the penalty. If the refusal is for a sample to be taken from a vehicle, the penalty is payable by the person in whose name the vehicle is registered. If the refusal is for a sample to be taken from any other storage tank or container, the penalty is payable by the owner of the container. (1995 (Reg. Sess., 1996), c. 647, s. 41; 2007-527, s. 16(f).)

Effect of Amendments. — Session Laws 2007-527, s. 16(f), effective August 31, 2007, in the second sentence, substituted "agency that assessed the penalty" for "Department of Transportation, Division of Motor Vehicles, or the Department of Revenue."

§ 105-449.119. Review of civil penalty assessment.

A person who denies liability for a penalty imposed under this Part must pay the penalty and file a request for a Departmental review of the penalty. The request must be filed within the time set in G.S. 105-241.11 for requesting a Departmental review of a proposed assessment. The procedures in Article 9 of this Chapter for review of a proposed assessment apply to the review of the penalty. The date the penalty was imposed is considered the date the notice of proposed assessment was delivered to the taxpayer. (1995, c. 390, s. 3; 1999-337, s. 44; 2007-491, s. 41.)

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 41, effective January 1, 2008, substituted "Review of" for "Hearing on" in the section catchline; and rewrote the section. For applicability, see Editor's note.

§ 105-449.120. Acts that are misdemeanors.

(a) Class 1. — A person who commits any of the following acts is guilty of a Class 1 misdemeanor:

(1) Fails to obtain a license required by this Article.

(2) Willfully fails to file a return required by this Article.

(3) Willfully fails to pay a tax when due under this Article or under former Article 36 or 36A of this Chapter. Failure to comply with a requirement of a supplier to remit tax payable to the supplier by electronic funds transfer is considered a failure to make a timely payment.

(3a) Repealed by Session Laws 2006-162, s. 17, effective January 1, 2007, and applicable to motor fuel purchased on or after that date.

(4) Makes a false statement in an application, a return, or a statement required under this Article.

(5) Makes a false statement in an application for a refund.

(6) Fails to keep records as required under this Article.

(7) Refuses to allow the Secretary or a representative of the Secretary to examine the person's books and records concerning motor fuel.

(8) Fails to disclose the correct amount of motor fuel sold or used in this State.

(9) Fails to file a replacement bond or an additional bond as required under this Article.

(10) Fails to show or give a shipping document as required under this Article.

(11) Willfully refuses to allow a licensed distributor, a licensed exporter, or a licensed importer to defer payment of tax to the supplier, as required by G.S. 105-449.91.

(12) Willfully refuses to allow a licensed distributor or a licensed importer to take the discount allowed by G.S. 105-449.93 when remitting tax to the supplier.

(b) Class 2. — A person who commits any of the following acts is guilty of a Class 2 misdemeanor:

(1) Knowingly dispenses non-tax-paid motor fuel into the supply tank of a highway vehicle.

(2) Knowingly allows non-tax-paid fuel to be dispensed into the supply tank of a highway vehicle. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 42; 1997-60, s. 20; 2006-162, s. 17.)

Editor's Note. — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

Effect of Amendments. — Session Laws 2006-162, s. 17, effective January 1, 2007, and applicable to motor fuel purchased on or after that date, deleted subdivision (a)(3a), which read: "Willfully fails to pay a tax collected on behalf of a destination state to that state when it is due."

§ 105-449.121. Record-keeping requirements; inspection authority.

(a) What Must Be Kept. — A person who is subject to audit under subsection (b) of this section must keep a record of all shipping documents or other documents used to determine information the person provides in a return or to determine the person's motor fuel transactions. The records must be kept for three years from the due date of the return to which the records apply or, if the records apply to a transaction not required to be reported in a return, for three years from the date of the transaction.

(b) Inspection. — The Secretary or a person designated by the Secretary may do any of the following to determine tax liability under this Article:

(1) Audit a distributor or a person who is required to have or elects to have a license under this Article.

(2) Audit a distributor, a retailer, a bulk-end user, or a motor fuel user that is not licensed under this Article.

(3) Examine a tank or other equipment used to make, store, or transport motor fuel, diesel dyes, or diesel markers.

(4) Take a sample of a product from a vehicle, a tank, or another container in a quantity sufficient to determine the composition of the product.

(5) Stop a vehicle for the purpose of taking a sample of motor fuel from the vehicle. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 43; 2000-173, s. 18.)

§ 105-449.122. Equipment requirements.

(a) Metered Pumps. — All motor fuel dispensed at retail must be dispensed from metered pumps that indicate the total amount of fuel measured through the pumps. Each pump must be marked to indicate the type of motor fuel dispensed.

(b) Truck Equipment. — A highway vehicle that transports diesel fuel in a tank that is separate from the fuel supply tank of the vehicle may not have a connection from the transporting tank to the motor or to the supply tank of the vehicle. (1995, c. 390, s. 3; 1997-60, s. 21.)

§ 105-449.123. Marking requirements for dyed fuel storage facilities.

(a) Requirements. — A person who is a retailer of dyed motor fuel or who stores both dyed and undyed motor fuel for use by that person or another person must mark the storage facility for the dyed motor fuel as follows in a manner that clearly indicates the fuel is not to be used to operate a highway vehicle. The storage facility must be marked "Dyed Diesel, Nontaxable Use Only, Penalty For Taxable Use" or "Dyed Kerosene, Nontaxable Use Only, Penalty for Taxable Use" or a similar phrase that clearly indicates the fuel is not to be used to operate a highway vehicle. A person who intentionally fails to mark the storage facility as required by this section is subject to a civil penalty equal to the excise tax at the motor fuel rate on the inventory held in the storage tank at the time of the violation. If the inventory cannot be determined, then the penalty is calculated on the capacity of the storage tank.

(1) The storage tank of the storage facility must be marked if the storage tank is visible.
(2) The fillcap or spill containment box of the storage facility must be marked.
(3) The dispensing device that serves the storage facility must be marked.
(4) The retail pump or dispensing device at any level of the distribution system must comply with the marking requirements.

(b) Exception. — The marking requirements of this section do not apply to a storage facility that contains fuel used only for one of the purposes listed in G.S. 105-449.105A(a)(1) and is installed in a manner that makes use of the fuel for any other purpose improbable. (1997-60, s. 22; 2001-205, s. 7; 2003-349, s. 10.11; 2004-170, s. 31; 2005-435, s. 18.)

Effect of Amendments. — Session Laws 2005-435, s. 18, effective January 1, 2006, added the last two sentences in subsection (a).

§ 105-449.124: Reserved for future codification purposes.

Part 7. Use of Revenue.

§ 105-449.125. Distribution of tax revenue among various funds and accounts.

The Secretary shall allocate the amount of revenue collected under this Article from an excise tax of one-half cent (1/2¢) a gallon to the following funds and accounts in the fraction indicated:

Fund or Account	Amount
Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund	Nineteen thirty-seconds
Noncommercial Leaking Petroleum Underground Storage Tank Cleanup Fund	Three thirty-seconds
Water and Air Quality Account	Five-sixteenths.

The Secretary shall allocate seventy-five percent (75%) of the remaining excise tax revenue collected under this Article to the Highway Fund and shall allocate twenty-five percent (25%) to the Highway Trust Fund.

The Secretary shall charge a proportionate share of a refund allowed under this Article to each fund or account to which revenue collected under this Article is credited. The Secretary shall credit revenue or charge refunds to the appropriate funds or accounts on a monthly basis. (1995, c. 390, s. 3.)

Editor's Note. — Session Laws 2004-124, s. 30.10(a), effective 1 July 2004, and expiring 30 June 2005, provides: "Notwithstanding G.S. 105-449.125, the Secretary of Revenue shall allocate the amount of revenue collected under Article 36C of Chapter 105 from an excise tax of one and one-tenth cent (1.1¢) a gallon to the following funds and accounts in the fraction indicated:

“Fund or Account	Amount
Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund	Five sevenths
Noncommercial Leaking Petroleum Underground Storage Tank Cleanup Fund	One seventh
Water and Air Quality Account	One seventh.

“The Secretary of Revenue shall allocate seventy-five percent (75%) of the remaining excise tax revenue collected under Article 36C of Chapter 105 to the Highway Fund and shall allocate twenty-five percent (25%) to the Highway Trust Fund.

“The Secretary of Revenue shall charge a proportionate share of a refund allowed under this Article to each fund or account to which revenue collected under this Article is credited. The Secretary of Revenue shall credit revenue or charge refunds to the appropriate funds or accounts on a monthly basis except that the Secretary of Revenue shall credit nineteen million dollars ($19,000,000) to the Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund, the Noncommercial Leaking Petroleum Underground Storage Tank Cleanup Fund, and the Water and Air Quality Account in September 2004 in the fractional amounts required by this section. The Secretary of Revenue shall credit the difference between nineteen million dollars ($19,000,000) and the amount calculated for September as allocated to those Funds to the Highway Fund and the Highway Trust Fund, in the amounts allocated to the Highway Fund and the Highway Trust Fund under this section, over the remaining months of fiscal year 2004-2005 such that the fractional distributions required by this section are met for the fiscal year.”

Session Laws 2004-124, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2004’.”

Session Laws 2004-124, s. 33.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year.”

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006’.”

Session Laws 2006-66, s. 2.2(g), provides: “There is created in the General Fund a Reserve for the Motor Fuels Tax Ceiling. The sum of twenty-two million nine hundred thirty-three thousand dollars ($22,933,000) is hereby transferred from the Savings Reserve Account to the Reserve for the Motor Fuels Tax Ceiling for the 2006-2007 fiscal year.

“The State Treasurer shall transfer funds reserved to hold harmless the Highway Fund and the Highway Trust Fund from the Reserve for the Motor Fuels Tax Ceiling only if the variable wholesale component of the motor fuel excise tax rate in G.S. 105-449.80 would, without the imposition of the cap imposed by Section 24.3 of this act, exceed twelve and four-tenths cents (12.4¢) a gallon. A transfer required under this subsection must be made on a monthly basis. The amount to be transferred from the Reserve for the Motor Fuels Tax Ceiling to the Highway Fund is the difference between the amount of motor fuel excise tax revenue allocated to the Highway Fund under G.S. 105-449.125 for a month and the amount that would have been allocated to it if the variable wholesale component were not capped at twelve and four-tenths cents (12.4¢) a gallon. The total amount transferred to the Highway Fund under this subsection during fiscal year 2006-2007 may not exceed seventeen million six hundred thousand dollars ($17,600,000). The amount to be transferred from the Reserve for the Motor Fuels Tax Ceiling to the Highway Trust Fund is the difference between the amount of motor fuel excise tax revenue allocated to the Highway Trust Fund under G.S. 105-449.125 for a month and the amount that would have been allocated to it if the variable wholesale component were not capped at twelve and four-tenths cents (12.4¢) a gallon. The total amount transferred to the Highway Trust Fund under this subsection during fiscal year 2006-2007 may not exceed five million seven hundred thousand dollars ($5,700,000).

“Funds remaining in the Reserve for the Motor Fuels Tax Ceiling on June 30, 2007, shall revert to the Savings Reserve Account on June 30, 2007.”

Session Laws 2006-66, s. 24.3(a), provides: “Notwithstanding G.S. 105-449.80(a), for the period July 1, 2006, through June 30, 2007, the variable wholesale component of the motor fuel excise tax rate may not exceed twelve and four-tenths cents (12.4¢) a gallon.”

Session Laws 2006-66, s. 28.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year.”

Session Laws 2006-66, s. 28.6 is a severability clause.

§ 105-449.126. Distribution of part of Highway Fund allocation to Wildlife Resources Fund.

The Secretary shall credit to the Wildlife Resources Fund one-sixth of one percent (1/6 of 1%) of the amount that is allocated to the Highway Fund under G.S. 105-449.125 and is from the excise tax on motor fuel. Revenue credited to the Wildlife Resources Fund under this section may be used only for the boating and water safety activities described in G.S. 75A-3(c). The Secretary must credit revenue to the Wildlife Resources Fund on an annual basis. (1995, c. 390, s. 3; c. 507, s. 18.16.)

§ 105-449.127: Repealed by Session Laws 2006-162, s. 12(c), effective July 24, 2006.

§§ 105-449.128, 105-449.129: Reserved for future codification purposes.

ARTICLE 36D.

Alternative Fuel.

§ 105-449.130. Definitions.

The following definitions apply in this Article:

(1) Alternative fuel. — A combustible gas or liquid that can be used to generate power to operate a highway vehicle and that is not subject to tax under Article 36C of this Chapter.

(1a) Bulk-end user. — A person who maintains storage facilities for alternative fuel and uses part or all of the stored fuel to operate a highway vehicle.

(2) Highway. — Defined in G.S. 20-4.01(13).

(3) Highway vehicle. — Defined in G.S. 105-449.60.

(4) Motor fuel. — Defined in G.S. 105-449.60.

(5) Motor fuel rate. — Defined in G.S. 105-449.60.

(6) Provider of alternative fuel. — A person who does one or more of the following:

  a. Acquires alternative fuel for sale or delivery to a bulk-end user or a retailer.

  b. Maintains storage facilities for alternative fuel, part or all of which the person uses or sells to someone other than a bulk-end user or a retailer to operate a highway vehicle.

  c. Sells alternative fuel and uses part of the fuel acquired for sale to operate a highway vehicle by means of a fuel supply line from the cargo tank of the vehicle to the engine of the vehicle.

  d. Imports alternative fuel to this State, by a means other than the usual tank or receptacle connected with the engine of a highway vehicle, for use by that person to operate a highway vehicle.

(7) Retailer. — A person who maintains storage facilities for alternative fuel and who sells the fuel at retail or dispenses the fuel at a retail location to operate a highway vehicle. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 44.)

Editor's Note. — The subdivision designations (1a), (6), and (7) were assigned by the Revisor of Statutes, the designations in Session Laws 1995 (Reg. Sess., 1996), c. 647, s. 44, having been (2), (7), and (8), respectively. The remaining subdivision designations are unchanged.

§ 105-449.131. List of persons who must have a license.

A person may not engage in business in this State as any of the following unless the person has a license issued by the Secretary authorizing the person to engage in that business:

(1) A provider of alternative fuel.
(2) A bulk-end user.
(3) A retailer. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 45.)

§ 105-449.132. How to apply for a license.

To obtain a license, an applicant must file an application with the Secretary on a form provided by the Secretary. An application must include the applicant's name, address, federal employer identification number, and any other information required by the Secretary. An applicant must meet the requirements for obtaining a license set out in G.S. 105-449.69(b). (1995, c. 390, s. 3; 1998-146, s. 11.)

§ 105-449.133. Bond or letter of credit required as a condition of obtaining and keeping certain licenses.

(a) Who Must Have Bond. — The following applicants for a license must file with the Secretary a bond or an irrevocable letter of credit:

(1) An alternative fuel provider.
(2) A retailer or a bulk-end user that intends to store highway and nonhighway alternative fuel in the same storage facility.

(b) Amount. — The amount of the bond is the amount that would be required if the fuel the applicant intended to provide or store was motor fuel rather than alternative fuel. An applicant that is also required to file a bond or an irrevocable letter of credit under G.S. 105-449.72 to obtain a license as a distributor of motor fuel may file a single bond or irrevocable letter of credit under that section for the combined amount.

A bond filed under this subsection must be conditioned upon compliance with this Article, be payable to the State, and be in the form required by the Secretary. The Secretary may require a bond issued under this subsection to be adjusted in accordance with the procedure set out in G.S. 105-449.72 for adjusting a bond filed by a distributor of motor fuel. (1995, c. 390, s. 3; 1997-60, s. 23.)

§ 105-449.134. Denial or cancellation of license.

The Secretary may deny an application for a license or cancel a license under this Article for the same reasons that the Secretary may deny an application for a license or cancel a license under Article 36C of this Chapter. The procedure in Article 36C for cancelling a license applies to the cancellation of a license under this Article. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 46.)

§ 105-449.135. Issuance of license; notification of changes.

(a) Issuance. — The Secretary must issue a license to each applicant whose application is approved. A license is not transferable and remains in effect until surrendered or cancelled.

(b) Notice. — A license holder that stops engaging in this State in the business for which the license was issued must give the Secretary written notice of the change and must surrender the license. The notice must give the date the change takes effect and, if the license holder has transferred the business to another by sale or otherwise, the date of the transfer and the name and address of the person to whom the business is transferred.

All taxes for which the license holder is liable under this Article but are not yet due become due on the date of the change. If the license holder transfers the business to another and does not give the notice required by this section, the person to whom the business was transferred is liable for the amount of any tax the license holder owed the State on the date the business was transferred. The liability of the person to whom the business is transferred is limited to the value of the property acquired from the license holder. (1995, c. 390, s. 3.)

§ 105-449.136. Tax on alternative fuel.

A tax at the motor fuel rate is imposed on liquid alternative fuel used to operate a highway vehicle by means of a vehicle supply tank that stores fuel only for the purpose of supplying fuel to operate the vehicle. A tax at the equivalent of the motor fuel rate is imposed on all other alternative fuel used to operate a highway vehicle. The Secretary must determine the equivalent rate. The exemptions from the tax on motor fuel in G.S. 105-449.88(2), (3), and (4) apply to the tax imposed by this section. The refunds for motor fuel tax allowed by Part 5 of Article 36C of this Chapter apply to the tax imposed by this section, except that the refund allowed by G.S. 105-449.107(b) for certain vehicles that use power takeoffs does not apply to a vehicle whose use of alternative fuel is taxed on the basis of miles driven. The proceeds of the tax imposed by this section must be allocated in accordance with G.S. 105-449.125. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 47.)

§ 105-449.137. Liability for and payment of the tax.

(a) Liability. — A bulk-end user or retailer that stores highway and nonhighway alternative fuel in the same storage facility is liable for the tax imposed by this Article. The tax payable by a bulk-end user or retailer applies when fuel is withdrawn from the storage facility. The alternative fuel provider that sells or delivers alternative fuel is liable for the tax imposed by this Article on all other alternative fuel.

(b) Payment. — The tax imposed by this Article is payable when a return is due. A return is due on the same date as a monthly return due under G.S. 105-449.90. A monthly return covers liabilities that accrue in the calendar month preceding the date the return is due. A return must be filed with the Secretary and must be in the form and contain the information required by the Secretary. (1995, c. 390, s. 3; 1997-60, s. 24; 2006-162, s. 15(d).)

Editor's Note. — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

Effect of Amendments. — Session Laws 2006-162, s. 15(d), effective January 1, 2007, and applicable to motor fuel purchased on or after that date, substituted "on the same date as a monthly return due under G.S. 105-449.90" for "monthly within 25 days after the end of each month" at the end of the second sentence in subsection (b).

§ 105-449.138. Requirements for bulk-end users and retailers.

(a) Informational Return. — A bulk-end user and a retailer must file a quarterly informational return with the Secretary. A quarterly return covers a calendar quarter and is due by the last day of the month that follows the quarter covered by the return.

The return must give the following information and any other information required by the Secretary:

(1) The amount of alternative fuel received during the quarter.
(2) The amount of alternative fuel sold or used during the quarter.

(b) Storage. — A bulk-end user or a retailer may store highway and nonhighway alternative fuel in separate storage facilities or in the same storage facility. If highway and nonhighway alternative fuel are stored in separate storage facilities, the facility for the nonhighway fuel must be marked in accordance with the requirements set by G.S. 105-449.123 for dyed diesel storage facilities. If highway and nonhighway alternative fuel are stored in the same storage facility, the storage facility must be equipped with separate metering devices for the highway fuel and the nonhighway fuel. If the Secretary determines that a bulk-end user or retailer used or sold alternative fuel to operate a highway vehicle when the fuel was dispensed from a storage facility or through a meter marked for nonhighway use, all fuel delivered into that storage facility is presumed to have been used to operate a highway vehicle. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 48; 1997-60, s. 25.)

§ 105-449.139. Miscellaneous provisions.

(a) Records. — A license holder must keep a record of all documents used to determine the information provided in a return filed under this Article. The records must be kept for three years from the due date of the return to which the records apply. The records are open to inspection during business hours by the Secretary or a person designated by the Secretary.

(b) Violations. — The offenses listed in subdivisions (1) through (9) of G.S. 105-449.120 apply to this Article. In applying those offenses to this Article, references to "this Article" are to be construed as references to Article 36D and references to "motor fuel" are to be construed as references to alternative fuel.

(c) Lists. — The Secretary must give a list of licensed alternative fuel providers to each licensed bulk-end user and licensed retailer. The Secretary must also give a list of licensed bulk-end users and licensed retailers to each licensed alternative fuel provider. A list must state the name, account number, and business address of each license holder on the list. The Secretary must send an annual update of a list to each license holder, as appropriate. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 49.)

SUBCHAPTER VI. TAX RESEARCH.

ARTICLE 37.

Tax Research.

§§ 105-450 through 105-457: Repealed by Session Laws 1991, c. 10, s. 3.

Cross References. — As to preparation of reports concerning taxes by the Secretary of Revenue, see now G.S. 105-256.

Editor's Note. — Repealed G.S. 105-450 to 105-452, 105-454, and 105-457 were previously repealed by Session Laws 1973, c. 476, s. 193.

SUBCHAPTER VII. PAYMENTS RECEIVED FROM TENNESSEE VALLEY AUTHORITY IN LIEU OF TAXES.

ARTICLE 38.

Equitable Distribution between Local Governments.

§ 105-458. Apportionment of payments in lieu of taxes between local units.

The payments received by the State and local governments from the Tennessee Valley Authority in lieu of taxes under section 13 of the Act of Congress creating it, and as amended, shall be apportioned between the local governments in which the property is owned or an operation is carried on, on the basis of the percentage of loss of taxes to each, determined as hereinafter provided: Provided, however, that the minimum annual payment to any local government from said fund, including the amounts paid direct to said local government by the Authority, shall not be less than the amount of annual actual tax loss to such local government based upon the two-year average on said property next prior to it being taken over by the Authority. (1941, c. 85, s. 1; 1959, c. 1060.)

§ 105-459. Determination of amount of taxes lost by virtue of T.V.A. operation of property; proration of funds.

The Department of Revenue shall determine each year, on the basis of current tax laws, the total taxes that would be due to both the State of North Carolina and the local governments in the same manner as if the property owned and/or operated by the Authority were owned and/or operated by a privately owned public utility: Provided, however, in making said calculations the Department of Revenue shall use the tax rate fixed by the local government unit and taxing district involved for the tax year next preceding such calculations. The Department of Revenue and the Treasurer of the State of North Carolina shall then prorate the funds received from the Authority by the State and local governments between the local governments upon the basis of the foregoing calculations. (1941, c. 85, s. 2; 1959, c. 1060; 1973, c. 476, s. 193.)

§ 105-460. Distribution of funds by State Treasurer.

The Treasurer of the State of North Carolina shall then ascertain the payments to be made to the local governments upon the basis of the provisions of G.S. 105-459 and he is authorized and directed to distribute the same between the local governments in accordance with the foregoing provisions of G.S. 105-459. The Treasurer of the State of North Carolina is further authorized and directed to pay said sums to the local governments each month or so often as he shall receive payments from the Authority, but not more often than once each month, after first deducting from any sum to be paid a local government such amount as has theretofore been paid direct to said local government by the Authority for the same period: Provided, however, that the minimum annual payment to any local government from said fund shall not be less than the average annual tax on the property taken by the Authority for the two years next preceding the taking. (1941, c. 85, s. 3; 1959, c. 1060.)

§ 105-461. Duty of county accountant, etc.

The county accountant or other proper officer of each local government to which this Subchapter is applicable shall:

(1) Certify to the Department of Revenue and the Treasurer of the State of North Carolina the tax rate fixed by the governing body of such local government immediately upon the fixing of the same;

(2) Certify each month to the Treasurer of the State of North Carolina a statement of the amount received by the local government direct from the Authority.

No local government shall be entitled to receive its distributive share of said fund from the Treasurer of the State of North Carolina until the foregoing information has been properly furnished. If any such local government shall fail to furnish the information herein required within 10 days from and after receipt by it from the Department of Revenue of request for the same, forwarded by registered mail, then and in that event it shall be barred from participating in the benefits provided for the period for which the same is requested. (1941, c. 85, s. 4; 1973, c. 476, s. 193.)

§ 105-462. Local units entitled to benefits; prerequisite for payments.

Any local governments within the State in which the Authority now or may hereafter own property or carry on an operation shall be entitled to the benefits arising under this Subchapter: Provided, however, that no payment shall be made to them by the Treasurer of the State of North Carolina until such time as such local governments shall have certified to the Department of Revenue and the Treasurer of the State of North Carolina the average annual tax loss it has sustained by the taking of said property for the two years immediately preceding the taking thereof: Provided, further, that in the event of any disagreement between said local governments and the Treasurer of the State of North Carolina as to such annual tax loss, then the same shall be determined by the Department of Revenue, and its decision thereon shall be final. (1941, c. 85, s. 5; 1973, c. 476, s. 193.)

SUBCHAPTER VIII. LOCAL GOVERNMENT SALES AND USE TAX.

ARTICLE 39.

First One-Cent (1¢) Local Government Sales and Use Tax.

§ 105-463. Short title.

This Article shall be known as the First One-Cent (1¢) Local Government Sales and Use Tax Act. (1971, c. 77, s. 2; 2002-123, s. 7(b).)

Editor's Note. — Session Laws 1991, c. 689, s. 320(a) provides: "Approval under the Local Government Sales and Use Tax Act, Article 39 of Chapter 105 of the General Statutes, or under the Mecklenburg County Sales and Use Tax Act, Chapter 1096 of the 1967 Session Laws, as amended, of one percent (1%) local sales and use taxes in addition to the three percent (3%) State sales and use taxes constitutes approval of one percent (1%) local sales and use taxes in addition to the four percent (4%) States sales and use taxes."

Section 352 of Session Laws 1991, c. 689 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1991-93 biennium, the textual provisions of Titles I, II and III of this act shall apply only to funds appropriated for and activities occurring during the 1991-93 biennium."

CASE NOTES

The sales tax and the use tax may often bring about the same result but they are different in conception. They are assessments upon different transactions and are bottomed on distinguishable taxable events. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

The purpose of North Carolina's sales and use tax scheme is two-fold. The primary purpose is, of course, to generate revenue for the State. The sales tax is, in effect, a tax imposed upon the retail merchant as a privilege tax for the right to engage in that business. The tax is, however, designed to be passed on to the consumer. The second purpose of the sales and use tax scheme is to equalize the tax burden on all State residents. This is achieved through imposition of the use tax in certain situations where the sales tax is not applicable. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

The chief function of the Sales and Use Tax Act is to prevent the evasion of a sales tax by persons purchasing tangible personal property outside of North Carolina for storage, use or consumption within the State. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

The use tax does not impermissibly burden interstate commerce since it is a tax imposed on the enjoyment of goods after the sale has already spent its interstate character. It is designed to complement the sales tax and to reach transactions which cannot constitutionally be subject to a sales tax. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

The North Carolina use tax can be constitutionally assessed against a newspaper which enjoys protection under U.S. Const., Amend. XIV. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

For case in which former local option sales and use tax act was held unconstitutional for lack of uniformity, see Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971), considering former §§ 105-164 to 105-164.58.

§ 105-464. Purpose and intent.

It is the purpose of this Article to afford the counties and municipalities of this State with opportunity to obtain an added source of revenue with which to meet their growing financial needs by providing all counties of the State with authority to levy a one percent (1%) sales and use tax as hereinafter provided. (1971, c. 77, s. 2.)

CASE NOTES

Cited in Gregory Poole Equip. Co. v. Coble, 297 N.C. 19, 252 S.E.2d 729 (1979).

§ 105-465. County election as to adoption of local sales and use tax.

The board of elections of any county, upon the written request of the board of county commissioners, or upon receipt of a petition signed by qualified voters of the county equal in number to at least fifteen percent (15%) of the total number of votes cast in the county, at the last preceding election for the office of Governor, shall call a special election for the purpose of submitting to the voters of the county the question of whether a one percent (1%) sales and use tax will be levied.

The special election shall be held under the same rules applicable to the election of members of the General Assembly. No new registration of voters shall be required. All qualified voters in the county who are properly registered not later than 21 days (excluding Saturdays and Sundays) prior to the election shall be entitled to vote at the election. The county board of elections shall give at least 20 days' public notice prior to the closing of the registration books for the special election.

The county board of elections shall prepare ballots for the special election. The question presented on the ballot shall be "FOR one percent (1%) local sales and use tax on items subject to State sales and use tax at the general State rate and on food" or "AGAINST one percent (1%) local sales and use tax on items subject to State sales and use tax at the general State rate and on food".

The county board of elections shall fix the date of the special election, except that the special election shall not be held on the date or within 60 days of any biennial election for county officers, nor within one year from the date of the last preceding special election under this section. (1971, c. 77, s. 2; 1981, c. 560, s. 2; 1991, c. 689, s. 315; 1996, 2nd Ex. Sess., c. 13, s. 1.2.)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 13, s. 1, provides that this act shall be known as the William S. Lee Quality Jobs and Business Expansion Act.

Session Laws 1996, Second Extra Session, c. 13, s. 1.7, provides: "Approval under Article 39, 40, or 42 of Chapter 105 of the General Statutes or under the Mecklenburg County Sales and Use Tax Act, Chapter 1096 of the 1967 Session Laws, as amended, of local sales and use taxes on items subject to State sales and use tax at the general State rate constitutes approval of local sales and use taxes on food."

Session Laws 1996, Second Extra Session, c. 13, s. 10.1, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before its amendment or repeal; nor does it affect the right to any refund or credit of a tax that would otherwise have been available under the amended or repealed statute before its amendment or repeal."

§ 105-466. Levy of tax.

(a) In the event a majority of those voting in a special election held pursuant to G.S. 105-465 shall approve the levy of the local sales and use tax, the board of county commissioners may, by resolution, proceed to levy the tax.

(b) In addition, the board of county commissioners may, in the event no election has been held within five years under the provisions of G.S. 105-465 in which the tax has been defeated, after not less than 10 days' public notice and after a public hearing held pursuant thereto, by resolution, impose and levy the local sales and use tax to the same extent and with the same effect as if the levy of the tax had been approved in an election held pursuant to G.S. 105-465.

(b1) If the board of commissioners of a county has imposed the local sales and use tax authorized by this Article and any or all of the taxes authorized by Articles 40 and 42 of this Chapter, with or without a special election, and the county subsequently becomes part of a consolidated city-county, the taxes shall continue in effect unless and until repealed by the governing board of the consolidated city-county.

(c) Collection of the tax, and liability therefor, must begin and continue only on and after the first day of the month of either January or July, as set by the board of county commissioners in the resolution levying the tax. In no event may the tax be imposed, or the tax rate changed, earlier than the first day of the second succeeding calendar month after the date of the adoption of the resolution. The county must give the Secretary at least 90 days advance notice of a new tax levy or tax rate change. The applicability of a new tax or a tax rate change to purchases from printed catalogs becomes effective on the first day of a calendar quarter after a minimum of 120 days from the date the Secretary notifies the seller that receives orders by means of a catalog or similar publication of the new tax or tax rate change.

(d) Upon adoption of a resolution levying the tax, the board of county commissioners shall immediately deliver a certified copy of the resolution to the Secretary, accompanied by a certified statement from the county board of elections, if applicable, setting forth the results of any special election approving the tax in the county. Upon receipt of these documents, the Secretary shall collect and administer the tax as provided in this Article. (1971, c. 77, s. 2; 1973, c. 302; c. 476, s. 193; 1977, c. 372, s. 1; 1993, c. 485, s. 22; 1995, c. 461, s. 16; 2000-120, s. 12; 2001-414, s. 28; 2003-284, s. 45.10.)

Local Modification. — Burke: 1977, c. 372, s. 2.

Editor's Note. — Session Laws 2003-284, s. 45.1, provides: "The Streamlined Sales and Use Tax Agreement is an historic multistate agreement designed to simplify and modernize sales and use tax collection and administration. The states and businesses involved in the Streamlined Sales Tax Project recognize that a simplified and uniform system saves businesses compliance and audit costs, while also saving states administrative costs and improving voluntary compliance, which should increase state collections. To participate in the Agreement, North Carolina must amend or modify some of its sales and use tax law to conform to the simplifications and uniformity in the Agreement. This part [Part XLV of Session Laws 2003-284] makes those necessary changes."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

§ 105-467. Scope of sales tax.

(a) Sales Tax. — The sales tax that may be imposed under this Article is limited to a tax at the rate of one percent (1%) of the transactions listed in this subsection. The sales tax authorized by this Article does not apply to sales that are taxable by the State under G.S. 105-164.4 but are not specifically included in this subsection.

(1) The sales price of tangible personal property subject to the general rate of sales tax imposed by the State under G.S. 105-164.4(a)(1) and (a)(4b).

(2) The gross receipts derived from the lease or rental of tangible personal property when the lease or rental of the property is subject to the general rate of sales tax imposed by the State under G.S. 105-164.4(a)(2).

(3) The gross receipts derived from the rental of any room or other accommodations subject to the general rate of sales tax imposed by the State under G.S. 105-164.4(a)(3).

(4) The gross receipts derived from services rendered by laundries, dry cleaners, and other businesses subject to the general rate of sales tax imposed by the State under G.S. 105-164.4(a)(4).

(5) The sales price of food that is not otherwise exempt from tax pursuant to G.S. 105-164.13 but is exempt from the State sales and use tax pursuant to G.S. 105-164.13B.

(5a) The sales price of a bundled transaction that includes food subject to tax under subdivision (5) of this subsection, if the price of the food exceeds ten percent (10%) of the price of the bundle. A retailer must determine the price of food in a bundled transaction in accordance with G.S. 105-164.4D.

(5b) The sales price of bread, rolls, and buns that are sold at a bakery thrift store and are exempt from State tax under G.S.105-164.13(27a).

(6) The sales price of prepaid telephone calling service taxed as tangible personal property under G.S. 105-164.4(a)(4d).

(7) The gross receipts derived from providing satellite digital audio radio service subject to the general rate of tax under G.S. 105-164.4(a)(6a).

(b) Exemptions and Refunds. — The State exemptions and exclusions contained in G.S. 105-164.13, the State sales and use tax holiday contained in G.S. 105-164.13C, and the State refund provisions contained in G.S. 105-164.14 apply to the local sales and use tax authorized to be levied and imposed under this Article. Except as provided in this subsection, a taxing county may not allow an exemption, exclusion, or refund that is not allowed under the State sales and use tax. A local school administrative unit and a joint agency created by interlocal agreement among local school administrative units pursuant to G.S. 160A-462 to jointly purchase food service-related materials, supplies, and equipment on their behalf is allowed an annual refund of sales and use taxes paid by it under this Article on direct purchases of tangible personal property and services, other than electricity, telecommunications service, and ancillary service. Sales and use tax liability indirectly incurred by the entity on building materials, supplies, fixtures, and equipment that become a part of or annexed to any building or structure that is owned or leased by the entity and is being erected, altered, or repaired for use by the entity is considered a sales or use tax liability incurred on direct purchases by the entity for the purpose of this subsection. A request for a refund shall be in writing and shall include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the entity's fiscal year. Refunds applied for more than three years after the due date are barred.

(c) Sourcing. — The local sales tax authorized to be imposed and levied under this Article applies to taxable transactions by retailers whose place of business is located within the taxing county. The sourcing principles in G.S. 105-164.4B apply in determining whether the local sales tax applies to a transaction. (1971, c. 77, s. 2; 1983 (Reg. Sess., 1984), c. 1097, s. 9; 1987, c. 557, s. 7; c. 832, s. 4; 1989, c. 692, s. 3.7; 1991, c. 689, s. 316; 1996, 2nd Ex. Sess., c. 13, s. 1.3; 1998-98, s. 30.1; 1998-171, s. 9; 2001-347, s. 2.15; 2001-414, s. 29; 2001-424, s. 34.16(b); 2001-430, s. 13; 2001-487, s. 67(e); 2002-16, s. 12; 2002-159, s. 61; 2005-276, s. 33.23; 2006-66, s. 7.20(a); 2006-162, s. 32; 2007-244, s. 6; 2007-368, s. 2.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2007-244, s. 7, amended the first paragraph of Section 4 of Chapter 1096 of the 1967 Session laws, by inserting a new subdivision between subdivisions (5) and (6) to read as follows: "(5a) The sales price of a bundled transaction that includes food subject to tax under subdivision (5) of this section, if the price of the food exceeds ten percent (10%) of the price of the bundle. A retailer must determine the price of food in a bundled transaction in accordance with G.S. 105-164.4D."

Session Laws 2007-368, s. 3, amended Session Laws 1967, c. 1096, s. 4, to address the applicability of sales tax to bread sold at bakery thrift stores.

Effect of Amendments. — Session Laws 2005-276, s. 33.23, effective January 1, 2006, added subdivision (a)(7).

Session Laws 2006-66, s. 7.20(a), effective July 1, 2005, and applicable to sales made on or after that date, in subsection (b), inserted the exception at the beginning of the second sentence and added the last five sentences.

Session Laws 2006-162, s. 32, effective January 1, 2007, substituted "electricity, telecommunications service, and ancillary service" for "electricity and telecommunications service" at the end of the third sentence in subsection (b).

Session Laws 2007-244, s. 6, effective October 1, 2007, added subdivision (a)(5a).

Session Laws 2007-368, s. 2, effective October 1, 2007, and applicable to sales made on or after that date, added subdivision (a)(5b).

Legal Periodicals. — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under former G.S. 105-89.1.*

Local Sales Tax Not Precluded by Exemption from State Tax. — The limitation, in subdivision (1), of local sales tax to sales "subject to" the State sales tax refers not to those transactions for which a State sales tax is actually assessed, but to any transaction described in (former) G.S. 105-164.4(1) without regard to whether the transaction might be exempted or excluded from taxation by the operation of G.S. 105-164.13. Thus, exemption from State sales tax does not preclude the assessment of a local sales tax. Gregory Poole Equip. Co. v. Coble, 38 N.C. App. 483, 248 S.E.2d 378 (1978), aff'd, 297 N.C. 19, 252 S.E.2d 729 (1979).

Municipal Tax on Operators of Gasoline Pumps. — The provision authorizing counties, cities and towns to levy a license tax on each place of business located therein, not in excess of one fourth of that levied by the State, does not preclude a city from levying a tax on operators of gasoline pumps located on sidewalks along certain streets between the curb and the property line when such city tax is levied in the nature of a permit in the exercise of regulatory police power. State v. Evans, 205 N.C. 434, 171 S.E. 640 (1933).

Retail sales of used tangible personal property were subject to the local government sales tax when such property, having been accepted in trade by the vendor as a credit or part payment on the sales price of new property that was exempt from local sales tax under the provisions of G.S. 105-467 by virtue of delivery to a purchaser at a point outside the taxing county by the vendor or his agent or by a common carrier, was sold at retail and delivered to the purchaser within the taxing county in which the taxpayer had a place of business. Gregory Poole Equip. Co. v. Coble, 38 N.C. App. 483, 248 S.E.2d 378 (1978), aff'd, 297 N.C. 19, 252 S.E.2d 729 (1979).

A retailer doing business in a county that imposes the one percent local government sales tax must collect that tax when it sells and delivers within that county used tangible personal property previously accepted in trade as part payment on the sales price of new property that was delivered outside the county. Gregory Poole Equip. Co. v. Coble, 297 N.C. 19, 252 S.E.2d 729 (1979).

No Exemption for Insurance Companies for Local Use Taxes. — Under G.S. 105-467 and G.S. 105-468, exemptions from local use taxes are explicitly limited to and made dependent on the existence of codified exemptions from the State sales and use taxes, and in G.S. 105-164.13, the legislature has meticulously set forth approximately 50 exemptions and exclusions to the states sales and use taxes, many of which are sub-categorized by industry, but nowhere in G.S. 105-164.13 are insurance companies exempted from state sales and use tax; thus, local use taxes are generally applicable, and the North Carolina General Assembly did not intend to make them inapplicable to insurance companies. Proposed Assessments of Additional Sales & Use Tax v. Jefferson-Pilot Ins.

Co., 161 N.C. App. 558, 589 S.E.2d 179, 2003 N.C. App. LEXIS 2274 (2003).

Cited in Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990).

OPINIONS OF ATTORNEY GENERAL

Situs of Sale. — See opinion of Attorney General to Honorable I. L. Clayton, Commissioner of Revenue, 40 N.C.A.G. 881 (1970), issued under former G.S. 105-164.51.

§ 105-468. Scope of use tax.

The use tax authorized by this Article is a tax at the rate of one percent (1%) of the cost price of each item or article of tangible personal property that is not sold in the taxing county but is used, consumed, or stored for use or consumption in the taxing county. The tax applies to the same items that are subject to tax under G.S. 105-467.

Every retailer who is engaged in business in this State and in the taxing county and is required to collect the use tax levied by G.S. 105-164.6 shall collect the one percent (1%) use tax when the property is to be used, consumed, or stored in the taxing county. The use tax contemplated by this section shall be levied against the purchaser, and the purchaser's liability for the use tax shall be extinguished only upon payment of the use tax to the retailer, where the retailer is required to collect the tax, or to the Secretary, where the retailer is not required to collect the tax.

Where a local sales or use tax has been paid with respect to tangible personal property by the purchaser, either in another taxing county within the State, or in a taxing jurisdiction outside the State where the purpose of the tax is similar in purpose and intent to the tax which may be imposed pursuant to this Article, the tax paid may be credited against the tax imposed under this section by a taxing county upon the same property. If the amount of sales or use tax so paid is less than the amount of the use tax due the taxing county under this section, the purchaser shall pay to the Secretary an amount equal to the difference between the amount so paid in the other taxing county or jurisdiction and the amount due in the taxing county. The Secretary may require such proof of payment in another taxing county or jurisdiction as is deemed to be necessary. The use tax levied under this Article is not subject to credit for payment of any State sales or use tax not imposed for the benefit and use of counties and municipalities. No credit shall be given under this section for sales or use taxes paid in a taxing jurisdiction outside this State if that taxing jurisdiction does not grant similar credit for sales taxes paid under this Article. (1971, c. 77, s. 2; 1973, c. 476, s. 193; 1979, 2nd Sess., c. 1100, s. 2; 1989, c. 692, s. 3.8; 1991, c. 689, s. 317; 1996, 2nd Ex. Sess., c. 13, s. 1.4.)

CASE NOTES

No Exemption for Insurance Companies for Local Use Taxes. — Under G.S. 105-467 and G.S. 105-468, exemptions from local use taxes are explicitly limited to and made dependent on the existence of codified exemptions from the State sales and use taxes, and in G.S. 105-164.13, the legislature has meticulously set forth approximately 50 exemptions and exclusions to the states sales and use taxes, many of which are sub-categorized by industry, but nowhere in G.S. 105-164.13 are insurance companies exempted from state sales and use tax; thus, local use taxes are generally applicable, and the North Carolina General Assembly did not intend to make them inapplicable to insurance companies. Proposed Assessments of Additional Sales & Use Tax v. Jefferson-Pilot Ins. Co., 161 N.C. App. 558, 589 S.E.2d 179, 2003 N.C. App. LEXIS 2274 (2003).

Cited in Gregory Poole Equip. Co. v. Coble, 297 N.C. 19, 252 S.E.2d 729 (1979).

§ 105-468.1. Certain building materials exempt from sales and use taxes.

The provisions of this Article shall not be applicable with respect to any building materials purchased for the purpose of fulfilling any lump sum or unit price contract entered into or awarded, or entered into or awarded pursuant to any bid made, before the effective date of the tax imposed by a taxing county when, absent the provisions of this section, such building materials would otherwise be subject to tax under the provisions of this Article. (1971, c. 77, s. 3.)

§ 105-469. Secretary to collect and administer local sales and use tax.

(a) The Secretary shall collect and administer a tax levied by a county pursuant to this Article. As directed by G.S. 105-164.13B, taxes levied by a county on food are administered as if they were levied by the State under Article 5 of this Chapter. The Secretary must, on a monthly basis, distribute local taxes levied on food to the taxing counties as follows:

(1) The Secretary must allocate one-half of the net proceeds on a per capita basis according to the most recent annual population estimates certified to the Secretary by the State Budget Officer. The Secretary must then adjust the amount allocated to each county as provided in G.S. 105-486(b). The Secretary must include one-half of the amount allocated under this subdivision in the distribution made under Article 40 of this Chapter and must include the remaining one-half in the distribution made under Article 42 of this Chapter.

(2) The Secretary must allocate the remaining net proceeds proportionately to each taxing county based upon the amount of sales tax on food collected in the taxing county in the 1997-1998 fiscal year under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws relative to the total amount of sales tax on food collected in all taxing counties in the 1997-1998 fiscal year under Article 39 of this Chapter and under Chapter 1096 of the 1967 Session Laws. The Secretary must include the amount allocated under this subdivision in the distribution made under Article 39 of this Chapter.

(b) The Secretary shall require retailers who collect use tax on sales to North Carolina residents to ascertain the county of residence of each buyer and provide that information to the Secretary along with any other information necessary for the Secretary to allocate the use tax proceeds to the correct taxing county. (1971, c. 77, s. 2; 1973, c. 476, s. 193; 1993, c. 485, s. 23; 1996, 2nd Ex. Sess., c. 14, s. 12; 2003-284, s. 45.11(a); 2003-416, s. 27(a); 2004-170, s. 32; 2005-435, s. 41.)

Editor's Note. — Session Laws 2003-284, s. 45.1, provides: "The Streamlined Sales and Use Tax Agreement is an historic multistate agreement designed to simplify and modernize sales and use tax collection and administration. The states and businesses involved in the Streamlined Sales Tax Project recognize that a simplified and uniform system saves businesses compliance and audit costs, while also saving states administrative costs and improving voluntary compliance, which should increase state collections. To participate in the Agreement, North Carolina must amend or modify some of its sales and use tax law to conform to the simplifications and uniformity in the Agreement. This part [Part XLV of Session Laws 2003-284] makes those necessary changes."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 1.2, provides:

"This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2007-368, s. 3, amended Session Laws 1967, c. 1096, s. 4, to address the applicability of sales tax to bread sold at bakery thrift stores.

Effect of Amendments. — Session Laws 2005-435, s. 41, effective September 27, 2005, added the last sentence in subdivisions (a)(1) and (a)(2).

§ 105-470: Repealed by Session Laws 1991, c. 689, s. 318.

§ 105-471. Retailer to collect sales tax.

Every retailer whose place of business is in a taxing county shall on and after the levy of the tax herein authorized collect the one percent (1%) local sales tax provided by this Article.

The tax to be collected under this Article shall be collected as a part of the sales price of the item of tangible personal property sold, the cost price of the item of tangible personal property used, or as a part of the charge for the rendering of any services, renting or leasing of tangible personal property, or the furnishing of any accommodation taxable hereunder. The tax shall be stated and charged separately from the sales price or cost price and shall be shown separately on the retailer's sales record and shall be paid by the purchaser to the retailer as trustee for and on account of the State or county wherein the tax is imposed. It is the intent and purpose of this Article that the local sales and use tax herein authorized to be imposed and levied by a taxing county shall be added to the sales price and that the tax shall be passed on to the purchaser instead of being borne by the retailer. The Secretary of Revenue shall design, print and furnish to all retailers in a taxing county in which he shall collect and administer the tax the necessary forms for filing returns and instructions to insure the full collection from retailers, and the Secretary may adapt the present form used for the reporting and collecting of the State sales and use tax to this purpose. (1971, c. 77, s. 2; 1973, c. 476, s. 193.)

§ 105-472. Disposition and distribution of taxes collected.

(a) County Allocation. — The Secretary shall, on a monthly basis, allocate to each taxing county for which the Secretary collects the tax the net proceeds of the tax collected in that county under this Article. For the purpose of this section, "net proceeds" means the gross proceeds of the tax collected in each county under this Article less taxes refunded, the cost to the State of collecting and administering the tax in the county as determined by the Secretary, and other deductions that may be charged to the county. If the Secretary collects local sales or use taxes in a month and the taxes cannot be identified as being attributable to a particular taxing county, the Secretary shall allocate the taxes among the taxing counties in proportion to the amount of taxes collected in each county under this Article during that month and shall include them in the monthly distribution. Amounts collected by electronic funds transfer payments are included in the distribution for the month in which the return that applies to the payment is received.

(b) Distribution Between Counties and Cities. — The Secretary shall divide the amount allocated to each taxing county among the county and its municipalities in accordance with the method determined by the county. The board of county commissioners shall, by resolution, choose one of the following methods of distribution:

(1) Per Capita Method. — The net proceeds of the tax collected in a taxing county shall be distributed to that county and to the municipalities in the county on a per capita basis according to the total population of the taxing county, plus the total population of the municipalities in the county. In the case of a municipality located in more than one county, only that part of its population living in the taxing county is considered its "total population". In order to make the distribution, the Secretary shall determine a per capita figure by dividing the amount allocated to each taxing county by the total population of that county plus the total population of all municipalities in the county. The Secretary shall then multiply this per capita figure by the population of the taxing county and by the population of each municipality in the county; each respective product shall be the amount to be distributed to the county and to each municipality in the county. To determine the population of each county and each municipality, the Secretary shall use the most recent annual estimate of population certified by the State Budget Officer.

(2) Ad Valorem Method. — The net proceeds of the tax collected in a taxing county shall be distributed to that county and the municipalities in the county in proportion to the total amount of ad valorem taxes levied by each on property having a tax situs in the taxing county during the fiscal year next preceding the distribution. For purposes of this section, the amount of the ad valorem taxes levied by a county or municipality includes ad valorem taxes levied by the county or municipality in behalf of a taxing district and collected by the county or municipality. In addition, the amount of taxes levied by a county includes ad valorem taxes levied by a merged school administrative unit described in G.S. 115C-513 in the part of the unit located in the county. In computing the amount of tax proceeds to be distributed to each county and municipality, the amount of any ad valorem taxes levied but not substantially collected shall be ignored. Each county and municipality receiving a distribution of the proceeds of the tax levied under this Article shall in turn immediately share the proceeds with each district in behalf of which the county or municipality levied ad valorem taxes in the proportion that the district levy bears to the total levy of the county or municipality. Any county or municipality that fails to provide the Department of Revenue with information concerning ad valorem taxes levied by it adequate to permit a timely determination of its appropriate share of tax proceeds collected under this Article may be excluded by the Secretary from each monthly distribution with respect to which the information was not provided in a timely manner, and those tax proceeds shall then be distributed only to the remaining counties or municipalities, as appropriate. For the purpose of computing the distribution of the tax under this subsection to any county and the municipalities located in the county for any month with respect to which the property valuation of a public service company is the subject of an appeal and the Department of Revenue is restrained by law from certifying the valuation to the county and the municipalities in the county, the Department shall use the last property valuation of the public service company that has been certified.

The board of county commissioners in each taxing county shall, by resolution adopted during the month of April of each year, determine which of the two foregoing methods of distribution shall be in effect in the county during the next succeeding fiscal year. In order for the resolution to be effective, a certified copy of it must be delivered to the Secretary in Raleigh within 15 calendar days after its adoption. If the board fails to adopt a resolution choosing a method of distribution not then in effect in the county, or if a certified copy of the resolution is not timely delivered to the Secretary, the method of distribution then in effect in the county shall continue in effect for the following fiscal year. The method of distribution in effect on the first of July of each fiscal year shall apply to every distribution made during that fiscal year.

(b1) **(Effective October 1, 2008 — see note)** County Reduction for City Hold Harmless. — The Secretary must reduce each county's monthly allocation under subsection (b) of this section by the amount set in G.S. 105-522. This reduction does not affect the amount allocated to municipalities under this section.

(c) Municipality Defined. — As used in this Article, the term "municipality" means "city" as defined in G.S. 153A-1.

(d) No municipality may receive any funds under this section if it was incorporated with an effective date of on or after January 1, 2000, and is disqualified from receiving funds under G.S. 136-41.2. No municipality may receive any funds under this section, incorporated with an effective date on or after January 1, 2000, unless a majority of the mileage of its streets are open to the public. The previous sentence becomes effective with respect to distribution of funds on or after July 1, 1999. (1971, c. 77, s. 2; 1973, c. 476, s. 193; c. 752; 1979, c. 12, s. 1; 1979, 2nd Sess., c. 1137, s. 49; 1981, c. 4, s. 2; 1985 (Reg. Sess., 1986), c. 934, s. 2; 1991, c. 325, s. 8; 1993, c. 485, s. 24; 1999-458, s. 6; 2001-427, s. 13(a); 2001-487, s. 118(b); 2002-72, s. 5; 2003-349, s. 5; 2004-203, s. 5(j); 2007-323, s. 31.16.3(d).)

Local Modification. — Burke: 1983, c. 273, 1983 (Reg. Sess., 1984), c. 1034, s. 127; 1985, c. 326; Pender: 1993 (Reg. Sess., 1994), c. 577, s. 1, 2003-416, s. 14; Roanoke Rapids: 1973, c. 3.

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 31.16.3(d), effective October 1, 2008, and applicable to distributions for months beginning on or after that date, added subsection (b1).

CASE NOTES

Constitutionality. — Per capita distribution offends neither the State Constitution nor the federal Constitution. Town of Beech Mt. v. County of Watauga, 324 N.C. 409, 378 S.E.2d 780, cert. denied, 493 U.S. 954, 110 S. Ct. 365, 107 L. Ed. 2d 351 (1989).

Construction with Other Provisions. — Since distribution of the residual sales taxes under subdivision (b)(2) is dependent upon the levy of ad valorem taxes within a taxing district, it does not appear that it was the intent of the legislature for G.S. 115C-430 to supersede subdivision (b)(2); therefore, the trial court properly concluded that the two statutes were not in conflict. Banks v. County of Buncombe, 128 N.C. App. 214, 494 S.E.2d 791 (1998), aff'd, 348 N.C. 687, 500 S.E.2d 666 (1998).

Per capita method of distribution of local sales and use tax revenues to municipalities does not burden the right of interstate travel and deprive out-of-state residents of their privileges and immunities under U.S. Const., Art. IV, § 2, since this section does not treat nonresidents any differently than it treats residents of this state. Town of Beech Mt. v. County of Watauga, 91 N.C. App. 87, 370 S.E.2d 453 (1988), aff'd, 324 N.C. 409, 378 S.E.2d 780, cert. denied 493 U.S. 954, 110 S. Ct. 365, 107 L. Ed. 2d 351 (1989).

Per capita method of distribution of local sales and use tax revenues to municipalities provides a reasonable means of returning revenues in an amount proportionate to those from whom they were collected; therefore, this method of revenue distribution is constitutionally valid and survives the rational basis test under the Equal Protection Clause of the United States Constitution. Town of Beech Mt. v. County of Watauga, 91 N.C. App. 87, 370 S.E.2d 453 (1988), aff'd, 324 N.C. 409, 378 S.E.2d 780, cert. denied 493 U.S. 954, 110 S. Ct. 365, 107 L. Ed. 2d 351 (1989).

Individuals owning a second or vacation home for less than half a year are not a suspect class such that this section is subject to strict scrutiny. Town of Beech Mt. v. County of Watauga, 91 N.C. App. 87, 370 S.E.2d 453 (1988), aff'd, 324 N.C. 409, 378 S.E.2d 780, cert. denied 493 U.S. 954, 110 S. Ct. 365, 107 L. Ed. 2d 351 (1989).

§ 105-473. Repeal of levy.

(a) The board of elections of any county, upon the written request of the board of county commissioners thereof, or upon receipt of a petition signed by qualified voters of the county equal in number to at least fifteen percent (15%) of the total number of votes cast in the county at the last preceding election for the office of Governor, shall call a special election for the purpose of submitting to the voters of the county the question of whether the levy of a one percent (1%) sales and use tax theretofore levied should be repealed.

The special election shall be held under the same rules and regulations applicable to the election of members of the General Assembly. No new registration of voters shall be required. All qualified voters in the county who are properly registered not later than 21 days (excluding Saturdays and Sundays) prior to the election shall be entitled to vote at said election. The county board of elections shall give at least 20 days' public notice prior to the closing of the registration books for the special election.

The county board of elections shall prepare ballots for the special election which shall contain the words "FOR repeal of the one percent (1%) local sales and use tax levy," and the words "AGAINST repeal of the one percent (1%) local sales and use tax levy," with appropriate squares so that each voter may designate his vote by his cross (X) mark.

The county board of elections shall fix the date of the special election; provided, however, that the special election shall not be held on the day of any biennial election for county officers, nor within 60 days thereof, nor within one year from the date of the last preceding special election held under this section.

(b) In the event a majority of those voting in a special election held pursuant to this section shall approve the repeal of the levy, the board of county commissioners shall, by resolution, proceed to terminate the levy and the imposition of the tax in the taxing county unless and until the tax is levied again as provided in G.S. 105-466(a).

(c) In addition, the board of county commissioners may, by resolution and without the necessity of an election proceed to terminate the levy and the imposition of the tax in the taxing county if the tax was levied under the provisions of G.S. 105-466(b).

(d) No termination of taxes levied and imposed under this Article shall be effective until the end of the fiscal year in which the repeal election was held.

(e) The board of county commissioners, upon adoption of said resolution, shall cause a certified copy of the resolution to be delivered immediately to the Secretary of Revenue, accompanied by a certified statement from the county board of elections, if applicable, setting forth the results of any special election approving the repeal of the tax in the county.

(f) No liability for any tax levied under this Article which shall have attached prior to the effective date on which a levy is terminated shall be discharged as a result of such termination, and no right to a refund of tax or otherwise, which shall have accrued prior to the effective date on which a levy is terminated shall be denied as a result of such termination. (1971, c. 77, s. 2; 1973, c. 476, s. 193; 1981, c. 560, s. 2; 1995, c. 461, s. 17.)

§ 105-474. Definitions; construction of Article; remedies and penalties.

The definitions set forth in G.S. 105-164.3 shall apply to this Article insofar as such definitions are not inconsistent with the provisions of this Article, and all other provisions of Article 5 and of Article 9 of Subchapter 1, Chapter 105 of the General Statutes, as the same relate to the North Carolina Sales and Use Tax Act shall be applicable to this Article unless such provisions are inconsistent with the provisions of this Article. The administrative interpretations made by the Secretary of Revenue with respect to the North Carolina Sales and Use Tax Act, to the extent not inconsistent with the provisions of this Article, may be uniformly applied in the construction and interpretation of this Article. It is the intention of this Article that the provisions of this Article and the provisions of the North Carolina Sales and Use Tax Act, insofar as practicable, shall be harmonized.

The provisions with respect to remedies and penalties applicable to the North Carolina Sales and Use Tax Act, as contained in Article 5 and Article 9, Subchapter 1, Chapter 105 of the General Statutes, shall be applicable in like manner to the tax authorized to be levied and collected under this Article, to the extent that the same are not inconsistent with the provisions of this Article. (1971, c. 77, s. 2; 1973, c. 476, s. 193.)

Legal Periodicals. — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

CASE NOTES

Cited in Gregory Poole Equip. Co. v. Coble, 38 N.C. App. 483, 248 S.E.2d 378 (1978); Gregory Poole Equip. Co. v. Coble, 297 N.C. 19, 252 S.E.2d 729 (1979).

§§ 105-475 through 105-479: Reserved for future codification purposes.

ARTICLE 40.

First One-Half Cent (1/2¢) Local Government Sales and Use Tax.

§ 105-480. Short title.

This Article shall be known as the First One-Half Cent (½¢) Local Government Sales and Use Tax Act. (1983, c. 908, s. 1; 2002-123, s. 8(b).)

Editor's Note. — Session Laws 1991, c. 689, s. 320(b) provides: "Approval under the Supplemental Local Government Sales and Use Tax Act, Article 40 of Chapter 105 of the General Statutes, on one-half percent (1/2%) local sales and use taxes in addition to the one percent (1%) local sales and use taxes and three percent (3%) State sales and use taxes constitutes approval of one-half percent (1/2%) local sales and use taxes in addition to the one percent (1%) local sales and use taxes and the four percent (4%) States sales and use taxes."

Section 352 of Session Laws 1991, c. 689 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1991-93 biennium, the textual provisions of Titles I, II and III of this act shall apply only to funds appropriated for and activities, occurring during the 1991-93 biennium."

§ 105-481. Purpose and intent.

It is the purpose of this Article to afford the counties and cities of this State an opportunity to obtain an added source of revenue with which to meet their growing financial needs, and to reduce their reliance on other revenues, such as the property tax, by providing all counties of the State that are subject to this Article with authority to levy one-half percent (1/2%) sales and use taxes. (1983, c. 908, s. 1.)

CASE NOTES

Cited in Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990).

§ 105-482. Limitations.

This Article applies only to counties that levy one percent (1%) sales and use taxes under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws. (1983, c. 908, s. 1; 1993, c. 485, s. 25.)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 13, ss. 1.5 and 1.6, amend Session Laws 1967, c. 1096, referred to in this section.

Session Laws 1996, Second Extra Session, c. 13, s. 1, provides that this act shall be known as the William S. Lee Quality Jobs and Business Expansion Act.

Session Laws 1996, Second Extra Session, c. 13, s. 1.7, provides: "Approval under Article 39, 40, or 42 of Chapter 105 of the General Statutes or under the Mecklenburg County Sales and Use Tax Act, Chapter 1096 of the 1967 Session Laws, as amended, of local sales and use taxes on items subject to State sales and use tax at the general State rate constitutes approval of local sales and use taxes on food."

Session Laws 1996, Second Extra Session, c. 13, s. 10.1, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before its amendment or repeal; nor does it affect the right to any refund or credit of a tax that would otherwise have been available under the amended or repealed statute before its amendment or repeal."

§ 105-483. Levy and collection of additional taxes.

Any county subject to this Article may levy one-half percent (1/2%) local sales and use taxes in addition to any other State and local sales and use taxes levied pursuant to law. Except as provided in this Article, the adoption, levy, collection, distribution, administration, and repeal of these additional taxes shall be in accordance with Article 39 of this Chapter. In applying the provisions of Article 39 of this Chapter to this Article, references to "this Article" mean Article 40 of this Chapter. The exemption for building materials in G.S. 105-468.1 does not apply to taxes levied under this Article. (1983, c. 908, s. 1; 1993, c. 485, s. 26.)

§ 105-484. Form of ballot.

(a) The form of the question to be presented on a ballot for a special election concerning the additional taxes authorized by this Article shall be: "FOR additional one-half percent (1/2%) local sales and use taxes" or "AGAINST additional one-half percent (1/2%) local sales and use taxes."

(b) The form of the question to be presented on a ballot for a special election concerning the repeal of any additional taxes levied pursuant to this Article shall be: "FOR repeal of the additional one-half percent (1/2%) local sales and use taxes" or "AGAINST repeal of the additional one-half percent (1/2%) local sales and use taxes." (1983, c. 908, s. 1.)

§ 105-485: Repealed by Session Laws 1991, c. 689, s. 318.

§ 105-486. Distribution of additional taxes.

(a) County Allocation. — The Secretary shall, on a monthly basis, allocate the net proceeds of the additional one-half percent (1/2%) sales and use taxes levied under this Article to the taxing counties on a per capita basis according to the most recent annual population estimates certified to the Secretary by the State Budget Officer.

(b) Adjustment. — The Secretary shall then adjust the amount allocated to each county under subsection (a) by multiplying the amount by the appropriate adjustment factor set out in the table below. If, after applying the adjustment factors, the resulting total of the amounts allocated is greater or lesser than the net proceeds to be distributed, the amount allocated to each county shall be proportionally adjusted to eliminate the excess or shortage.

County	**Adjustment Factor**
Dare	1.49
Brunswick	1.17
Orange	1.15
Carteret and Durham	1.14
Avery	1.12
Moore	1.11
Transylvania	1.10
Chowan, McDowell, and Richmond	1.09
Pitt and New Hanover	1.07
Beaufort, Perquimans, Buncombe, and Watauga	1.06
Cabarrus, Jackson, and Surry	1.05
Alleghany, Bladen, Robeson, Washington, Craven, Henderson, Onslow, and Vance	1.04
Gaston, Granville, and Martin	1.03
Alamance, Burke, Caldwell, Chatham, Duplin, Edgecombe, Haywood, Swain, and Wilkes	1.02
Hertford, Union, Stokes, Yancey, Halifax, Rockingham, and Cleveland	1.01
Alexander, Anson, Johnston, Northampton, Pasquotank, Person, Polk, and Yadkin	1.00
Catawba, Harnett, Iredell, Pamlico, Pender, Randolph, Stanly, and Tyrrell	0.99
Cherokee, Cumberland, Davidson, Graham, Hyde, Macon, Rutherford, Scotland, and Wilson	0.98
Ashe, Bertie, Franklin, Hoke, Lincoln, Montgomery, and Warren	0.97
Wayne, Clay, Madison, Sampson, Wake, Lee, and Forsyth	0.96
Caswell, Gates, Mitchell, and Greene	0.95
Currituck and Guilford	0.94
Davie and Nash	0.93
Rowan and Camden	0.92
Jones	0.90
Mecklenburg	0.89
Lenoir	0.88
Columbus	0.81

(c) Distribution Between Counties and Cities. — The amount allocated to each taxing county shall then be divided among the county and its municipalities in accordance with the method by which the one percent (1%) sales and use taxes levied in that county pursuant to Article 39 of this Chapter or Chapter 1096 of the 1967 Session Laws are distributed.

(d) No municipality may receive any funds under this section if it was incorporated with an effective date of on or after January 1, 2000, and is disqualified from receiving funds under G.S. 136-41.2. No municipality may receive any funds under this section, incorporated with an effective date on or after January 1, 2000, unless a majority of the mileage of its streets are open to the public. The previous sentence becomes effective with respect to distribution of funds on or after July 1, 1999. (1983, c. 908, s. 1; 1985 (Reg. Sess., 1986), c. 906, s. 2; 1987, c. 832, s. 6; 1987 (Reg. Sess., 1988), c. 1082, s. 2; 1999-458, s. 7; 2001-427, s. 13(b), (c).)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 13, ss. 1.5 and 1.6, amend Session Laws 1967, c. 1096, referred to in this section.

Session Laws 1996, Second Extra Session, c. 13, s. 1, provides that this act shall be known as the William S. Lee Quality Jobs and Business Expansion Act.

Session Laws 1996, Second Extra Session, c. 13, s. 10.1, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before its amendment or repeal; nor does it affect the right to any refund or credit of a tax that would otherwise have been available under the amended or repealed statute before its amendment or repeal."

§ 105-487. Use of additional tax revenue by counties.

(a) Except as provided in subsection (c), forty percent (40%) of the revenue received by a county from additional one-half percent (½%) sales and use taxes levied under this Article during the first five fiscal years in which the additional taxes are in effect in the county and thirty percent (30%) of the revenue received by a county from these taxes in the next 23 fiscal years in which the taxes are in effect in the county may be used by the county only for public school capital outlay purposes as defined in G.S. 115C-426(f) or to retire any indebtedness incurred by the county for these purposes.

(b) Repealed by Session Laws 1998-98, s. 31, effective August 14, 1998.

(c) The Local Government Commission may, upon petition by a county, authorize the county to use part or all its tax revenue, otherwise required by subsection (a) of this section to be used for public school capital needs, for any lawful purpose. The petition shall be in the form of a resolution adopted by the Board of County Commissioners and transmitted to the Local Government Commission. The petition shall demonstrate that the county can provide for its public school capital needs without restricting the use of part or all of the designated amount of the additional one-half percent (½%) sales and use tax revenue for that purpose.

In making its decision, the Local Government Commission shall consider information contained in the petition concerning not only the public school capital needs, but also the other capital needs of the petitioning county. The Commission may also consider information from sources other than the petition. The Commission shall issue a written decision on each petition stating the findings of the Commission concerning the public school capital needs of the petitioning county and the percentage of revenue otherwise restricted by subsection (a) of this section that may be used by the petitioning county for any lawful purpose.

Decisions of the Commission allowing counties to use a percentage of their tax revenue that would otherwise be restricted under subsection (a) of this section for any lawful purpose are final and shall continue in effect until the restrictions imposed by that subsection expire. A county whose petition is denied, in whole or in part, by the Commission may subsequently submit a new petition to the Commission.

(d) For purposes of determining the number of fiscal years in which one-half percent (½%) sales and use taxes levied under this Article have been in effect in a county, these taxes are considered to be in effect only from the effective date of the levy of these taxes and are considered to be in effect for a full fiscal year during the first year in which these taxes were in effect, regardless of the number of months in that year in which the taxes were actually in effect.

(e) A county may expend part or all of the revenue restricted for public school capital needs pursuant to subsection (a) of this section in the fiscal year in which the revenue is received, or the county may place part or all of this revenue in a capital reserve fund and shall specifically identify this revenue in accordance with Chapter 159 of the General Statutes. (1983, c. 908, s. 1; 1993, c. 255, ss. 1, 3; 1998-98, s. 31; 1998-186, s. 1.)

Local Modification. — Burke County: 1985, c. 326.

CASE NOTES

Cited in Banks v. County of Buncombe, 128 N.C. App. 214, 494 S.E.2d 791 (1998), aff'd, 348 N.C. 687, 500 S.E.2d 666 (1998).

ARTICLE 41.

Alternative Local Government Sales and Use Taxes.

§§ 105-488 through 105-494: Repealed by Session Laws 1991, c. 689, s. 318.

ARTICLE 42.

Second One-Half Cent (½¢) Local Government Sales and Use Tax.

§ 105-495. Short title.

This Article shall be known as the Second One-Half Cent (½¢) Local Government Sales and Use Tax Act. (1985 (Reg. Sess., 1986), c. 906, s. 1; 2002-123, s. 9(b).)

Editor's Note. — Session Laws 1991, c. 689, s. 320(c) provides: "Approval under the Additional Supplemental Local Government Sales and Use Tax Act, Article 42 of Chapter 105 of the General Statutes, of one-half percent (1/2%) local sales and use taxes in addition to the one and one-half percent (11/2%) local sales and use taxes and three percent (3%) States sales and use taxes constitutes approval of one-half percent (1/2%) local sales and use taxes in addition to the one and one-half percent (11/2%) local sales and use taxes and the four percent (4%) State sales and use taxes."

Section 352 of Session Laws 1991, c. 689 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1991-93 biennium, the textual provisions of Titles I, II and III of this act shall apply only to funds appropriated for and activities, occurring during the 1991-93 biennium."

§ 105-496. Purpose and intent.

It is the purpose of this Article to afford the counties and cities of this State an opportunity to obtain an added source of revenue with which to meet their growing financial needs, and to reduce their reliance on other revenues, such as the property tax and federal revenue sharing, by providing all counties of the State that are subject to this Article with authority to levy one-half percent (½%) sales and use taxes. (1985 (Reg. Sess., 1986), c. 906, s. 1.)

CASE NOTES

Cited in Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990).

§ 105-497. Limitations.

This Article applies only to counties that levy one percent (1%) sales and use taxes under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws and also levy one-half percent (½%) local sales and use taxes under Article 40 of this Chapter. (1985 (Reg. Sess., 1986), c. 906, s. 1.)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 13, ss. 1.5 and 1.6, amend Session Laws 1967, c. 1096, referred to in this section.

Session Laws 1996, Second Extra Session, c. 13, s. 1, provides that this act shall be known as the William S. Lee Quality Jobs and Business Expansion Act.

Session Laws 1996, Second Extra Session, c. 13, s. 10.1, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before its amendment or repeal; nor does it affect the right to any refund or credit of a tax that would otherwise have been available under the amended or repealed statute before its amendment or repeal."

§ 105-498. Levy and collection of additional taxes.

Any county subject to this Article may levy one-half percent (1/2%) local sales and use taxes in addition to any other State and local sales and use taxes levied pursuant to law. Except as provided in this Article, the adoption, levy, collection, distribution, administration, and repeal of these additional taxes shall be in accordance with Article 39 of this Chapter. In applying the provisions of Article 39 of this Chapter to this Article, references to "this Article" mean Article 42 of this Chapter. The exemption for building materials in G.S. 105-468.1 does not apply to taxes levied under this Article. (1985 (Reg. Sess., 1986), c. 906, s. 1; 1993, c. 485, s. 27.)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 13, s. 1.7, provides: "Approval under Article 39, 40, or 42 of Chapter 105 of the General Statutes or under the Mecklenburg County Sales and Use Tax Act, Chapter 1096 of the 1967 Session Laws, as amended, of local sales and use taxes on items subject to State sales and use tax at the general State rate constitutes approval of local sales and use taxes on food."

Session Laws 1996, Second Extra Session, c. 13, s. 1, provides that this act shall be known as the William S. Lee Quality Jobs and Business Expansion Act.

Session Laws 1996, Second Extra Session, c. 13, s. 10.1, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before its amendment or repeal; nor does it affect the right to any refund or credit of a tax that would otherwise have been available under the amended or repealed statute before its amendment or repeal."

§ 105-499. Form of ballot.

(a) The form of the question to be presented on a ballot for a special election concerning the additional taxes authorized by this Article shall be: "FOR one-half percent (½%) local sales and use taxes in addition to the current one and one-half percent (1½%) local sales and use taxes" or "AGAINST one-half percent (½%) local sales and use taxes in addition to the current one and one-half percent (1½%) local sales and use taxes."

G.S. 105-501 is set out twice. See note.

(b) The form of the question to be presented on a ballot for a special election concerning the repeal of any additional taxes levied pursuant to this Article shall be: "FOR repeal of the additional one-half percent (½%) local sales and use taxes, thus reducing local sales and use taxes to one and one-half percent (1½%)" or "AGAINST repeal of the additional one-half percent (½%) local sales and use taxes, thus reducing local sales and use taxes to one and one-half percent (1½%)." (1985 (Reg. Sess., 1986), c. 906, s. 1.)

§ 105-500: Repealed by Session Laws 1991, c. 689, s. 318.

§ 105-501. (Effective until October 1, 2009) Distribution of additional taxes.

The Secretary shall, on a monthly basis, allocate the net proceeds of the additional one-half percent (1/2%) sales and use taxes levied under this Article to the taxing counties on a per capita basis according to the most recent annual population estimates certified to the Secretary by the State Budget Officer. The Secretary shall then adjust the amount allocated to each county as provided in G.S. 105-486(b). The amount allocated to each taxing county shall then be divided among the county and the municipalities located in the county in accordance with the method by which the one percent (1%) sales and use taxes levied in that county pursuant to Article 39 of this Chapter or Chapter 1096 of the 1967 Session Laws are distributed. No municipality may receive any funds under this section if it was incorporated with an effective date of on or after January 1, 2000, and is disqualified from receiving funds under G.S. 136-41.2. No municipality may receive any funds under this section, incorporated with an effective date on or after January 1, 2000, unless a majority of the mileage of its streets are open to the public. The previous sentence becomes effective with respect to distribution of funds on or after July 1, 1999.

In determining the net proceeds of the tax to be distributed, the Secretary shall deduct from the collections to be allocated an amount equal to one-twelfth of the costs during the preceding fiscal year of:

(1) The Department of Revenue in performing the duties imposed by G.S. 105-275.2 and by Article 15 of this Chapter.
(1a) Seventy percent (70%) of the expenses of the Department of Revenue in performing the duties imposed by Article 2D of this Chapter.
(2) The Property Tax Commission.
(3) The School of Government at the University of North Carolina at Chapel Hill in operating a training program in property tax appraisal and assessment.
(4) The personnel and operations provided by the Department of State Treasurer for the Local Government Commission. (1985 (Reg. Sess., 1986), c. 906, s. 1; 1987, c. 832, s. 8; 1987 (Reg. Sess., 1988), c. 1082, s. 4; 1995, c. 41, s. 4; c. 370, s. 1; 1999-458, s. 9; 2001-427, s. 13(d); 2002-126, s. 30D(a); 2006-264, s. 29(f).)

Section Set Out Twice. — The section above is effective until October 1, 2009. For the section as amended October 1, 2009, see the following section, also numbered G.S. 105-501.

Local Modification. — Community of Gray's Creek: 1999, c. 458, s. 13 (contingent on petition filed before July 1, 2002); Community of Union Cross: 1999, c. 458, s. 13 (contingent on petition filed before July 1, 2002).

Editor's Note. — Session Laws 1996, Second Extra Session, c. 13, ss. 1.5 and 1.6, amend Session Laws 1967, c. 1096, referred to in this section.

Session Laws 1996, Second Extra Session, c.

13, s. 1, provides that this act shall be known as the William S. Lee Quality Jobs and Business Expansion Act.

Session Laws 1996, Second Extra Session, c. 13, s. 10.1, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before its amendment or repeal; nor does it affect the right to any refund or credit of a tax that would otherwise have been available under the amended or repealed statute before its amendment or repeal."

Section 105-275.2, referred to in subdivision (1), was repealed effective July 1, 2002.

Effect of Amendments. — Session Laws 2006-264, s. 29(f), effective August 27, 2006, substituted "School of Government at the University of North Carolina at Chapel Hill" for "Institute of Government" in subdivision (3).

§ 105-501. (Effective October 1, 2009) Distribution of additional taxes.

(a) Method. — The Secretary must, on a monthly basis, allocate to each taxing county the net proceeds of the additional one-half percent (1/2%) sales and use taxes collected in that county under this Article. If the Secretary collects taxes under this Article in a month and the taxes cannot be identified as being attributable to a particular taxing county, the Secretary must allocate the net proceeds of these taxes among the taxing counties in proportion to the amount of taxes collected in each county under this Article in that month.

The Secretary must divide and distribute the funds allocated to a taxing county each month under this section between the county and the municipalities located in the county in accordance with the method by which the one percent (1%) sales and use taxes levied in that county pursuant to Article 39 of this Chapter or Chapter 1096 of the 1967 Session Laws are distributed. No municipality may receive any funds under this section if it was incorporated with an effective date of on or after January 1, 2000, and is disqualified from receiving funds under G.S. 136-41.2. No municipality may receive any funds under this section, incorporated with an effective date on or after January 1, 2000, unless a majority of the mileage of its streets are open to the public.

(b) Deductions. — In determining the net proceeds of the tax to be distributed, the Secretary must deduct from the collections to be allocated an amount equal to one-twelfth of the costs during the preceding fiscal year of:

(1) The Department of Revenue in performing the duties imposed by G.S. 105-275.2 and by Article 15 of this Chapter.

(1a) Seventy percent (70%) of the expenses of the Department of Revenue in performing the duties imposed by Article 2D of this Chapter.

(2) The Property Tax Commission.

(3) The School of Government at the University of North Carolina at Chapel Hill in operating a training program in property tax appraisal and assessment.

(4) The personnel and operations provided by the Department of State Treasurer for the Local Government Commission. (1985 (Reg. Sess., 1986), c. 906, s. 1; 1987, c. 832, s. 8; 1987 (Reg. Sess., 1988), c. 1082, s. 4; 1995, c. 41, s. 4; c. 370, s. 1; 1999-458, s. 9; 2001-427, s. 13(d); 2002-126, s. 30D(a); 2006-264, s. 29(f); 2007-323, s. 31.16.4(b).)

Section Set Out Twice. — The section above is effective October 1, 2009. For the section as in effect until October 1, 2009, see the preceding section, also numbered G.S. 105-501.

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 31.16.4(b), effective October 1, 2009, and applicable to distributions for months beginning on or after October 1, 2009, rewrote this section.

§ 105-502. Use of additional tax revenue by counties.

(a) Sixty percent (60%) of the revenue received by a county under this Article during the first 25 fiscal years in which the tax is in effect may be used by the county only for public school capital outlay purposes as defined in G.S. 115C-426(f) or to retire any indebtedness incurred by the county for these purposes during the period beginning five years prior to the date the taxes took effect.

(b) The Local Government Commission may, upon petition by a county, authorize a county to use part or all of its tax revenue, otherwise required by subsection (a) to be used for public school capital outlay purposes, for any lawful purpose. The petition shall be in the form of a resolution adopted by the Board of County Commissioners and transmitted to the Local Government Commission. The petition shall demonstrate that the county can provide for its public school capital needs without restricting the use of part or all of the designated amount of the additional one-half percent (1/2%) sales and use tax revenue for these purposes.

In making its decision, the Local Government Commission shall consider information in the petition concerning not only the public school capital needs but also the other capital needs of the petitioning county. The Commission may consider information from sources other than the petition. The Commission shall issue a written decision on each petition stating the findings of the Commission concerning the public school capital needs of the petitioning county and the percentage of revenue otherwise restricted by subsection (a) that may be used by the petitioning county for any lawful purpose.

Decisions of the Commission allowing counties to use a percentage of their tax revenue that would otherwise be restricted under subsection (a) for any lawful purpose are final and shall continue in effect until the restrictions imposed by those subsections expire. A county whose petition is denied, in whole or in part, by the Commission may subsequently submit a new petition to the Commission.

(c) A county may expend part or all of the revenue restricted for public school capital needs pursuant to subsection (a) in the fiscal year in which the revenue is received, or the county may place part or all of this revenue in a capital reserve fund and shall specifically identify this revenue in accordance with Chapter 159 of the General Statutes.

(d) For purposes of this section in determining the number of fiscal years in which one-half percent (½%) sales and use taxes levied under this Article have been in effect in a county, these taxes are considered to be in effect only from the effective date of the levy of these taxes and are considered to be in effect for a full fiscal year during the first year in which these taxes were in effect, regardless of the number of months in that year in which the taxes were actually in effect. (1985 (Reg. Sess., 1986), c. 906, s. 1; 1987, c. 622, s. 11; 1993, c. 255, ss. 2, 4; 1998-186, s. 2.)

CASE NOTES

Cited in Banks v. County of Buncombe, 128 N.C. App. 214, 494 S.E.2d 791 (1998), aff'd, 348 N.C. 687, 500 S.E.2d 666 (1998).

§ 105-503: Recodified as § 115C-440.1 by Session Laws 1995 (Regular Session, 1996), c. 666, s. 4.

§ 105-504: Repealed by Session Laws 1998-98, s. 32, effective August 14, 1998.

§§ 105-505 through 105-509: Reserved for future codification purposes.

Article 43.

§§ 105-510 through 105-514: Reserved for future codification purposes.

Article 44.

Third One-Half Cent (1/2¢) Local Government Sales and Use Tax.

(Effective Until October 1, 2009)

§ 105-515. (Effective until October 1, 2009 — see Editor's note) Short title.

This Article is the Third One-Half Cent (½¢) Local Government Sales and Use Tax Act. (2001-424, s. 34.14(a).)

Article 44 Set Out Twice. — This Article is effective until October 1, 2009. For the Article as effective October 1, 2009, see the following Article, also numbered G.S. 105-515 through G.S. 105-524.

Editor's Note. — Session Laws 2007-323, s. 31.16.3(a), provides: "Notwithstanding the provisions of Article 44 of Chapter 105 of the General Statutes that authorize one-half percent (1/2%) local sales and use taxes, the tax rate for a tax imposed under that Article for the period October 1, 2008, through September 30, 2009, is one-quarter percent (1/4%) rather than one-half percent (1/2%). A resolution enacted by a county under Article 44 before October 1, 2008, to levy one-half percent (1/2%) local sales and use tax is considered to be a resolution authorizing the levy of one-fourth percent (1/4%) local sales and use taxes under that Article, as amended by this section."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 105-516. (Effective until October 1, 2009) Limitations.

This Article applies only to counties that levy the first one-cent (1¢) sales and use tax under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws, the first one-half cent (½¢) local sales and use tax under Article 40 of this Chapter, and the second one-half cent (½¢) local sales and use tax under Article 42 of this Chapter. (2001-424, s. 34.14(a).)

Article 44 Set Out Twice. — This Article is effective until October 1, 2009. For the Article as effective October 1, 2009, see the following Article, also numbered G.S. 105-515 through G.S. 105-524.

§ 105-517. (Effective until October 1, 2009) Levy.

(a) After Vote. — If a majority of those voting in a special election held pursuant to this Article vote for the levy of the taxes in a county, the board of commissioners of a county may, by resolution, levy one-half percent (½%) local sales and use taxes in addition to any other State and local sales and use taxes levied pursuant to law.

Article 44 of Chapter 105 is set out twice. See notes.

(b) Without Vote. — If the question of whether to levy taxes under this Article has not been defeated in a special election held in the county within two years, the board of commissioners of a county may, by resolution, levy one-half percent (½%) local sales and use taxes in addition to any other State and local sales and use taxes levied pursuant to law. Before adopting a resolution under this subsection, the board of commissioners must give at least 10 days' public notice of its intent to adopt the resolution and must hold a public hearing on the issue of adopting the resolution.

(c) Effective Date. — A tax levied under this Article may not become effective before December 1, 2002. (2001-424, s. 34.14(a); 2002-123, s. 1.)

Article 44 Set Out Twice. — This Article is effective until October 1, 2009. For the Article as effective October 1, 2009, see the following Article, also numbered G.S. 105-515 through G.S. 105-524.

Editor's Note. — Session Laws 2002-123, s. 10, provides: "Notwithstanding the provisions of G.S. 105-517(b), a county may levy a tax by resolution that becomes effective on or before January 1, 2003, under Article 44 of Chapter 105 of the General Statutes by giving at least 48 hours notice of its intent to adopt the resolution, as provided under G.S. 143-318.12(b)(2)."

§ 105-518. (Effective until October 1, 2009) County election on adoption of tax.

(a) Resolution. — The board of commissioners of a county may direct the county board of elections to conduct a special election on the question of whether to levy local one-half percent (½%) sales and use taxes in the county as provided in this Article. The election must be held on a date jointly agreed upon by the two boards and must be held in accordance with the procedures of G.S. 163-287.

(b) Ballot Question. — The question to be presented on a ballot for a special election concerning the levy of the taxes authorized by this Article must be in the following form:

[ ] FOR [ ] AGAINST
one-half percent (½%) local sales and use taxes, in addition
to all current State and local sales and use taxes.

(2001-424, s. 34.14(a); 2002-123, s. 2.)

Article 44 Set Out Twice. — This Article is effective until October 1, 2009. For the Article as effective October 1, 2009, see the following Article, also numbered G.S. 105-515 through G.S. 105-524.

§ 105-519. (Effective until October 1, 2009) Administration of taxes.

Except as provided in this Article, the adoption, levy, collection, administration, and repeal of these additional taxes must be in accordance with Article 39 of this Chapter. A tax levied under this Article does not apply to the sales price of food that is exempt from tax pursuant to G.S. 105-164.13B or to the sales price of a bundled transaction taxable pursuant to G.S. 105-467(a)(5a). (2001-424, s. 34.14(a); 2007-244, s. 8.)

Article 44 Set Out Twice. — This Article is effective until October 1, 2009. For the Article as effective October 1, 2009, see the following Article, also numbered G.S. 105-515 through G.S. 105-524.

Effect of Amendments. — Session Laws

2007-244, s. 8, effective October 1, 2007, added "or to the sales price of a bundled transaction taxable pursuant to G.S. 105-467(a)(5a)" at the end of the second sentence.

§ 105-520. (Effective until October 1, 2009) Distribution of taxes.

(a) **(Effective until October 1, 2008)** Point of Origin. — The Secretary must, on a monthly basis, allocate to each taxing county one-half of the net proceeds of the tax collected in that county under this Article. If the Secretary collects taxes under this Article in a month and the taxes cannot be identified as being attributable to a particular taxing county, the Secretary must allocate one-half of the net proceeds of these taxes among the taxing counties in proportion to the amount of taxes collected in each county under this Article in that month.

(a) **(Effective October 1, 2008)** Point of Origin. — The Secretary must, on a monthly basis, allocate to each taxing county the net proceeds of the tax collected in that county under this Article. If the Secretary collects taxes under this Article in a month and the taxes cannot be identified as being attributable to a particular taxing county, the Secretary must allocate the net proceeds of these taxes among the taxing counties in proportion to the amount of taxes collected in each county under this Article in that month.

(b) **(Repealed effective October 1, 2008 — see note)** Per Capita. — The Secretary must, on a monthly basis, allocate the remaining net proceeds of the tax collected under this Article among the taxing counties on a per capita basis according to the most recent annual population estimates certified to the Secretary by the State Budget Officer. The Secretary must then adjust the amount allocated to each county as provided in G.S. 105-486(b).

(c) Distribution Between Counties and Cities. — The Secretary must divide and distribute the funds allocated under this section each month between each taxing county and the municipalities located in the county in accordance with the method by which the one percent (1%) sales and use taxes levied in that county pursuant to Article 39 of this Chapter or Chapter 1096 of the 1967 Session Laws are distributed. No municipality may receive any funds under this subsection for a month if it is not entitled to a distribution under G.S. 105-501 for the same month. (2001-424, s. 34.14(a); 2007-323, s. 31.16.3(b).)

Article 44 Set Out Twice. — This Article is effective until October 1, 2009. For the Article as effective October 1, 2009, see the following Article, also numbered G.S. 105-515 through G.S. 105-524.

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective until October 1, 2008. The second version of subsection (a) set out above is effective October 1, 2008.

Editor's Note. — Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 31.16.3(b), effective October 1, 2008, and applicable to distributions for months beginning on or after October 1, 2008, in subsection (a), deleted "one half of" preceding "the net" twice; and deleted subsection (b).

§ 105-521. (Effective until October 1, 2009) Transitional local government hold harmless for repealed reimbursements.

(a) Definitions. — The following definitions apply in this section:

Article 44 of Chapter 105 is set out twice. See notes.

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(1) Local government. — A county or municipality that received a distribution of local sales taxes in the most recent fiscal year for which a local sales tax share has been calculated.

(2) Local sales tax share. — A local government's percentage share of the two-cent (2¢) sales taxes distributed during the most recent fiscal year for which data are available.

(3) Repealed reimbursement amount. — The total amount a local government would have been entitled to receive during the 2002-2003 fiscal year under G.S. 105-164.44C, 105-275.1, 105-275.2, 105-277.001, and 105-277.1A, if the Governor had not withheld any distributions under those sections.

(3a) Replacement revenue. — The sum of the following:

a. Fifty percent (50%) of the amount of sales and use tax revenue distributed under Article 40 of this Chapter, other than revenue from the sale of food that is subject to local tax but is exempt from State tax under G.S. 105-164.13B.

b. Twenty-five percent (25%) of the amount of sales and use tax revenue distributed under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws, other than revenue from the sale of food that is subject to local tax but is exempt from State tax under G.S. 105-164.13B.

(4) Two-cent (2¢) sales taxes. — The first one-cent (1¢) sales and use tax authorized in Article 39 of this Chapter and in Chapter 1096 of the 1967 Session Laws, the first one-half cent (1/2¢) local sales and use tax authorized in Article 40 of this Chapter, and the second one-half cent (1/2¢) local sales and use tax authorized in Article 42 of this Chapter.

(b) Distributions. — On or before August 15, 2008, and every August 15 through August 15, 2012, the Secretary must multiply each local government's local sales tax share by the estimated amount of replacement revenue that all local governments are expected to receive during the current fiscal year. If the resulting amount is less than one hundred percent (100%) of the local government's repealed reimbursement amount, the Secretary must pay the local government the difference, but not less than one hundred dollars ($100.00).

On or before May 1 of each fiscal year through May 1, 2012, the Department of Revenue and the Fiscal Research Division of the General Assembly must each submit to the Secretary and to the General Assembly a final projection of the estimated amount of replacement revenue that all local governments would be expected to receive during the upcoming fiscal year. If, after May 1 and before a distribution is made, a law is enacted that would affect the projection, an updated projection must be submitted as soon as practicable. If the Secretary does not use the lower of the two final projections to make the calculation required by this subsection, the Secretary must report the reasons for this decision to the Joint Legislative Commission on Governmental Operations within 60 days after receiving the projections.

(c) Source of Funds. — The Secretary must draw the funds distributed under this section from sales and use tax collections under Article 5 of this Chapter.

(d) Reports. — The Secretary must report to the Revenue Laws Study Committee by January 31, 2004, and each January 31 through January 31, 2013, the amount distributed under this section for the current fiscal year. (2001-424, s. 34.14(a); 2003-284, s. 37.1; 2003-349, s. 6; 2004-124, s. 6.3; 2007-323, s. 31.16.3(c).)

Article 44 of Chapter 105 is set out twice. See notes.

Article 44 Set Out Twice. — This Article is effective until October 1, 2009. For the Article as effective October 1, 2009, see the following Article, also numbered G.S. 105-515 through G.S. 105-524.

Editor's Note. — Sections 105-164.44C, 105-275.1, 105-275.2, 105-277.001, and 105-277.1A, referred to in subdivision (a)(3), were repealed effective July 1, 2002.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 31.16.3(c), effective January 1, 2008, and applicable to distributions for months beginning on or after that date, added "for repealed reimbursements" at the end of the section heading; added subdivision (a)(3a); and, in subsection (b), in the first sentence of the first paragraph, substituted "2008" for "2003," inserted "or replacement revenue," substituted "are" for "would be," and deleted "year under G.S. 105-520 if every county levied the tax under this Article for the" following "current fiscal," and, in the first sentence of the second paragraph, substituted "May 1 of each fiscal year" for "May 1, 2003, and every May 1," inserted "of replacement revenue," and deleted "fiscal year under G.S. 105-520 if every county levied the tax under this Article for the" preceding "fiscal year" at the end.

§ 105-522. (Effective October 1, 2008 until October 1, 2009) City hold harmless for repealed local taxes.

(a) Definitions. — The following definitions apply in this section:

(1) Eligible municipality. — A municipality that was incorporated on or before October 1, 2008, and receives a distribution of sales and use taxes under G.S. 105-472.

(2) Hold harmless amount. — Fifty percent (50%) of the amount of sales and use tax revenue distributed under Article 40 of this Chapter to the municipality for a month, other than revenue from the sale of food that is subject to local tax but is exempt from State tax under G.S. 105-164.13B.

(b) Requirement. — A county is required to hold the eligible municipalities in the county harmless from the repeal of the local sales and use taxes formerly imposed under this Article. The Secretary must add an eligible municipality's hold harmless amount to the amount distributed to the municipality under this Subchapter. To obtain the revenue for the hold harmless distribution, the Secretary must reduce each county's monthly allocation under G.S. 105-472(b) or under Chapter 1096 of the 1967 Session Laws by the hold harmless amounts for the municipalities in that county. (2007-323, s. 31.16.3(f).)

Article 44 Set Out Twice. — This Article is effective until October 1, 2009. For the Article as effective October 1, 2009, see the following Article, also numbered G.S. 105-515 through G.S. 105-524.

Editor's Note. — Session Laws 2007-323, s. 31.16.3(j), made this section effective October 1, 2008, and applicable to distributions for months beginning on or after October 1, 2008.

Session Laws 2007-323, s. 31.16.3(f), enacted G.S. 105-523 with two subsections designated as (b). The second occurrence of subsection (b) has been redesignated as subsection (c), and subsection (c) has been redesignated as subsection (d), at the direction of the Revisor of Statutes.

Session Laws 2007-323, s. 31.16.3(g), provides: "For fiscal year 2008-2009, the repealed sales tax amount determined under G.S. 105-522 and G.S. 105-523, as enacted by this section, is calculated based on fifty percent (50%) of the amount distributed to a municipality or county under Article 40 of Chapter 105 of the General Statutes on or after October 2, 2008, less the amount distributed to the municipality or county on a per capita basis under repealed G.S. 105-520(b) in October, November, and December of 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 105-523. (Effective October 1, 2008 until October 1, 2009) County hold harmless for repealed local taxes.

(a) Intent. — It is the intent of the General Assembly that each county benefit by at least five hundred thousand dollars ($500,000) annually from the exchange of a portion of the local sales and use taxes for the State's agreement to assume the responsibility for the non-administrative costs of Medicaid.

(b) Definitions. — The following definitions apply in this section:

(1) Hold harmless threshold. — The amount of a county's Medicaid service costs and Medicare Part D clawback payments assumed by the State under G.S. 108A-54 for the fiscal year, less five hundred thousand dollars ($500,000).

(2) Repealed sales tax amount. — Fifty percent (50%) of the amount of sales and use tax revenue distributed to a county under Article 40 of this Chapter, other than revenue from the sale of food that is subject to local tax but is exempt from State tax under G.S. 105-164.13B.

(c) Requirement. — If a county's repealed sales tax amount for a fiscal year exceeds the county's hold harmless threshold for that fiscal year, the State is required to hold the county harmless for the difference by paying the amount of the difference to the county. The Secretary must withhold from sales and use tax collections under Article 5 of this Chapter the amount needed to make the hold harmless payments required by this section.

(d) Method. — The Secretary must estimate a county's repealed sales tax amount and hold harmless threshold for a fiscal year to determine if the county is eligible for a hold harmless payment. The Secretary must send to an eligible county with the distribution made under G.S. 105-472 for March of that year an amount equal to ninety percent (90%) of its estimated hold harmless payment. At the end of each fiscal year, the Secretary must determine the difference between a county's repealed sales tax amount and its hold harmless threshold for that year. The Secretary must send by August 15 the remainder of the county's hold harmless payment for the fiscal year that ended on June 30. The Secretary of the Department of Human Resources must give the Secretary of Revenue the data needed to determine a county's hold harmless threshold. (2007-323, s. 31.16.3(f).)

Article 44 Set Out Twice. — This Article is effective until October 1, 2009. For the Article as effective October 1, 2009, see the following Article, also numbered G.S. 105-515 through G.S. 105-524.

Editor's Note. — Session Laws 2007-323, s. 31.16.3(j), made this section effective October 1, 2008, and applicable to distributions for months beginning on or after October 1, 2008.

Session Laws 2007-323, s. 31.16.3(f), enacted G.S. 105-523 with two subsections designated as (b). The second occurrence of subsection (b) has been redesignated as subsection (c), and subsection (c) has been redesignated as subsection (d), at the direction of the Revisor of Statutes.

Session Laws 2007-323, s. 31.16.3(g), provides: "For fiscal year 2008-2009, the repealed sales tax amount determined under G.S. 105-522 and G.S. 105-523, as enacted by this section, is calculated based on fifty percent (50%) of the amount distributed to a municipality or county under Article 40 of Chapter 105 of the General Statutes on or after October 2, 2008, less the amount distributed to the municipality or county on a per capita basis under repealed G.S. 105-520(b) in October, November, and December of 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Article 44 of Chapter 105 is set out twice. See notes.

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 105-524: Reserved for future codification purposes.

§§ 105-532 through 105-534: Reserved for future codification purposes.

Editor's Note. — Session Laws 2004-123, s. 1, created a new article authorizing imposition of a local government sales and use tax. The session law was not signed by the Governor. The act is noted below at the direction of the Revisor of Statutes.

Session Laws 2005-276, s. 33.33, amends Session Laws 2004-123, s.1, by adding a new section, to read: "Section 3.1. This act applies to Dare County only."

"Article 45

"Local Government Sales and Use Tax for Beach Nourishment

"105-525. Short title.

"This Article is the Local Government Sales and Use Tax for Beach Nourishment Act.

"105-526. Limitations.

"This Article applies only to counties that levy the first one-cent (1¢) sales and use tax under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws, the first one-half cent (1/2¢) local sales and use tax under Article 40 of this Chapter, the second one-half cent (1/2¢) local sales and use tax under Article 42 of this Chapter, and the third one-half cent (1/2¢) local sales and use tax under Article 44 of this Chapter.

"105-527. Definitions.

"The following definitions apply in this Article:

"(1) Beach nourishment. —

"The placement of sand, from other sand sources, on a beach or dune by mechanical means and other associated activities that are in conformity with the North Carolina Coastal Management Program, or which have otherwise been authorized by the General Assembly, along the North Carolina shorelines and connecting inlets for the purpose of widening the beach to benefit public recreational use and mitigating damage and erosion from storms to inland property and transportation routes. The term includes expenditures for the following:

"a. Costs directly associated with qualifying for projects either contracted through the U.S. Army Corps of Engineers or otherwise permitted by all appropriate federal and State agencies.

"b. The nonfederal share of the costs required to construct these projects.

"c. The costs associated with providing enhanced public beach access.

"d. The costs of associated nonhardening activities such as the planting of vegetation, the building of dunes, and the placement of sand fences.

"(2) Net proceeds. —

"Defined in G.S. 105-472.

"105-528. Levy.

"The board of commissioners of a county may, by resolution, levy one percent (1%) local sales and use taxes in addition to any other State and local sales and use taxes levied pursuant to law. Before adopting a resolution under this section, the board of commissioners must give at least 10 days' public notice of its intent to adopt the resolution and must hold a public hearing on the issue of adopting the resolution.

"105-529. Administration of taxes.

"Except as provided in this Article, the adoption, levy, collection, administration, and repeal of these additional taxes must be in accordance with Article 39 of this Chapter. A tax levied under this Article does not apply to the sales price of food that is exempt from tax pursuant to G.S. 105-164.13B.

"105-530. Expiration.

"A tax levied under this Article expires eight years after the effective date of its levy. A county's authorization to levy a tax under this Article expires eight years after the effective date of the first tax a county levies under this Article, even if the tax has not remained in effect for the entire eight-year period. The expiration of a tax pursuant to this Article does not affect the rights or liabilities of a county, a taxpayer, or another person arising under the expired tax; nor does it affect the right to any refund or credit of a tax that would otherwise have been available under the expired tax before its expiration.

"If the Secretary receives a valid request for a refund of a tax levied under this Article after the tax has expired and the net proceeds have been distributed, the Secretary shall draw the refund from the taxing county's share of the net proceeds of the tax it levies under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws, as applicable.

"105-531. Distribution and use of taxes.

"(a) Distribution. —

"The Secretary shall, on a monthly basis, distribute to each taxing county for which the Secretary collects the tax the net proceeds of the tax collected in that county under this Article. If the Secretary collects local sales or use taxes in a month and the taxes cannot be identified as being attributable to a particular taxing county, the Secretary shall allocate the taxes among the taxing counties in proportion to the amount of taxes collected in each county under this Article during that month and shall include them in the monthly distribution. Amounts collected by electronic funds transfer payments are included in the distribution for the month in which the return that applies to the payment is received.

"(b) Use. —

"A county may use the net proceeds of a tax levied under this Article only for beach nourishment."

Session Laws 2004-123, s. 4, makes this Article effective July 18, 2004.

Session Laws 2004-123, s. 2, provides: "A tax levied under Article 45 of Chapter 105 of the General Statutes, as enacted by this part, does not apply to construction materials purchased to fulfill a lump-sum or unit-price contract entered into or awarded before the effective date of the levy or entered into or awarded pursuant to a bid made before the effective date of the levy when the construction materials would otherwise be subject to the tax levied under Article 45 of Chapter 105 of the General Statutes."

Session Laws 2004-123, s. 3, provides: "Section 2 of Chapter 449 of the 1985 Session Laws, as amended by Chapter 177 of the 1991 Session Laws, S.L. 2001-347, and S.L. 2001-439, reads as rewritten:

"'Sec. 2. Definitions. The definitions in G.S. 105-164.3 apply in this act. In addition, the following definitions apply in this act:

"(1) Net proceeds. Gross proceeds less the cost to the county of administering and collecting the tax.

"(2) Prepared food and beverages. The term has the same meaning as the term 'prepared food' in G.S. 105-164.3.

"(3) Beach nourishment. The term has the same meaning as in G.S. 105-527.'"

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

ARTICLE 44.

Local Government Hold Harmless Provisions.

(Effective October 1, 2009)

§§ 105-515 through 105-120: Repealed by Session Laws 2007-323, s. 31.16.4(a), effective October 1, 2009, and applicable to sales occurring on or after that date.

Article 44 Set Out Twice. — This Article is effective October 1, 2009. For the Article as effective before October 1, 2009, see the preceding Article, also numbered G.S. 105-515 through G.S. 105-524.

Editor's Note. — Session Laws 2007-323, s. 31.16.4(f), effective October 1, 2009, rewrote the Article 44 heading, which formerly read "Third One-Half Cent (1/2¢) Local Government Sales and Use Tax."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Article 44 of Chapter 105 is set out twice. See notes.

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§ 105-521. (Effective October 1, 2009) Transitional local government hold harmless for repealed reimbursements.

(a) Definitions. — The following definitions apply in this section:

(1) Local government. — A county or municipality that received a distribution of local sales taxes in the most recent fiscal year for which a local sales tax share has been calculated.

(2) Local sales tax share. — A local government's percentage share of the two-cent (2¢) sales taxes distributed during the most recent fiscal year for which data are available.

(3) Repealed reimbursement amount. — The total amount a local government would have been entitled to receive during the 2002-2003 fiscal year under G.S. 105-164.44C, 105-275.1, 105-275.2, 105-277.001, and 105-277.1A, if the Governor had not withheld any distributions under those sections.

(3a) Replacement revenue. — The sum of the following:

a. Fifty percent (50%) of the amount of sales and use tax revenue distributed under Article 40 of this Chapter, other than revenue from the sale of food that is subject to local tax but is exempt from State tax under G.S. 105-164.13B.

b. Twenty-five percent (25%) of the amount of sales and use tax revenue distributed under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws, other than revenue from the sale of food that is subject to local tax but is exempt from State tax under G.S. 105-164.13B.

(4) Two-cent (2¢) sales taxes. — The first one-cent (1¢) sales and use tax authorized in Article 39 of this Chapter and in Chapter 1096 of the 1967 Session Laws, the first one-half cent (1/2¢) local sales and use tax authorized in Article 40 of this Chapter, and the second one-half cent (1/2¢) local sales and use tax authorized in Article 42 of this Chapter.

(b) Distributions. — On or before August 15, 2008, and every August 15 through August 15, 2012, the Secretary must multiply each local government's local sales tax share by the estimated amount of replacement revenue that all local governments are expected to receive during the current fiscal year. If the resulting amount is less than one hundred percent (100%) of the local government's repealed reimbursement amount, the Secretary must pay the local government the difference, but not less than one hundred dollars ($100.00).

On or before May 1 of each fiscal year through May 1, 2012, the Department of Revenue and the Fiscal Research Division of the General Assembly must each submit to the Secretary and to the General Assembly a final projection of the estimated amount of replacement revenue that all local governments would be expected to receive during the upcoming fiscal year. If, after May 1 and before a distribution is made, a law is enacted that would affect the projection, an updated projection must be submitted as soon as practicable. If the Secretary does not use the lower of the two final projections to make the calculation required by this subsection, the Secretary must report the reasons for this decision to the Joint Legislative Commission on Governmental Operations within 60 days after receiving the projections.

(c) Source of Funds. — The Secretary must draw the funds distributed under this section from sales and use tax collections under Article 5 of this Chapter.

Article 44 of Chapter 105 is set out twice. See notes.

(d) Reports. — The Secretary must report to the Revenue Laws Study Committee by January 31, 2004, and each January 31 through January 31, 2013, the amount distributed under this section for the current fiscal year. (2001-424, s. 34.14(a); 2003-284, s. 37.1; 2003-349, s. 6; 2004-124, s. 6.3; 2007-323, s. 31.16.3(c).)

Article 44 Set Out Twice. — This Article is effective October 1, 2009. For the Article as effective before October 1, 2009, see the preceding Article, also numbered G.S. 105-515 through G.S. 105-524.

Editor's Note. — Sections 105-164.44C, 105-275.1, 105-275.2, 105-277.001, and 105-277.1A, referred to in subdivision (a)(3), were repealed effective July 1, 2002.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 31.16.3(c), effective January 1, 2008, and applicable to distributions for months beginning on or after that date, added "for repealed reimbursements" at the end of the section heading; added subdivision (a)(3a); and, in subsection (b), in the first sentence of the first paragraph, substituted "2008" for "2003," inserted "or replacement revenue," substituted "are" for "would be," and deleted "year under G.S. 105-520 if every county levied the tax under this Article for the" following "current fiscal," and, in the first sentence of the second paragraph, substituted "May 1 of each fiscal year" for "May 1, 2003, and every May 1", inserted "of replacement revenue", and deleted "fiscal year under G.S. 105-520 if every county levied the tax under this Article for the" preceding "fiscal year" at the end.

§ 105-522. (Effective October 1, 2009) City hold harmless for repealed local taxes.

(a) Definitions. — The following definitions apply in this section:

(1) Eligible municipality. — A municipality that was incorporated on or before October 1, 2008, and receives a distribution of sales and use taxes under G.S. 105-472.

(2) Hold harmless amount. — The sum of the following distributed to a municipality for the month:

a. Fifty percent (50%) of the amount of sales and use tax revenue distributed under Article 40 of this Chapter, other than revenue from the sale of food that is subject to local tax but is exempt from State tax under G.S. 105-164.13B.

b. Twenty-five percent (25%) of the amount of sales and use tax revenue distributed under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws, other than revenue from the sale of food that is subject to local tax but is exempt from State tax under G.S. 105-164.13B.

c. The amount determined by subtracting twenty-five percent (25%) of the amount of sales and use tax revenue distributed under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws from fifty percent (50%) of the amount distributed under Article 40 of this Chapter. This calculation determines the effect of distributing a one-quarter percent (.25%) tax on the basis of point of origin instead of on a per capita basis.

(b) Requirement. — A county is required to hold the eligible municipalities in the county harmless from the repeal of the local sales and use taxes formerly imposed under this Article. The Secretary must add an eligible municipality's hold harmless amount to the amount distributed to the municipality under this Subchapter. To obtain the revenue for the hold harmless distribution, the Secretary must reduce each county's monthly allocation under G.S. 105-472(b) or under Chapter 1096 of the 1967 Session Laws by the hold harmless amounts for the municipalities in that county. (2007-323, ss. 31.16.3(f), 31.16.4(c); 2007-345, s. 14.4(a).)

Section Set Out Twice. — This Article is effective October 1, 2009. For the Article as effective before October 1, 2009, see the preceding Article, also numbered G.S. 105-515 through G.S. 105-524.

Editor's Note. — Session Laws 2007-323, s. 31.16.4(e), provides: "For fiscal year 2009-2010, the repealed sales tax amount determined under G.S. 105-522(2)(a)(2)b, as enacted by this section, and G.S. 105-523(a)(2)b, as enacted by this section, is calculated based on twenty-five percent (25%) of the amount distributed to a municipality or county under Article 39 of Chapter 105 of the General Statutes or Chapter 1096 of the 1967 Session Laws on or after October 1, 2009, less the amount distributed to the municipality or county on the basis of point of origin under repealed G.S. 105-520(a) in October, November, and December of 2009."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 31.16.4(c), effective October 1, 2009, and applicable to distributions for months beginning on or after October 1, 2009, in subdivision (a)(2), added "the sum o of the following:" at the beginning of the introductory paragraph, designated the former provisions of subdivision (a)(2) as subdivision (a)(2)a., and added subdivisions (a)(2)b. and (a)(2)c.

Session Laws 2007-345, s. 14.4(a), effective October 1, 2009, and applicable to distributions for months beginning on or after that date, inserted "distributed to a municipality for the month" in subdivision (a)(2); deleted "Chapter to the municipality for a month" in subdivision (a)(2)a.; in subdivision (a)(2)c., substituted "by subtracting twenty-five percent (25%) of the amount of sales and use tax revenue distributed under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws from fifty percent (50%) of the amount distributed under Article 40 of this Chapter" for "under sub-subdivision a. of this subdivision subtracted from the amount determined under sub-subdivision b. of this subdivision" in the first sentence, and deleted the last sentence.

§ 105-523. (Effective October 1, 2009) County hold harmless for repealed local taxes.

(a) Intent. — It is the intent of the General Assembly that each county benefit by at least five hundred thousand dollars ($500,000) annually from the exchange of a portion of the local sales and use taxes for the State's agreement to assume the responsibility for the non-administrative costs of Medicaid.

(b) Definitions. — The following definitions apply in this section:

(1) Hold harmless threshold. — The amount of a county's Medicaid service costs and Medicare Part D clawback payments assumed by the State under G.S. 108A-54 for the fiscal year, plus five hundred thousand dollars ($500,000).

(2) Repealed sales tax amount. — The sum of the following:

a. Fifty percent (50%) of the amount of sales and use tax revenue distributed to a county under Article 40 of this Chapter, other than revenue from the sale of food that is subject to local tax but is exempt from State tax under G.S. 105-164.13B.

b. Twenty-five percent (25%) of the amount of sales and use tax revenue distributed under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws, other than revenue from the sale of food that is subject to local tax but is exempt from State tax under G.S. 105-164.13B.

c. The amount determined under sub-subdivision a. of this subdivision subtracted from the amount determined under sub-subdivision b. of this subdivision. This calculation determines the effect of distributing a one-quarter percent (.25%) tax on the basis of point of origin instead of on a per capita basis. If the difference is negative, the result increases the hold harmless amount.

(c) Requirement. — If a county's repealed sales tax amount for a fiscal year exceeds the county's hold harmless threshold for that fiscal year, the State is required to hold the county harmless for the difference by paying the amount of the difference to the county. The Secretary must withhold from sales and use tax collections under Article 5 of this Chapter the amount needed to make the hold harmless payments required by this section.

(d) Method. — The Secretary must estimate a county's repealed sales tax amount and hold harmless threshold for a fiscal year to determine if the county is eligible for a hold harmless payment. The Secretary must send to an eligible county with the distribution made under G.S. 105-472 for March of that year an amount equal to ninety percent (90%) of its estimated hold harmless payment. At the end of each fiscal year, the Secretary must determine the difference between a county's repealed sales tax amount and its hold harmless threshold for that year. The Secretary must send by August 15 the remainder of the county's hold harmless payment for the fiscal year that ended on June 30. The Secretary of the Department of Human Resources must give the Secretary of Revenue the data needed to determine a county's hold harmless threshold. (2007-323, s. 31.16.4(d); 2007-345, s. 14.4(b).)

Article 44 Set Out Twice. — This Article is effective October 1, 2009. For the Article as effective before October 1, 2009, see the preceding Article, also numbered G.S. 105-515 through G.S. 105-524.

Editor's Note. — Session Laws 2007-323, s. 31.16.4(e), provides: "For fiscal year 2009-2010, the repealed sales tax amount determined under G.S. 105-522(2)(a)(2)b, as enacted by this section, and G.S. 105-523(a)(2)b, as enacted by this section, is calculated based on twenty-five percent (25%) of the amount distributed to a municipality or county under Article 39 of Chapter 105 of the General Statutes or Chapter 1096 of the 1967 Session Laws on or after October 1, 2009, less the amount distributed to the municipality or county on the basis of point of origin under repealed G.S. 105-520(a) in October, November, and December of 2009."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-323, s. 31.16.4(d), effective October 1, 2009, and applicable to distributions for months beginning on or after October 1, 2009, rewrote subdivision (b)(2).

Session Laws 2007-345, s. 14.4(b), effective October 1, 2009, and applicable to distributions for months beginning on or after that date, added "distributed to a county for the month" at the end of the introductory paragraph, deleted "to a county" following "distributed" in sub-subdivision (b)(2)a., and rewrote sub-subdivision (b)(2)c.

§ **105-524:** Reserved for future codification purposes.

§§ **105-532 through 105-534:** Reserved for future codification purposes.

Editor's Note. — Session Laws 2004-123, s. 1, created a new article authorizing imposition of a local government sales and use tax. The session law was not signed by the Governor. The act is noted below at the direction of the Revisor of Statutes.

Session Laws 2005-276, s. 33.33, amends Session Laws 2004-123, s.1, by adding a new section, to read: "Section 3.1. This act applies to Dare County only."

"Article 45

"Local Government Sales and Use Tax for Beach Nourishment

"105-525. Short title.

"This Article is the Local Government Sales and Use Tax for Beach Nourishment Act.

"105-526. Limitations.

"This Article applies only to counties that levy the first one-cent (1¢) sales and use tax under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws, the first one-half cent (1/2¢) local sales and use tax under Article 40 of this Chapter, the second one-half cent (1/2¢) local sales and use tax under Article 42 of this Chapter, and the third one-half cent (1/2¢) local sales and use tax under Article 44 of this Chapter.

"105-527. Definitions.

"The following definitions apply in this Article:

"(1) Beach nourishment. —

"The placement of sand, from other sand sources, on a beach or dune by mechanical means and other associated activities that are in conformity with the North Carolina Coastal Management Program, or which have otherwise been authorized by the General Assembly, along the North Carolina shorelines and connecting inlets for the purpose of widening the beach to benefit public recreational use and mitigating damage and erosion from storms to inland property and transportation routes. The term includes expenditures for the following:

"a. Costs directly associated with qualifying for projects either contracted through the U.S. Army Corps of Engineers or otherwise permitted by all appropriate federal and State agencies.

"b. The nonfederal share of the costs required to construct these projects.

"c. The costs associated with providing enhanced public beach access.

"d. The costs of associated nonhardening activities such as the planting of vegetation, the building of dunes, and the placement of sand fences.

"(2) Net proceeds. —

"Defined in G.S. 105-472.

"105-528. Levy.

"The board of commissioners of a county may, by resolution, levy one percent (1%) local sales and use taxes in addition to any other State and local sales and use taxes levied pursuant to law. Before adopting a resolution under this section, the board of commissioners must give at least 10 days' public notice of its intent to adopt the resolution and must hold a public hearing on the issue of adopting the resolution.

"105-529. Administration of taxes.

"Except as provided in this Article, the adoption, levy, collection, administration, and repeal of these additional taxes must be in accordance with Article 39 of this Chapter. A tax levied under this Article does not apply to the sales price of food that is exempt from tax pursuant to G.S. 105-164.13B.

"105-530. Expiration.

"A tax levied under this Article expires eight years after the effective date of its levy. A county's authorization to levy a tax under this Article expires eight years after the effective date of the first tax a county levies under this Article, even if the tax has not remained in effect for the entire eight-year period. The expiration of a tax pursuant to this Article does not affect the rights or liabilities of a county, a taxpayer, or another person arising under the expired tax; nor does it affect the right to any refund or credit of a tax that would otherwise have been available under the expired tax before its expiration.

"If the Secretary receives a valid request for a refund of a tax levied under this Article after the tax has expired and the net proceeds have been distributed, the Secretary shall draw the refund from the taxing county's share of the net proceeds of the tax it levies under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws, as applicable.

"105-531. Distribution and use of taxes.

"(a) Distribution. —

"The Secretary shall, on a monthly basis, distribute to each taxing county for which the Secretary collects the tax the net proceeds of the tax collected in that county under this Article. If the Secretary collects local sales or use taxes in a month and the taxes cannot be identified as being attributable to a particular taxing county, the Secretary shall allocate the taxes among the taxing counties in proportion to the amount of taxes collected in each county under this Article during that month and shall include them in the monthly distribution. Amounts collected by electronic funds transfer payments are included in the distribution for the month in which the return that applies to the payment is received.

"(b) Use. —

"A county may use the net proceeds of a tax levied under this Article only for beach nourishment."

Session Laws 2004-123, s. 4, makes this Article effective July 18, 2004.

Session Laws 2004-123, s. 2, provides: "A tax levied under Article 45 of Chapter 105 of the General Statutes, as enacted by this part, does not apply to construction materials purchased to fulfill a lump-sum or unit-price contract entered into or awarded before the effective date of the levy or entered into or awarded pursuant to a bid made before the effective date of the levy when the construction materials would otherwise be subject to the tax levied under Article 45 of Chapter 105 of the General Statutes."

Session Laws 2004-123, s. 3, provides: "Section 2 of Chapter 449 of the 1985 Session Laws, as amended by Chapter 177 of the 1991 Session Laws, S.L. 2001-347, and S.L. 2001-439, reads as rewritten:

"'Sec. 2. Definitions. The definitions in G.S. 105-164.3 apply in this act. In addition, the following definitions apply in this act:

"(1) Net proceeds. Gross proceeds less the cost to the county of administering and collecting the tax.

"(2) Prepared food and beverages. The term has the same meaning as the term 'prepared food' in G.S. 105-164.3.

"(3) Beach nourishment. The term has the same meaning as in G.S. 105-527.'"

Session Laws 2005-276, s. 33.34, provides in part: "For prepayments of telecommunications and direct-to-home satellite services, the first billing period is considered to start on or after November 1, 2005. For prepayments of satellite digital audio radio services or cable services, the first billing period is considered to start on or after February 1, 2006."

ARTICLE 46.

One-Quarter Cent (1/4¢) County Sales and Use Tax.

§ 105-535. Short title.

This Article is the One-Quarter Cent (1/4¢) County Sales and Use Tax Act. (2007-323, s. 31.17(b).)

Editor's Note. — Session Laws 2007-323, s. 31.17(d), made this Article effective July 31, 2007.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 105-536. Limitations.

This Article applies only to counties that levy the first one-cent (1¢) sales and use tax under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws, the first one-half cent (1/2¢) local sales and use tax under Article 40 of this Chapter, and the second one-half cent (1/2¢) local sales and use tax under Article 42 of this Chapter. (2007-323, s. 31.17(b).)

§ 105-537. Levy.

(a) Authority. — If the majority of those voting in a referendum held pursuant to this Article vote for the levy of the tax, the board of county commissioners may, by resolution and after 10 days' public notice, levy a local sales and use tax at a rate of one-quarter percent (0.25%).

(b) Vote. — The board of county commissioners may direct the county board of elections to conduct an advisory referendum on the question of whether to levy a local sales and use tax in the county as provided in this Article. The election shall be held on a date jointly agreed upon by the board of county commissioners and the board of elections and shall be held in accordance with the procedures of G.S. 163-287.

(c) Ballot Question. — The form of the question to be presented on a ballot for a special election concerning the levy of the tax authorized by this Article shall be:

"[ ] FOR [ ] AGAINST

Local sales and use tax at the rate of one-quarter percent (0.25%) in addition to all other State and local sales and use taxes."

(d) Limitation. — A tax levied under this Article may not be in effect in a county at the same time as a tax levied under Article 60 of this Chapter. (2007-323, s. 31.17(b).)

§ 105-538. Administration of taxes.

Except as provided in this Article, the adoption, levy, collection, administration, and repeal of these additional taxes must be in accordance with Article 39 of this Chapter. G.S. 105-468.1 is an administrative provision that applies to this Article. A tax levied under this Article does not apply to the sales price of food that is exempt from tax pursuant to G.S. 105-164.13B. The Secretary shall not divide the amount allocated to a county between the county and the municipalities within the county. Notwithstanding the provisions of G.S. 105-467(c), during the 2008 calendar year a tax levied under this Article may become effective on the first day of any calendar quarter so long as the county gives the Secretary at least 60 days' advance notice of the new tax levy. (2007-323, s. 31.17(b); 2007-345, s. 14.5(a).)

Effect of Amendments. — Session Laws 2007-345, s. 14.5(a), effective July 1, 2007, added the second sentence.

§§ 105-539 through 105-549: Reserved for future codification purposes.

SUBCHAPTER IX. MULTICOUNTY TAXES.

Article 50.

Regional Transit Authority Vehicle Rental Tax.

§ 105-550. Definitions.

The definitions in G.S. 105-164.3 and the following definitions apply in this Article:

(1) Authority. — A regional public transportation authority or a regional transportation authority created pursuant to Article 26 or Article 27 of Chapter 160A of the General Statutes.

(2) Long-term lease or rental. — Defined in G.S. 105-187.1.

(3) Motorcycle. — Defined in G.S. 20-4.01.

(4) Repealed by Session Laws 1998-98, s. 33, effective August 14, 1998.

(5) Public transportation system. — Any combination of real and personal property established for purposes of public transportation. The systems may include one or more of the following: structures, improvements, buildings, equipment, vehicle parking or passenger transfer facilities, railroads and railroad rights-of-way, rights-of-way, bus services, shared-ride services, high-occupancy vehicle facilities, carpool and vanpool programs, voucher programs, telecommunications and information systems, integrated fare systems, bus lanes, and

busways. The term does not include, however, streets, roads, or highways except to the extent they are dedicated to public transportation vehicles or to the extent they are necessary for access to vehicle parking or passenger transfer facilities.

(6) Short-term lease or rental. — A lease or rental that is not a long-term lease or rental.

(7) U-drive-it vehicle. — Defined in G.S. 20-4.01. (1997-417, s. 3; 1998-98, s. 33; 1999-452, s. 26.)

Editor's Note. — Session Laws 2006-162, s. 30, amended Part 3 of S.L. 1997-417, by adding a section to read: "3.1. A county authorized to impose a tax under Article 43 of Chapter 105 of the General Statutes, as enacted by Part 1 of this act [applies only to Mecklenburg County], is considered an authority under Article 50 of Chapter 105 of the General Statutes, as enacted by Section 3 of this act, and the board of commissioners of that county is considered the board of trustees of the authority under Article 50. G.S. 105-554 of Article 50 does not apply to the proceeds of a tax imposed by a county considered an authority under this section. The proceeds of a tax imposed by a county considered an authority under this section must be transferred to the largest city in that county operating a public transportation system and used only for financing, constructing, operating, and maintaining a public transportation system. The proceeds may supplant existing funds allocated for a public transportation system. The term 'public transportation system' has the same meaning as defined in G.S. 105-506 of Article 43."

§ 105-551. Tax on gross receipts authorized.

(a) Tax. — The board of trustees of an Authority may levy a privilege tax on a retailer who is engaged in the business of leasing or renting U-drive-it vehicles or motorcycles based on the gross receipts derived by the retailer from the short-term lease or rental of these vehicles. The tax rate must be a percentage and may not exceed five percent (5%). A tax levied under this section applies to short-term leases or rentals made by a retailer whose place of business or inventory is located within the territorial jurisdiction of the Authority. This tax is in addition to all other taxes.

(b) Restrictions. — The board of trustees of an Authority may not levy a tax under this section or increase the tax rate of a tax levied under this section until all of the following requirements have been met:

(1) The board of trustees has held a public hearing on the tax or the increase in the tax rate after giving at least 10 days' notice of the hearing.

(2) If the Authority has a special tax board, the special tax board has adopted a resolution approving the levy of the tax or the increase in the tax rate.

(3) The board of commissioners of each county included in the territorial jurisdiction of the Authority has adopted a resolution approving the levy of the tax or the increase in the tax rate.

(c) Special Tax District. — If a regional transportation authority created under Article 27 of Chapter 160A of the General Statutes has not levied the tax under this section or has levied the tax at a rate of less than five percent (5%), it may create a special district that consists of the entire area of one or more counties within its territorial jurisdiction and may levy on behalf of the special district the tax authorized in this section. The rate of tax levied within the special district may not, when combined with the rate levied within the entire territorial jurisdiction of the authority, exceed five percent (5%). The regional transportation authority may not levy or increase a tax within the special district unless the board of commissioners of each county in the special district has adopted a resolution approving the levy or increase.

A special district created pursuant to this subsection is a body corporate and politic and has the power to carry out the purposes of this subsection. The board of trustees of the regional transportation authority created under Article 27 of Chapter 160A of the General Statutes shall serve, ex officio, as the governing body of a special district it creates pursuant to this subsection. The proceeds of a tax levied under this subsection may be used only for the benefit of the special district and only for the purposes provided in G.S. 105-554. Except as provided in this subsection, a tax levied under this subsection is governed by the provisions of this Article. (1997-417, s. 3; 1998-98, s. 34; 1999-445, s. 3; 1999-452, s. 27.)

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Board of County Commissioners has no authority to amend request to levy the five percent tax on rental vehicles. — In pursuance of implementing a tax under the statute, the Board of County Commissioners does not have authority to add provisions or amend in any way the request that may come to them from a regional transportation authority to levy the five percent tax on rental vehicles. See opinion of Attorney General to Commissioner Trudy Wade, Guilford Board of County Commissioners, 2002 N.C. AG LEXIS 9 (1/17/02).

§ 105-552. Collection and administration of gross receipts tax.

(a) Effective Date. — A tax or a tax increase levied under this Article becomes effective on the date set by the board of trustees in the resolution levying the tax or the tax increase. The effective date must be the first day of a month and may not be earlier than the first day of the second month after the board of trustees adopts the resolution.

(b) Collection. — A tax levied by an Authority under this Article shall be collected by the Authority but shall otherwise be administered in the same manner as the optional gross receipts tax levied by G.S. 105-187.5. Like the optional gross receipts tax, a tax levied under this Article is to be added to the lease or rental price of a U-drive-it vehicle or motorcycle and thereby be paid by the person to whom it is leased or rented.

A tax levied under this Article applies regardless of whether the retailer who leases or rents the U-drive-it vehicle or motorcycle has elected to pay the optional gross receipts tax on the lease or rental receipts from the vehicle. A tax levied under this Article must be paid to the Authority that levied the tax by the date an optional gross receipts tax would be payable to the Secretary of Revenue under G.S. 105-187.5 if the retailer who leases or rents the U-drive-it vehicle or motorcycle had elected to pay the optional gross receipts tax.

(c) Penalties and Remedies. — The penalties and remedies that apply to local sales and use taxes levied under Subchapter VIII of this Chapter apply to a tax levied under this Article. The board of trustees of an Authority may exercise any power the Secretary of Revenue or a board of county commissioners may exercise in collecting local sales and use taxes. (1997-417, s. 3; 1998-98, s. 35; 1999-452, s. 28.)

§ 105-553. Exemptions and refunds.

No exemptions are allowed from a tax levied under this Article. No refunds are allowed for a tax lawfully levied under this Article. (1997-417, s. 3.)

§ 105-554. Use of tax proceeds.

An Authority that levies a tax under this Article may use the proceeds of the tax for any purpose for which the Authority is authorized to use funds. An Authority shall use the tax proceeds to supplement and not to supplant or replace existing funds or other resources for public transportation systems. Authorized purposes for which an Authority may use funds include the following:

(1) Pledging funds in connection with the financing of a public transportation system or any part of a public transportation system.

(2) Paying a note, bond, or other obligation entered into by the Authority pursuant to Article 26 or Article 27 of Chapter 160A of the General Statutes. (1997-417, s. 3.)

§ 105-555. Repeal of tax or decrease in tax rate.

The board of trustees of an Authority may repeal a tax levied under this Article or decrease the tax rate of a tax levied under this Article. The same restrictions that apply to the levy of a tax or an increase in a tax rate under this Article apply to the repeal of the tax or a decrease in the tax rate.

A tax repeal or a tax decrease becomes effective on the date set by the board of trustees in the resolution repealing or decreasing the tax. The effective date must be on the first day of a month and may not be earlier than the first day of the second month after the board of trustees adopts the resolution. Repeal or decrease of a tax levied under this Article does not affect the rights or liabilities of an Authority, a taxpayer, or another person arising before the repeal or decrease. (1997-417, s. 3.)

§§ 105-556 through 105-559: Reserved for future codification purposes.

Article 51.

Regional Transit Authority Registration Tax.

§ 105-560. Definitions.

(1) Authority. — Any of the following:
  a. A public transportation authority created pursuant to Article 25 of Chapter 160A of the General Statutes that includes two or more counties.
  b. A regional public transportation authority created pursuant to Article 26 of Chapter 160A of the General Statutes.
  c. A regional transportation authority created pursuant to Article 27 of Chapter 160A of the General Statutes.

(2) Board of trustees. — The governing body of an Authority.

(3) Public transportation system. — Defined in G.S. 105-550. (1997-417, s. 4.)

§ 105-561. Authority registration tax authorized.

(a) Tax Authorized. — The board of trustees of an Authority may, by resolution, levy an annual license tax in accordance with this Article upon any motor vehicle with a tax situs within its territorial jurisdiction. The purpose of the tax levied under this Article is to raise revenue for capital and operating expenses of an Authority in providing public transportation systems. The rate of tax levied under this Article must be a full dollar amount, but may not exceed five dollars ($5.00) a year.

(b) Restrictions. — The board of trustees of an Authority may not levy a tax under this Article or increase the tax rate until all of the following requirements have been met:

(1) The board of trustees has held a public hearing on the tax or the increase in the tax rate after giving at least 10 days“ notice of the hearing.

(2) If the Authority has a special tax board, the special tax board has adopted a resolution approving the levy of the tax or the increase in the tax rate.

(3) Except where the levy or increase in tax is necessary for debt service on bonds or notes that each of the boards of county commissioners had previously approved under G.S. 159-51, the board of commissioners of each county included in the territorial jurisdiction of the Authority has adopted a resolution approving the levy of the tax or the increase in the tax rate.

(c) Resolutions. — The board of trustees and the board of county commissioners, upon adoption of a resolution pursuant to this section, shall cause a certified copy of the resolution to be delivered immediately to the Authority and to the Division of Motor Vehicles.

(d) Special Tax District. — If a regional transportation authority created under Article 27 of Chapter 160A of the General Statutes has not levied the tax under this section or has levied the tax at a rate of less than five dollars ($5.00) it may create a special district that consists of the entire area of one or more counties within its territorial jurisdiction and may levy on behalf of the special district the tax authorized in this section. The rate of tax levied within the special district may not, when combined with the rate levied within the entire territorial jurisdiction of the authority, exceed five dollars ($5.00). The regional transportation authority may not levy or increase a tax within the special district unless the board of commissioners of each county in the special district has adopted a resolution approving the levy or increase.

A special district created pursuant to this subsection is a body corporate and politic and has the power to carry out the purposes of this subsection. The board of trustees of the regional transportation authority created under Article 27 of Chapter 160A of the General Statutes shall serve, ex officio, as the governing body of a special district it creates pursuant to this subsection. The proceeds of a tax levied under this subsection may be used only for the benefit of the special district and only for the purposes provided in G.S. 105-564. Except as provided in this subsection, a tax levied under this subsection is governed by the provisions of this Article. (1997-417, s. 4; 1999-445, s. 4.)

§ 105-562. Collection and scope.

(a) Collection. — A tax or a tax increase levied under this Article becomes effective on the date set by the board of trustees in the resolution levying the tax or the tax increase. The effective date must be the first day of a month and may not be earlier than the first day of the third calendar month after the board of trustees adopts the resolution. To the extent the tax applies to vehicles whose tax situs is in a county the entire area of which is within the jurisdiction of the Authority, the Division of Motor Vehicles shall collect and administer the tax. To the extent the tax applies to vehicles whose tax situs is in a county that is only partially within the jurisdiction of the county, the Authority shall collect and administer the tax. The Authority may contract with one or more local governments in its jurisdiction to collect the tax on its behalf.

Upon receipt of the resolutions under G.S. 105-561, the Division of Motor Vehicles shall proceed to collect and administer the tax as provided in this Article. The tax is due at the same time and subject to the same restrictions as in G.S. 20-87(1), (2), (4), (5), (6), and (7) and G.S. 20-88. The Division of Motor Vehicles may adopt rules to carry out its responsibilities under this Article.

(b) Scope. — Only vehicles required to pay a tax under G.S. 20-87(1), (2), (4), (5), (6), and (7) and G.S. 20-88 shall be subject to the tax provided by this Article. Taxes shall be prorated in accordance with G.S. 20-95.

(c) Tax Situs. — The tax situs of a motor vehicle for the purpose of this Article is its ad valorem tax situs. If the vehicle is exempt from ad valorem tax, its tax situs for the purpose of this Article is the ad valorem tax situs it would have if it were not exempt from ad valorem tax. (1997-417, s. 4.)

§ 105-563. Modification or repeal of tax.

The Board of Trustees may, by resolution, repeal the levy of the tax under this Article or decrease the amount of the tax, under the same procedures and subject to the same limitations as provided in G.S. 105-561. A tax repeal or a tax decrease becomes effective on the date set by the board of trustees in the resolution repealing or decreasing the tax. The effective date must be on the first day of a month and may not be earlier than the first day of the third calendar month after the board of trustees adopts the resolution. Repeal or decrease of a tax levied under this Article does not affect the rights or liabilities of an Authority, a taxpayer, or another person arising before the repeal or decrease. (1997-417, s. 4.)

§ 105-564. Distribution and use of proceeds.

The Authority shall retain the net proceeds of taxes it collects under this Article. Taxes collected by the Division of Motor Vehicles under this Article shall be credited to a special fund and the net proceeds disbursed quarterly to the appropriate Authority. Interest credited to the fund shall be disbursed quarterly to the Highway Fund to reimburse the Division of Motor Vehicles for the cost of collecting and administering the tax.

An Authority that levies a tax under this Article may use the proceeds of the tax for any purpose for which the Authority is authorized to use funds. An Authority shall use the tax proceeds to supplement and not to supplant or replace existing funds or other resources for public transportation systems. (1997-417, s. 4.)

§§ 105-565 through 105-599: Reserved for future codification purposes.

SUBCHAPTER X. LOCAL OPTION COUNTY TAXES.

ARTICLE 60.

Land Transfer Tax.

§ 105-600. Short title.

This Article is the County Land Transfer Tax Act. (2007-323, s. 31.17(a).)

Editor's Note. — Session Laws 2007-323, s. 31.17(d), made this subchapter effective July 31, 2007.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

§ 105-601. Levy.

(a) Authority. — If the majority of those voting in a referendum held pursuant to this Article vote for the levy of the tax, the board of county commissioners may, by resolution and after 10 days' public notice, levy a local land transfer tax on instruments conveying interests in real property located in the county, up to a rate of four-tenths percent (0.4%), in increments of one-tenth percent (0.1%).

(b) Vote. — The board of county commissioners may direct the county board of elections to conduct an advisory referendum on the question of whether to levy a local land transfer tax in the county as provided in this Article. The election shall be held on a date jointly agreed upon by the board of county commissioners and the board of elections and shall be held in accordance with the procedures of G.S. 163-287.

(c) Ballot Question. — The form of the question to be presented on a ballot for a special election concerning the levy of the tax authorized by this Article shall be:

"[ ] FOR [ ] AGAINST
Real property transfer tax at the rate of up to [X] percent [X%] of value or consideration."

(d) Resolution. — The board of county commissioners must, upon adoption of a resolution levying a tax under this Article, immediately deliver a certified copy of the resolution to the register of deeds of the county, accompanied by a certified statement from the county board of elections setting forth the results of the special election approving the tax in the county. Upon receipt of these documents, the register of deeds shall administer the tax in the county as provided in this Article.

(e) Limitation. — A tax levied under this Article may not be in effect in a county at the same time as a tax levied under Article 46 of this Chapter. (2007-323, s. 31.17(a).)

§ 105-602. Scope of tax.

(a) Scope. — A tax levied under this Article does not apply to transfers exempt pursuant to G.S. 105-228.28 or G.S. 105-228.29 from the tax levied by Article 8E of this Chapter. The tax is in addition to the tax levied by Article 8E of this Chapter. A tax levied under this Article applies to transfers of interests in real property located within the county. If the property is located in two or more counties, a transfer of an interest in the property is taxable only by the county in which the greater part of the property, with respect to value, lies.

(b) Basis and Effective Date. — A tax levied under this Article applies to the consideration or value, whichever is greater, of the interest conveyed, including the value of any lien or encumbrance remaining on the property at the time of conveyance. The levy of the tax may become effective only on the first day of a calendar month set in the resolution levying the tax, which may not be earlier than the first day of the second succeeding calendar month after the date the resolution is adopted. (2007-323, s. 31.17(a).)

§ 105-603. Administration and use.

(a) Administration. — A tax levied under this Article is payable by the transferor of the interest. Except as otherwise provided in this Article, the provisions of G.S. 105-228.32 through G.S. 105-228.37 apply to a tax levied under this Article. The county must provide metering or similar equipment for the collection of the tax in lieu of the use of tax stamps.

(b) Use. — The proceeds of a tax levied under this Article may be used for any lawful purpose. (2007-323, s. 31.17(a).)

§ 105-604. Repeal or reduction.

A county may, by resolution, repeal or reduce the rate of a tax levied under this Article. Repeal or reduction of the tax must become effective on the first day of a month and may not become effective until the end of the fiscal year in which the repeal or reduction resolution was adopted. Repeal of a land transfer tax, or reduction of its rate, under this Article does not affect a liability for a tax that attached before the effective date of the repeal or reduction, nor does it affect a right to a refund of a tax that accrued before the effective date of the repeal or reduction. (2007-323, s. 31.17(a).)

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